Neutral Citation Number: [2023] EWCA Civ 924

Case No: CA-2022-000429

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
ADMINISTRATIVE COURT
Mr Justice Bennathan
[2022] EWHC 308 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 31 July 2023

Before:

LADY JUSTICE ELISABETH LAING
LADY JUSTICE FALK
and
SIR LAUNCELOT HENDERSON

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Between:

THE KING ON THE APPLICATION OF SB	**Claimant/ Respondent**
- and -	
ROYAL BOROUGH OF KENSINGTON & CHELSEA	**Defendant/ Appellant**

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Catherine Rowlands (instructed by **Manminder Mangat, Bi-borough Shared Legal Services**) for the **Appellant**
Shu Shin Luh and Agata Patyna (instructed by **Luke and Bridger Law**) for the **Respondent**

Hearing date: 15 June 2023

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Approved Judgment

This judgment was handed down remotely at 3pm on 31 July 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. This is an appeal, with the permission of Andrews LJ, from an order by Bennathan J ('the Judge'). The Judge allowed an application for judicial review by the Respondent ('R'). R had applied for judicial review of a decision dated 11 June 2021 ('the Decision') by the Appellant local authority ('the Council') to assess R's age as 'at least 25 years old', and his date of birth as 25 May 1996. The Decision was based on an assessment, by two social workers, of R's physical appearance and his demeanour in an interview held with him on 11 June 2021 ('the Interview').

2. The Council were represented by Miss Rowlands in this court and below. R was represented by Ms Luh (who did not appear below) and by Ms Patyna (who did). I thank counsel for their written and oral submissions. We decided at the start of the hearing that the anonymity order made in the Administrative Court should be continued. Miss Rowlands pointed out that, as R is now an adult, even on his case, he no longer needs a litigation friend, on any basis. I agree. Andrews LJ also noted this point when she gave permission.

3. At the start of the hearing we were invited to dismiss the appeal because it was academic. After hearing from counsel, we decided that we would hear all the arguments before reaching a view whether the appeal was academic, and if so, whether to exercise our discretion nevertheless to decide it.

4. The short issue raised by the grounds of appeal is whether the Judge was wrong to hold that the Decision was unlawful because the process which led to it was unfair, as I explain below. A further issue is also raised by this appeal. It seems that in at least three age assessment cases, including this case, the Administrative Court has hived off procedural challenges from substantive challenges to age assessments, and decided the procedural challenge in isolation from the substantive challenge, which in two of the cases, the court anticipated, would then be decided by the Upper Tribunal (Immigration and Asylum) Chamber ('the UT'). For the reasons I give in paragraphs 83-88, below, I consider that the parties and the court should carefully consider, in every case, whether this practice is consistent with the overriding objective.

5. In this judgment I will first summarise the Decision and the judgment, before summarising the law which is relevant to the assessment of the age of a young person. I will then consider the grounds of appeal and the submissions. For the reasons given in this judgment I consider that, as between the parties, this appeal is academic. The Council submitted that even if it was academic, the appeal raised an issue of law of general importance and that we should, nevertheless, therefore, exercise our exceptional discretion to hear and to decide the appeal. As I will explain below, I have decided that we should exercise that discretion and decide the appeal on its merits. I have also decided, for the reasons I give in paragraphs 89-91, below, that the Judge was wrong to hold that the Decision was unlawful. Paragraph references are to the Judge's judgment, unless I am referring to an authority.

The Decision

6. R's age was assessed by two social workers, Nicola Hughes and Aaron McCrossan ('the social workers'), who worked in the Council's Unaccompanied Minors and Independence Support Team. As the Decision is central to the issues on this appeal, and because its terms are also central to an evaluation of the Judge's concerns, I must summarise it in some detail.

7. The Decision recorded that the social workers interviewed R on 11 June 2021 at the Council's offices. The Council had been contacted on 9 June by Roxanne Nanton ('RN') of the Refugee Council ('the RC'). RN had asked the Council to provide R with services as a child.

8. On 10 June, a social worker had a telephone conversation with R 'to establish that he was proficient in English'. During the telephone 'conversations' (the singular is used in one relevant paragraph and the plural in the second) R 'spoke confidently on a range of subjects'. When the social workers asked him 'broad, open questions', he gave 'detailed and relevant' answers, showing both that he understood the questions and that he had a 'sufficient grasp of English to be able to say what he wanted'. The Decision noted that at the start of the session, the social workers had used Google Images to show R pictures of what they were talking about, but soon stopped because he 'had a wide vocabulary' and was able to say all the things that he wanted to say.

9. R had said in the telephone conversation that his first language was Nuer. The social workers made 'extensive…efforts' to find a Nuer interpreter who could be at the meeting or who could attend remotely 'to help with communication'. They described their efforts. They could not find one. Nuer is spoken by fewer than a million speakers. The social workers spoke to RN. She said that she had communicated with R in English, and that she, too, had tried, and failed, to find a Nuer interpreter. The Decision then explained that the social workers had had the meeting without an interpreter because none was present, there was no realistic prospect of getting one 'in the short-term' and R had shown that he could communicate in English. The social workers told R to 'make sure if he wanted anything to be clarified to ask them to repeat or to re-phrase it'. The Decision added that the social workers were 'experienced in communicating, with and without interpreters, with unaccompanied minors and other young people who have first languages other than English. Where interpreters are not present, they are used to communicating in simple, easy-to-understand language. They know how to check a young person's comprehension by asking him to repeat what has been said or asking questions about it'.

10. R gave his consent for his photograph to be taken.

11. The Decision recorded that the social workers did not do a 'full "Merton-compliant" age assessment' because 'the conclusion of this assessment is that his appearance and demeanour very clearly demonstrate that he is well over the age of 18'.

12. The social workers asked R about his life before he left Sudan and about his journey to the United Kingdom. Their summary of his account takes up a page or so of the text of the Decision under the heading 'History and background'. He arrived in the United Kingdom on 28 May 2021. He had four siblings but only knew the age of one of his sisters. His mother was about 40. His father was younger than his mother and was killed in about 2013. He is a Christian. He is in contact with his mother. His

father was a soldier. His relationship with his father meant that 'they' also wanted to kill R. He therefore had to escape. He left South Sudan in 2018 when he was 14. He travelled via Libya, and paid for his journey by working for months at a time. He 'systematically' listed the countries he had travelled through, referring to Sudan, Libya and Malta. He did not mention Egypt or Ethiopia.

13. He said that he was in Malta for ten months "in detention". He then gave the social workers permission to look at his Facebook account on his telephone. They saw photographs of him in Malta from January to March 2021 showing him 'relaxed and at leisure on the sofa in a smart apartment, a building that was clearly a domestic home, not an institution'. When social workers asked him about that, he told them that he was visiting a home owned by a friend.

14. They also saw photographs of R in Ethiopia and in Egypt among groups of black men who looked as though they were between 25 and 45 years old. The photographs on Facebook showed that he was in Ethiopia in May 2019 and in Egypt in July 2019. That contradicted what he had said earlier. When asked expressly whether he had been to those countries, he 'changed his story'. He had flown to Egypt using his passport. He denied having been to Ethiopia, however. The Facebook photographs clearly contradicted his statement that 'he had never been to Ethiopia'. This is the only reference in the Decision to R's passport.

15. Akobo, the town in South Sudan in which R said he lived, noted the social workers, is close to the Egyptian border. Egypt has a border with both Sudan and Libya. R had not volunteered that he had been to those two countries, so it seemed likely to the social workers that R had wanted to withhold that information.

16. The next heading in the Decision is 'Physical appearance, demeanour and interactions'. R is tall, 'of large build and with large features'. His hairline appeared to be receding. The hair on the top of his head was thinner than that of 17 year olds, suggesting that he might be losing his hair. There were areas of his head where his scalp was visible. He had some grey hairs. He had 'pronounced lines on his neck'. Those were evidence that his skin was aging. The social workers had not seen such lines on a young person of about 17. They were typical of a significantly older adult. He had 'deep-set marks' on his face, which looked like 'well-healed acne scars'.

17. He spoke to the social workers in a 'deep, rich, confident voice', again indicating that he was more than 17. His communication was 'calm'. 'He engaged in a way that felt like an adult speaking to equals rather than a young person speaking to people who are older than him'. He was 'calm and reflective'. At the end of the session, when the social workers explained that they could not accept that he was a child, he calmly and assertively said, "How can you tell me my age. How could I not look like a child?" They described their observations, and he 'appeared to accept this'. He behaved like someone who 'is confident in expressing his position eloquently with unfamiliar people, and able to manage his emotions and affect'. The social workers were not 'used to observing such sophisticated communication and emotional regulation in seventeen year-olds'.

18. The social workers' impression was that R was 'much older than seventeen'. They both had 'years of experience' of working with unaccompanied asylum-seeking

children and other young people of a range of different ages. They had known many male Sudanese teenagers and young men. They acknowledged that many seventeen year-olds look much older than others and were conscious of the factors which might influence that, 'such as stress, time spent outside in the elements and experience of physical work'. Even when such factors were considered, R looked 'years older than any other seventeen year old Sudanese male known to them'.

19. When he was talking, R made good eye contact with Mr McCrossan. His eye contact with Ms Hughes was less good. On first impressions, R did not seem over-confident, but once he got talking, he began to be confident enough to give long answers. Some were fuller than the question required. It seemed that there were some things which he wanted to talk about, even though he had not been asked about them. He did not seem to find it hard to answer questions, except when he was 'visibly upset about missing his mother'. His 'engagement' with the social workers was more typical of an adult than a child. He seemed 'quietly confident'. He did not behave as a teenager would behave in a stressful situation, for example, by 'struggling to maintain eye contact, fidgeting, or having difficulty managing his emotions'.

20. The fourth section of the Decision summarises the information which the social workers took into account. That was all the information which came from R in their conversations with him, and 'Home Office documents'. Once they had told R their decision, they told him that they could reconsider it if further information came to light. They felt that 'observations' of R's 'appearance and demeanour provide sufficient evidence for them to conclude that he is an adult'. The Home Office had concluded that R was over 25 for similar reasons.

21. The fifth section of the Decision is headed 'Decision on age issue'. R had given an account of a journey from South Sudan to the United Kingdom over a period of about three years. He claimed that he was 14 when he left and was 17 then. Elements of his story were contradicted by 'evidence on' his Facebook account. Photographs showed that 'he had travelled to Egypt and Ethiopia in 2019 which he had previously denied to us'. When challenged, he had changed his story to say that he had flown to Egypt using a passport. There was a different date of birth on his Facebook account. The year was 2004, but the date and month were different. It was 'evident' that R had not been 'fully honest' about his story. He had deliberately withheld parts of it, and had lied about some details, such as the nature of his time in Malta and that he had been to Ethiopia. That he was not 'completely honest' about some things made the social workers 'believe it is more likely that he might also have been dishonest with us about his age. Inconsistency on his date of birth makes him appear a less reliable witness on this subject'.

22. He did not seem surprised when at the end of the assessment the social workers told him that they believed he was an adult and would not be supported as a child. He continued to look downcast as he had throughout the assessment. He did not show any particular change in his emotions.

23. The penultimate section of the Decision is headed 'Summary and analysis of reasons Observations of appearance and functioning'. The Decision said that it was 'obvious' from R's physical appearance that he was not a child or a young man in his early twenties. He did not look close in age to Sudanese young men in their teens and early

twenties who were known to the social workers. When they were making comparisons with teenagers who were the age R said he was, they were considering 'boys from a wide range of backgrounds including those who are Sudanese and have come to the UK as unaccompanied asylum-seeking children and those from other cultures and backgrounds'.

24. The social workers had considered whether to give R the benefit of the doubt, and to accept him as a 17-year-old. They could not do that because 'his physical appearance suggests that he is many years older than seventeen'. They would have been prepared to give him the benefit of the doubt if he had looked slightly older than 17, or in his early twenties. As he looked 'so much older than 18' they did not consider that there was any doubt that he was an adult.

25. R was 'relatively confident in his communication' in the assessment. He showed 'some initiative and agency' in talking about the things he wanted to discuss, rather than just answering questions. He 'communicated in a controlled manner' which indicated someone older than 17. He was better able to manage 'his emotions and presentation than a teenager would be'. His communication and engagement with the assessment 'generally point to him being older than seventeen'.

26. The conclusion of the social workers was that they relied 'primarily' on R's physical appearance to assess his age. From that, including the development of his 'facial features, hairline, skin complexion, and physical body size and shape, it is abundantly clear that he is not a child'. Assessing age from appearance cannot be done with 'a high degree of precision', but they were able to say, 'with confidence', that he was not a child.

27. R's (assessed) age directly contradicted his account. The social workers therefore concluded that he was not a reliable witness about his age and date of birth. They were content to allocate a date of birth of 25 May 'in the absence of any counter-indication'. They rejected 'outright' the suggestion that he was born in 2004. The Home Office had allocated R a date of birth of 25 May 1996. The social workers did not know how the Home Office had arrived at that date, or how strong their evidence was. As they felt R was at least 25, they were content with that date.

28. The Decision was communicated to R in the meeting on 11 June 2021. They explained their reasons to him, that is, the basis of the written assessment.

29. The Decision was endorsed on 24 June 2021 by Robert Young, a 'Practice Manager', and the supervisor of the social workers. He said that he agreed with the assessment. He also confirmed that it had been 'lawfully conducted and complies with guidance arising from the Merton Judgement and subsequent case law'.

The judgment

30. The Judge made findings of fact in paragraphs 4-20. R arrived in the United Kingdom on 28 May 2021. He claimed to be 17. The Home Office, based on an assessment of his appearance and demeanour, rejected that claim. He was accommodated with adult asylum seekers in the Council's area. He was referred to the RC, which in turn referred him to the Council for his age to be assessed. In paragraph 6(2), in a passage

on which Miss Rowlands relied, the Judge said that both social workers believed that R was 'well above the age of 18, perhaps by as much as 7 or 8 years'. He recorded that, in the light of that view, they had not done 'a full "*Merton compliant*" age assessment'. He also recorded that, in the Interview, R had given answers which 'in the view of the social workers, were unlikely to be true' (paragraph 6(3)). Their witness statements and the Decision showed that they had relied, 'at least in part' on the contents of the Interview (paragraphs 6(4) and 6(5)).

31. R argued that three aspects of the Interview were unfair. There was no interpreter, no 'appropriate adult' and the Council did not give R the chance to 'argue against any adverse conclusions the social workers were minded to reach'. The first two elements were 'fairly simply described'. The third was 'factually more complex' (paragraph 7).

32. In paragraph 8, the Judge described the attempts to get an interpreter, and the social workers' contact with RN, in line with the account given in the Decision. He referred to the social worker's views about R's proficiency in English. He added 'I note that there are, even in their own documents, some grounds for at least a degree of caution'. Mr McCrossan's notes recorded that R 'spoke English with next to no difficulty'. Ms Hughes' notes said, 'became emotional could be because of stress of meeting, lack of interpretation or speaking about family'. The Judge then referred to R's claim, given in his witness statement for the application for judicial review, that his English is 'not very good'.

33. There was no 'appropriate adult' at the Interview. R's evidence was that he had not been told that he could ask for one. Neither social worker suggested that they had made such an offer, nor did they explain why not (paragraph 9). In paragraph 10, the Judge listed four subjects in the Interview, which were recorded in the Decision, and in relation to which R had given answers which 'led the social workers to doubt that he was giving them an accurate and truthful account'. He supplemented the account given in the Decision with material in the social worker's notes in two of the examples (paragraphs 10(1) and 10(4)).

34. In paragraph 10 the Judge referred, relying on the Decision and on the social workers' notes, to a number of topics on which R had given answers which 'led the social workers to doubt he was giving them an accurate and truthful account'. One of those concerned the passport which R had used to fly to Egypt. Mr McCrossan's notes recorded that R had said that the passport was black, and written in Nuer, and that Mr McCrossan had checked on-line, and discovered that Sudanese passports are green, and written in Arabic. In paragraph 11, the Judge commented that the parts of the Decision which described how the social workers had communicated the outcome of their assessment to R suggested that R had simply been told the outcome, and had not been given an opportunity to argue against it. That impression was confirmed by the social workers' notes. In paragraph 12 he summarised, from witness statements made by R and by his solicitors, four answers given by R to the points raised by the social workers in the Interview, noting one case where there was support for R's account in the social worker's notes. He made his own observations about the colour of a Sudanese passport.

35. The Judge described the pre-action protocol correspondence and the claim from the claim form. The claim was that the Decision that R was 'an adult over 25' was 'unlawful, unreasonable and irrational'. He then recounted the history of litigation.

36. In paragraphs 21-26 he summarised the relevant law. The starting point was the decision of Stanley Burnton J (as he then was) in *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin); [2003] 4 All ER 280. The Judge described this decision as giving 'detailed guidance on the process to be followed by local authorities'. The *Merton* principles had been approved and discussed by this court in *R (Z) v Croydon London Borough Council* [2011] EWCA Civ 59; [2011] PTSR 748. This court had repeated that age assessments should not be 'judicialised'. Except in clear cases, appearance alone could not 'be a basis for determining age'. This court 'laid emphasis on the importance of the interviewers allowing the interviewed person the chance to deal with any adverse findings they were minded to make'.

37. The Judge quoted in full a list of 'the relevant principles to be extracted from the case law and Home Office guidance' from the judgment of Thornton J in *R (AB) v Kent County Council* [2020] EWHC 109 (Admin). Many of the other authorities were 'examples of the application of what are now established principles'. In paragraph 25, he said that the Council had relied on a decision of Miss Geraldine Andrews QC sitting as a Deputy Judge of the High Court (as she then was), *R (AK) v Home Office and Leicester City Council* [2011] EWHC 3188 (Admin). She had refused permission to apply for judicial review on various grounds. One of those was an argument based on the absence of an 'appropriate adult'. The Judge noted that she had stressed that the claimant had been given the chance to bring a friend to the interview. He added that that decision was made before the decision of Thornton J in *AB*, and that in *Z v Croydon* this court 'did find for the Claimant on the basis of unfairness relying, only in part, on the absence of an appropriate adult'.

38. He rejected the Council's argument that he was only considering a challenge to the Council's refusal to do a further assessment. The claim was clearly and obviously a challenge to the Decision (paragraphs 27-30). The Council, rightly, does not appeal against that conclusion.

39. The Judge had to decide one question: 'Does the [Decision] meet the standards of fairness required by law?' He reminded himself that courts should not take a 'highly technical approach'. Some asylum seekers 'may realise there is a legal advantage in being treated as a child'. The courts, therefore, 'need to allow age assessment procedures to be robust and effective' (paragraph 31). He directed himself, correctly, that 'the depth of inquiry required of a local authority in an age assessment process is not binary'. There would 'obviously' be cases, 'for example of a young child' in which no process was needed. 'At the other end of the scale, were a middle aged person to claim the status of a child, it must be open to a local authority to dismiss the claim without any formal process or interview'. He added, 'Once, as in this case, the local authority is dealing with a young person who their qualified staff regard as very likely to be older than 18, a shortened process must be permissible, but it still needs to be fair'. He recorded a concession by the Council that once social workers decided that the assessment required an interview, that interview had to be fair (paragraph 32).

40. He then considered the three aspects of R's claim that the Interview was unfair. In paragraph 33 he described the evidence in the social workers' witness statements about their searches for an interpreter who could speak Nuer. He did not doubt that evidence. He recorded their views that R could have a conversation in English. He also noted that 'as most judges and lawyers will have seen, a person's command of English may ebb and flow depending on them tiring or being under stress'. He referred again to the passage in the notes of Ms Hughes which he had already described in paragraph 8 (see paragraph 32, above). Her view was that one possible cause of R's distress was the lack of an interpreter. He also noted that 'some of the matters which the social workers relied on to undermine [R's] credibility are the sort of comments which could be explained by a lack of verbal precision; the difference between a passport "*in Nuer*", meaning in that language, and one "*in the name Nuer*" is just one example' (paragraph 32).

41. His conclusion, in paragraph 34, was that, in his view, 'the lack of an interpreter was a significant short falling'. He added that 'by itself [it] would not necessarily have been sufficient to render the process so unfair as to be unlawful. Any problems might have been sufficiently mitigated by other steps such as an appropriate adult and/or a slower and more thorough "*minded to*" process'.

42. He turned to the role of the appropriate adult. That role, he said, was well established when an interview could lead to adverse inferences. He referred to the Age Assessment Guidance published by the Association of Directors of Children's Services in October 2015 ('the ADCS guidance') which describes that role. The appropriate adult should ask for breaks if the interviewee seems upset, ensuring that they understand the questions, clarifying questions and interrupting if irrelevant matters are raised (paragraph 35). In paragraph 36, he quoted the Home Office guidance about interviewing children under caution, having reminded himself that 'the situation is factually distinct'. In paragraph 37 he rejected the Council's suggestion that an appropriate adult was not allowed to interfere in an interview. He said that if R had been 'accompanied by a sympathetic adult, they could have played a role in avoiding what, according to [R's] statement, were misunderstandings that were then used as a basis for the social workers to disbelieve what he was telling them'. One example the Judge gave was the record in the Decision of the description of R's journey. He was said not to have mentioned Egypt and to have changed his story when, with his permission, the social workers looked at his Facebook account and saw pictures of him there. In his witness statement in the claim, R had explained that he had visited Egypt from Sudan but that that visit was not part of his journey west. The Judge commented that 'that is the sort of confusion which, if genuine, could have been helped by an appropriate adult ensuring that such a misunderstanding was not held against' R. That view was reinforced by a passage in the notes of Ms Hughes. The Judge added, in paragraph 38, that the absence of an appropriate adult would not always make an interview unfair. It would depend on the other safeguards which were available. On these facts, the lack of an interpreter and of an appropriate adult did make the interview unfair.

43. The Judge acknowledged, in paragraph 39, further written submissions which counsel had given him after the hearing on the subject of the "minded to" process. He did not consider that, in 'an abbreviated assessment' the case law requires 'any very formal process'. He did not think that the social workers had to pause the interview and

present R with a list of answers which, in their view, reduced his credibility. There were three answers, however, which were relied on as being dishonest and as 'supporting' the social workers' assessment of R's appearance. They were 'the Nuer passport, the trip to Egypt and the terms under which he had stayed in Malta'. Those were the sorts of answers which could have been explained as misunderstandings 'if the perceived inconsistencies had been carefully and slowly articulated to' R. If 'an interpreter and an appropriate adult' had been present, the failure to allow the chance to explain away those answers' might not have been enough to make the interview unfair, 'but when viewed cumulatively with those absences, I think they amount to another unfairness'.

44. He was 'driven to the conclusion that the combination of the lack of an interpreter, the absence of even the offer of an appropriate adult, and the flaws in the "*minded to*" process amount to a clearly unfair process'. Once the social workers had decided to interview R, they 'were obliged to ensure that it was a fair' interview. He had not been asked to express any view on R's actual age, and did not do so, 'but nothing I have seen suggests the conclusion would necessarily have been the same, had a fair process been carried out'. He quashed the Decision. It would be for the authority in the area of which R then lived to assess his age fairly. He did not consider that it was necessary make any further order in order to ensure that that happened (paragraph 40). He added, in paragraph 41, that after his judgment was circulated in draft, the Council had asked him to reconsider his decision to quash the Decision. That application should not have been made.

The law

The Children Act 1989

45. Section 20(1) of the Children Act 1989 ('the 1989 Act') requires every local authority to provide accommodation for 'any child in need in their area who appears to them to require accommodation' as a result of the circumstances listed in section 20(1). Sections 22 and 22A-22G impose other duties in relation to children who are 'looked after' by local authorities. 'Looked after' is defined in section 22(1). Local authorities also continue to owe duties to children who have been 'looked after' by a local authority, but are no longer being 'looked after'. Section 105(1) of the 1989 Act defines a child as 'a person under the age of 18'.

The Merton case

46. In the *Merton* case, a social worker interviewed the claimant for between 25 and 45 minutes (depending on whose recollection was accurate). Stanley Burnton J said that his decision could not depend on the length of the interview. The claimant spoke French and did not speak English. An interpreter interpreted the interview by telephone. The claimant claimed to be 17. The social worker's written assessment was that he was 'in his late teens'. In her later witness statement she said that he was 'at least 18-20 years old'. She also referred in her witness statement to various inconsistencies in the claimant's account. In paragraph 21, Stanley Burnton J noted that there was no statutory procedure or guidance governing age assessments. There were no reliable physiological tests (paragraph 22).

47. He said (paragraph 27) that there may be 'cases where it is very obvious that the person is over or under 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 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'.

48. In paragraph 28 he said because it was impossible to decide objectively the age of a person who might be

> *'...in the range of, say 16-20, 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 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 which reflect on each other'*.

49. In paragraph 36 he said that assessing age was difficult, but not complex. It did not require 'anything approaching a trial'. He added that judicialisation was to be avoided. The assessment could be done informally, as long as 'safeguards of minimum standards of inquiry and of fairness' were observed. Except in clear cases, a decision could not be made on the basis of appearance alone. A social worker should take a relatively detailed history from the applicant. If there was reason to doubt his claimed age, the social worker would have to ask questions designed to test his credibility (paragraph 37). It was not helpful to apply an onus of proof. The local authority must make an assessment of the material available to it, and which it has obtained. Appearance and demeanour might justify a provisional view one way or the other. In an obvious case, appearance alone might provide the answer, 'in the absence of compelling evidence to the contrary' (paragraph 38).

50. A local authority could not simply adopt a decision of the Home Office, but must make the decision itself, although it could take into account information obtained by the Home Office. Stanley Burnton J was satisfied, on the evidence, that the local authority had made its own decision.

51. There was an issue about whether the local authority should be able to justify its decision by relying on material which was not in the decision letter. He referred to his summary of the relevant principles in paragraph 34 of his judgment in *Nash v Chelsea College of Art & Design* [2001] EWHC (Admin) 538, and referred to other cases on that subject (including *R v Westminster City Council ex p Ermakov* [1996] 2 All ER 302). If there is a statutory duty to give reasons, only in exceptional circumstances, if at all, will a court allow later evidence of the reasons. In other cases, a court can admit such evidence, but will be cautious about accepting it. There are several relevant factors. For example, it should be clear that the new reasons are consistent with reasons given previously, that they are the reasons of all the decision-makers, and that they do not amount to an ex post facto justification for the decision. Reasons

produced for the first time in litigation must be viewed with particular care. In the *Merton* case, there was no statutory duty to give reasons. On the facts, he did not doubt either the notes of the social worker or the reasons given in her later statement.

52. He accepted the claimant's submission that the reasons had to be adequate. Such reasons did not have to be elaborate. It would have been enough to say that the decision was based on the claimant's appearance and demeanour and on the matters on which the social worker had relied in deciding that he was not truthful (paragraph 48).

53. He repeated in paragraph 50 that the process should not be judicialised. The social worker took a full history. She did not need to get a medical report, or to make arrangements for others to observe the claimant over time (paragraph 51). In paragraph 52 he said that if an interpreter is needed, it is better for him or her to be present. The procedure in this case gave rise to a risk of misunderstandings. He was not aware of any note by the interpreter, which would have been 'highly relevant' to the claimant's suggestion that he had been misunderstood. A verbatim note was not necessary as a matter of law, but would help to resolve any doubts (paragraph 54).

54. The decision-maker should explain the purpose of the interview. If the decision-maker forms a provisional view that the applicant is lying about his age, he must be given the opportunity to address the underlying concerns, so that he can try to explain himself. The unsatisfactory arrangements for interpretation reinforced the need for such an opportunity (paragraph 55). He considered that the decision should be quashed unless the authority could show that the points on which the claimant relied 'could not reasonably have affected her decision'. He was narrowly persuaded that the authority had not satisfied him that even if the claimant had been given the chance to comment on those points, 'the same decision would inevitably have been made' (paragraph 56).

R (A) v Croydon London Borough Council

55. The issue in *R (A) v Croydon London Borough Council* [2009] UKSC 8; [2009] 1 WLR 2557 was whether the duty imposed by section 20 of the 1989 Act is owed to a person who, the local authority believes, is a child (subject to *Wednesbury*) or whether it is owed to a person who is in fact a child, so that, if there is a dispute, the court must decide that question on the balance of probabilities (see paragraph 13 of the judgment of Baroness Hale: Lords Scott, Walker and Neuberger agreed with her judgment). The Supreme Court decided that a young person's age is a question of jurisdictional fact for the court to decide on the balance of probabilities.

56. Baroness Hale explained, in paragraph 3, that, in most cases, until recently, it was easy to discover how old a child was by finding his or her birth certificate. As a result of the recent increase in arrivals of unaccompanied young people 'the problem of determining age ha[d] come to prominence'. The services which are available to children are more extensive than those available to adults. The Home Office did (and still does), treat children who claim asylum differently from adults who claim asylum, and the Secretary of State did not (and does not) usually detain children (see paragraphs 4 and 5 of her judgment). Then, (as now), the Home Office did, (and does), refer many young asylum seekers to local authorities for those authorities to

assess their ages. Then (as now), the assessments were (and are) guided by the decision of Stanley Burnton J in the *Merton* case.

57. In paragraph 33 she said that the fact that the forum was an application for judicial review did not dictate the way in which the court should decide the issue. The local authority had to make a decision in the first instance. It was only if that was disputed that the court might have to intervene. She added that '…the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence.' In paragraph 44 she rejected an argument that social workers lacked impartiality for the purposes of article 6. She said that she would be 'most reluctant to accept, unless driven by Strasbourg authority to do so, that article 6 requires the judicialisation of claims to welfare services of this kind'. She considered that if a civil right was at issue, it was at the periphery of such rights, and 'the present decision-making processes, coupled with judicial review on conventional grounds, are adequate to result in a fair determination within the meaning of article 6' (paragraph 45).

R (Z) v Croydon London Borough Council

58. *R (Z) v Croydon London Borough Council* was an appeal from a decision to refuse permission to apply for judicial review of an age assessment. The Home Office's assessment had been that the claimant, who was from Iran, was a child. He was referred to the defendant local authority for it to provide him with services. The defendant disputed his age. Two social workers assessed his age. No appropriate adult was present. He was not given an opportunity to respond to the assessment: either initially, or when it was reviewed. A Deputy Judge refused the application for judicial review. He held that there was no realistic prospect that a court would reach a different view from the social workers after a hearing and that there was no realistic prospect that the assessment would be quashed on procedural points alone (paragraph 17). There were three grounds of appeal: whether a local authority was obliged to give a young person an opportunity to comment on its provisional view about his age, whether a local authority should offer a young person the chance to have an appropriate adult present at an interview, and how the court should address the factual question whether a young person's claim to be a child was arguable.

59. Sir Anthony May P gave the judgment of the court. In paragraph 2, he referred to the range of cases which local authorities had to decide, and noted that local authorities had to decide the age, and the date of birth, of the young person. Some cases were obvious. 'It is for those whose age may be objectively borderline, between perhaps 16 and 20, that an appropriate and fair process of age determination may be necessary'. He said that a process had been developed. Two appropriately trained social workers interview the young person formally. The answers may help with the assessment. 'It is often necessary for there to be an interpreter'. The young person might or might not have relevant documents, some of which might need to be translated.

60. Sir Anthony May P referred to the decision in *Merton*. He summarised the judgment in paragraph 3. In paragraph 4 he said that such assessments are challenged by an application for judicial review. 'Such a challenge may be on orthodox judicial review grounds'. It could also be on the ground that the decision was factually wrong. He referred to *A v Croydon*. He said that the Administrative Court did not have the

resources to decide factual disputes 'more than occasionally' yet, as at 12 January 2011, there were 64 outstanding age assessment challenges in that Court. In paragraph 5 he added that while challenges could be on orthodox judicial review grounds, 'the core challenge in most cases is likely to be a challenge to the age which the local authority assessed the claimant to be'. So 'most of these cases' would involve evidence. The local authority submitted that orthodox judicial review challenges were likely to be 'subsumed in the court's factual determination of the claimant's age. If the claimant succeeds on his factual case, the orthodox judicial review challenges fall away as unnecessary'.

61. In paragraph 6, Sir Anthony May P considered what the test should be for giving permission to apply for judicial review to make a factual challenge to an age assessment. The parties agreed that an assertion that the assessment was wrong was not enough. The test was agreed, but its implications were not. The test was 'whether there is a realistic prospect or arguable case' that the court would decide that the claimant was younger than the local authority thought. The court should ask whether 'the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing' (paragraph 9).

62. In paragraph 10, Sir Anthony May P noted that, apart from the *Merton* case, there was no government guidance for local authorities about age assessments. In paragraph 22, he said that 'On the face of it, there is substance in the first ground of appeal' (paragraph 22). He considered the second ground of appeal in paragraphs 23-25. The claimant claimed to be a child and was known to have 'mental health problems'. The claimant 'should have had the opportunity to have an appropriate adult present'. The fact that he was not given the opportunity 'contributes to our decision whether he should be given permission to proceed'.

63. Sir Anthony May P turned to 'the main question in this appeal' in paragraph 26. The correct test had already been stated. He summarised aspects of the claimant's factual case in paragraph 29. He concluded that the claimant should be given permission to proceed with his factual case to a hearing at which evidence would be heard. One factor which contributed to that decision was that there had been 'two procedural lapses'. But the main reason was that the test for refusing permission to apply for judicial review on a factual case was not met. He took into account that 'the social workers will have been able to judge his general appearance and demeanour, and to make a general credibility judgment from the manner in which he answered their questions. It does not follow that the court would be bound to make the same judgments; nor is general credibility, judged by others, alone sufficient for the court to refuse permission for a factual hearing before the court when it is for the court to determine in a disputed case the fact of the young person's age'.

64. In paragraph 31, Sir Anthony May P drew attention to the unsuitability of the Administrative Court as a forum for deciding factual disputes about a young person's age. He also drew attention to a power to transfer disputed age assessment cases to the UT. He said such transfer was appropriate as judges in the UT had experience of assessing the age of young people in immigration cases. If an age assessment judicial review was started in the Administrative Court, therefore, the Administrative Court would normally decide whether permission should be granted before considering

whether the case should be transferred to the UT. This court ordered the claim to be transferred to the UT.

R (ZS) Afghanistan v Secretary of State for the Home Department

65. The appellant in *R (ZS) Afghanistan v Secretary of State for the Home Department* [2015] EWCA Civ 1137 challenged, among other things, his detention by the Home Office at a time when, he claimed, he was a child. He argued that his detention was a breach of the Home Office's relevant policy, which required that a young person should not be detained unless the Home Office had a copy of a '*Merton*-compliant' assessment by a local authority that the young person was more than 18. One of the issues was whether an assessment by a local authority was '*Merton*-compliant' for the purposes of the Home Office policy. The appellant argued that the relevant assessment did not comply with the decision in *Merton* in six ways (paragraphs 33 and 35). Burnett LJ (as he then was), giving a judgment with which the other members of this court agreed, said that phrase in the policy meant 'an age assessment which would not be quashed by the High Court in judicial review proceedings' (paragraph 38).

66. In paragraphs 48-53 Burnett LJ considered whether there was a requirement that an independent adult be present. He referred to *Z v Croydon* (paragraphs 58-64, above). He said that *Z* 'confirmed that an opportunity should be given to a young person to have an independent adult present at an age assessment interview…The need to provide an opportunity for an independent adult to be present at an age assessment interview was by then a required part of the process' (paragraph 52). In paragraph 53, he said that the evidence did not show that the appellant had not been offered the chance to have an independent adult present at the interview. Even if it did, he did not accept that this was a requirement by February 2009, the date the relevant policy was published.

R (HAM) v Brent London Borough Council

67. In *R (HAM) v Brent London Borough Council* [2022] EWHC 1924 (Admin); [2022] PTSR 1779 Swift J held that even though a young person's age is a question of fact for the reviewing court, that does not reduce the need for a fair procedure. An age assessment could be quashed on procedural grounds alone. The claimant's age was assessed by the Home Office and by a local authority as 23. The claimant complained that the assessment was wrong and unfair (on three grounds).

68. Swift J referred to *Z v Croydon* and *ZS (Afghanistan)*. He noted that *Z v Croydon* was an appeal against a refusal of permission to apply for judicial review. '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 point 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'. A 'one-size fits all' approach was not warranted. He also referred to the ADCS guidance, which said that an appropriate adult must be provided. He did not consider that this 'professional guidance' gave rise to an equivalent legal requirement. Whether or not it was unfair not to have an appropriate adult 'should depend on the circumstances of a case'; and what such an opportunity would add, 'in the case in hand' (paragraph 20).

69. In paragraph 22, he considered the circumstances in which a local authority could make a lawful decision after a 'short-form assessment'. He rejected the premise of that question. In paragraph 24, he said that what was required was such 'investigation as is reasonable on the facts of the case'. He added that the phrase 'short-form assessment' is ambiguous (paragraph 25). The Home Office's practice was no guide to what a local authority should do (paragraph 27). In paragraph 31 he approved the statement in paragraph 32 of the Judge's judgment in this case that 'the depth of the inquiry required of a local authority is not binary'. If the case is an obvious one, what is required by way of inquiry may be brief. In some cases, decisions may be based on appearance and demeanour alone. The local authority was obliged to do a reasonable investigation (paragraph 32).

70. Local authorities, he said in paragraph 34, should determine the scope of the investigation 'step by step'. While the question whether an investigation is fair is for the court, the court will pay 'close regard to the explanation given by the decision-maker for why some steps were taken and others were not'. He approved another statement of the Judge in this case (judgment 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 used.

71. He noted in paragraph 38 that some of the claimant's complaints were, in truth, not about fairness, but were complaints that the decision was wrong. The 'substantive decision will be looked at afresh' in the UT. There was no need to pretend that those complaints were complaints about fairness. He explained in paragraph 41 that fairness does not require a 'full *Merton*-compliant assessment' in every case, unless the young person is 'very obviously not a child'. What fairness requires depends on the facts. 'In each case, the local authority must take reasonable steps to equip itself with the relevant information'. If it interviews the young person, it must do so fairly. If his credibility becomes an issue, he must be given a chance to address points which were thought relevant to that. It was not necessary in all cases slavishly to stick to a checklist (paragraph 42).

72. In paragraph 46, he said that a court's decision on whether an appropriate adult was necessary 'must take into account any relevant observations made by the social workers conducting the interview'. In that case, their assessment was that the claimant 'spoke confidently' and 'was able to advocate for himself'. They saw his insistence on a Sudanese Arabic interpreter as evidence 'of his maturity and ability to speak up for himself'. Those factors led Swift J to conclude that the absence of an appropriate adult did not make the interviews unfair. He dismissed that ground of challenge. He upheld only one ground of challenge, which was that the local authority had not given the claimant a chance to comment on all the points which were relevant to the social workers' assessment of his credibility (paragraph 51).

73. He considered that the appropriate relief was a declaration. He rejected a submission that the assessment should be quashed and that the local authority should be required to do the assessment again. The parties had agreed that the substance of the claim should be transferred to the UT. The UT would decide, as primary fact-finder, whether, at the material time, the claimant was a child. It was better that that decision be made sooner rather than later. The social workers' procedural error would not

'result in any distortion or difficulty' for the UT when it made its decision on the claimant's age for itself (paragraph 54).

The grounds of appeal and submissions

74. As I have already indicated, there was a dispute about whether this appeal was academic, and if so, whether we should hear it, nevertheless.

75. The Council was given permission to appeal, in effect, on six related grounds.
    i. The Judge wrongly characterised the views of the social workers.
    ii. He failed to give due weight to the views of the social workers, who considered that R was definitely over 25, wrongly recording, instead, that they thought that he was very likely an adult.
    iii. The Judge imported procedural requirements which were inappropriate in a clear case.
    iv. The Judge failed to give due weight to the reasoned views of the social workers that R was not prejudiced by the lack of an interpreter.
    v. The Judge erred in considering that an appropriate adult was necessary.
    vi. The Judge erred in quashing the Decision and in refusing to consider the Council's application for an order that the age assessment and material in this case be disclosed to any new local authority assessing R's age.

76. R lodged a Respondent's Notice, relying on two main arguments.
    i. The appeal is academic.
    ii. The Council did not rely only on R's appearance, but decided to take a history. Minimum standards of fairness required both
        1. the presence of an appropriate adult and
        2. that R be given an opportunity to address any concerns arising from the content of the interview.

Discussion

Is the appeal academic?

77. R no longer lives in the Council's area. He is now an adult, even on his case. While he was still under 18 (on his case), on 5 May 2022, Southampton City Council ('Council 2') assessed his age. Ms Luh submitted that while the Judge had quashed the Decision, he had not required the Council to do a further assessment. Matters had moved on. Council 2 accepted that, when they did their assessment, R was a child, and decided to provide, and have provided him with, appropriate services. On the face of it, that means that there is no longer a live dispute between the Council and R about R's age.

78. At the hearing, Ms Luh and Miss Rowlands took different positions about whether the Council might be exposed, as a result of the quashing of the Decision, to some further liability towards R. During the hearing, we asked them to provide further written submissions on this issue. I am grateful to them for providing those. Having considered Ms Luh's comprehensive exposition of the relevant law, I consider that there is now no live dispute between the parties and (if this is necessary) that there are three main reasons why it is very unlikely that the quashing of the Decision will have

any practical impact on the Council in the future. First, R was never 'looked after' by the Council. There is therefore no risk of his invoking, as against the Council, any of the duties which are owed by local authorities to former 'looked-after' children. Second, Council 2's age assessment does not bind the Council, so that R could not, as against the Council, invoke, the discretion recognised in *R (GE) Eritrea* [2014] EWCA Civ 1490; [2015] 1 WLR 4123. Third, R's status as a care-leaver is unlikely to distort the application of Part VII of the Housing Act 1996 were R to present himself to the Council as a homeless person. Putting things at their very highest, there is no more than remote possibility of a potential future dispute between R and the Council to which the Decision might be indirectly relevant. I accept Ms Luh's submission, therefore, that the appeal is academic.

Should this court exercise its exceptional discretion to hear an academic appeal?

79. Ms Luh referred to *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450 at 456-457. Lord Slynn recognised that the House of Lords had a discretion to hear an academic appeal. It should be exercised 'with caution' and only if 'there is a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete issue of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future'.

80. She also referred to *Hutcheson v Popdog Limited* [2011] EWCA Civ 1580; [2012] 1 WLR 782. In that case, this court considered an application for permission to appeal. Lord Neuberger MR (as he then was) gave a judgment with which the other members of the court agreed. The application was resisted on the grounds that the appeal was academic. He said, at paragraph 15, that other than in exceptional circumstances, the court must be satisfied that an academic appeal would raise a point of some importance, the respondent to the appeal must agree to its proceeding, or at least be completely indemnified in costs, and not otherwise inappropriately prejudiced, and the court must be satisfied that both sides of the argument will be fully and properly ventilated. It is not clear whether, when Andrews LJ gave permission to appeal, she had received R's submissions on this issue, but I doubt it. It seems, therefore, that this authority is only now indirectly relevant.

81. Ms Luh also submitted that this case turns on its own facts. Miss Rowlands argued that this case raises an issue of wider importance, both for the Council, which has to deal with age assessments in other cases, and for the other local authorities which also have to decide whether or not a young person is a child. Her main point was that the effect of this judgment, on these facts, is to attenuate, virtually to a vanishing point, the scope which a local authority was thought to have had to do a less elaborate assessment in what, in the expert judgment of social workers, is thought to be an obvious case. The outcome in this case is inconsistent with that approach in many other cases, starting with *Merton*, and including authority in this court. The Judge's self-directions have recently been endorsed in the *HAM* case. Those endorsements give the outcome, as well as the underlying reasoning, an added apparent authority.

82. I accept Miss Rowlands's submission. This case is of wider general importance than a mere decision on an academic dispute. I have considered the cases to which we were referred. Some of the relevant principles were also considered by this court in *R (L) v*

Devon County Council [2021] EWCA Civ 358; [2021] ELR 420. In my judgment this is a case in which this court should exercise its exceptional discretion to hear an academic appeal. There is a further reason for doing so. The Judge in this case, and judges in at least two other cases to which we were referred, have considered procedural challenges to age assessments in isolation from the merits of such a challenge. This appeal prompts me to express my concern that this practice should not be followed unless there is a very good reason to do so.

Was the Judge wrong?

83. As a result of *A v Croydon*, the Administrative Court, or on a transfer from the Administrative Court, the UT, has jurisdiction to decide an age dispute on its merits. In other words, the court has power and the duty to decide the person's age, as a matter of jurisdictional fact. This makes an application for judicial review of an age assessment a relatively unusual type of application for judicial review. The court does not usually decide anything about the underlying merits of a decision which is challenged on an application for judicial review. Rather, its role is to supervise the exercise by a public authority of its functions: *General Medical Council v Michalak* [2017] UKSC 71; [2017] 1 WLR 4193.

84. *Z v Croydon* was an appeal from a refusal of permission to apply for judicial review in an age assessment case. This court considered the test for giving permission in such a case. Part of the test concerned the nature of the factual case which had to be advanced by the claimant in order to pass the threshold for permission. In that case, this court considered that the factual threshold was met. The decision to give permission was also supported by 'two procedural lapses'. This court nevertheless recognised that, when the court eventually came to make its factual decision at the substantive hearing, the procedural challenges were likely to fall away. The reason for this was that if a court can, and does, decide the merits of a dispute, an earlier 'procedural lapse' by a local authority is likely to lose any legal significance. So, a failure to put adverse points to a claimant, or to provide him with an appropriate adult will not matter once the court has decided, on the basis of all the evidence which it has heard, what his age actually is. Conversely, the reason why fairness is usually so important in judicial review is precisely because the reviewing court can only review a decision on limited grounds, which include fairness, and precisely because, since it can only review a decision, it is rarely in a position to decide reliably whether, if a procedural lapse had not occurred, the impugned decision would have been the same, or not. Those strictures self-evidently do not apply in an application for judicial review of an age assessment, because of the decision in *A v Croydon*.

85. I wonder whether the Judge in this case, and the judges in two of the cases to which we were referred, *AB v Kent* and *HAM*, might have lost sight of this point. In all three cases, a procedural challenge was considered first, in isolation from the decision on the merits, I assume because that is what the parties asked for. The decision in *A v Croydon* has, however, reduced the importance of procedural challenges in a substantive judicial review of an age assessment. In cases like these, the parties and the court should consider whether the overriding objective is best furthered by hiving off a procedural challenge from a decision on the merits, deciding the procedural challenge in the Administrative Court and then the transferring consideration of the merits to the UT. There are two linked reasons why it might not be. Firstly, the

outcome on the merits may well make an independent decision on any procedural challenges unnecessary. Second, it may well be artificial and unhelpful for the court to consider a procedural challenge without also, as it must eventually, confronting the merits, as, without a decision on the merits, it is impossible to make an accurate assessment of the significance of the procedural challenge, which a decision on the merits may well supersede.

86. It might be useful if, in future cases, the Administrative Court were expressly to consider whether there is, in each case, a good reason to hive off a procedural challenge. It seems to me that there will be cases in which such a division is likely to add to costs and delay in the litigation, for no evident benefit. As this court realised in *Z v Croydon*, an arguable procedural lapse may support an application for permission to apply for judicial review, but once permission to apply has been granted, it is unlikely to play a significant part in the court's decision, based on all the evidence, about the claimant's actual age, which is the court's real job in these cases. Once permission to apply for judicial review has been granted, it seems to me that the norm should be that the whole case is transferred to the UT, for the UT to consider any procedural challenges in the context of its decision on the merits. In most cases, the UT's decision about the claimant's age will enable the UT properly to consider the legal significance of any procedural flaw. It is undesirable for litigants to take up scarce court resources with two separate hearings in the same case, if, on analysis, the court is best placed to deal with the whole case in one hearing. In those cases in which points about fairness may still be relevant when the UT makes its assessment of the claimant's age, I consider that the observations of Swift J in *HAM* (which I have summarised in paragraphs 68-72, above), are useful guidance, as is the reasoning in *Merton* (with the caveat that it is necessary to remember that it was decided before *A v Croydon*).

87. The Judge said that nothing he had seen suggested that 'the conclusion would necessarily have been the same, had fair process been carried out' (paragraph 40). That observation, which might have been appropriate in a standard application for judicial review, illustrates the dangers of hiving off a procedural challenge in these cases. The observation shows that the Judge appreciated that the merits of the challenge were relevant to whether or not the procedural challenge should have succeeded. Had the Judge postponed a decision on the procedural arguments until the merits of the challenge had been decided, he would, precisely, have been able to say whether or not the conclusion would have been the same. I do not criticise the Judge on this account, as it seems that both parties wanted the case to be dealt with in this way.

88. There is a further paradox in the approach of the Judge. The Judge quashed the Decision because it was not made fairly, applying the principles of procedural fairness which would apply on an application for judicial review. I do not consider, however, that his approach to the Council's reasons for the Decision was appropriate on an application for judicial review. As Stanley Burnton J pointed out in *Merton*, a court should be cautious about accepting late reasons for a decision. Stanley Burnton J said that in a case in which the contemporaneous reasons were very short. That caution is all the more necessary when the contemporaneous reasons are as detailed as they were in this case. The Council's reasons in this case are very full, compared with the limited reasons relied on by the local authority in *Merton*. They were, formally, the

reasons of the two social workers who composed them, presumably after comparing their separate notes of the Interview and discussing and agreeing what their joint decision on behalf of the Council should be. The Judge, no doubt encouraged by the parties, did not take the reasons at face value, but supplemented them with other material, at times using the social workers' notes to cast doubt on the reasons, and to support his own views about the merits of some of the arguments. In the end it does not matter in this case, but if a decision is to be quashed on judicial review principles, such an approach to the formal, contemporaneous reasons for the decision is unprincipled.

89. I will now consider the grounds of appeal on the assumption, which is shared by the parties, but which may not be correct, that the Judge was right to consider a challenge to the fairness of the Decision in isolation. I consider the absence of an interpreter first. The social workers were the decision-makers in this case. They described in the Decision their experience of interviewing other young people from a range of backgrounds and different nationalities. They explained very clearly, and in detail, why they decided that they could safely interview R without an interpreter, how they reached that conclusion, and the extent to which, during the course of the interview, they checked their understanding and his. For reasons similar to those which were given by Swift J in paragraphs 34 and 46 of *HAM* (see paragraphs 70 and 72, above), I consider that the Judge was wrong not to take into account the express reasoning of the experienced social workers on this issue, and to substitute his own view for theirs. I also consider that the Judge was wrong to hold that the Decision was unfair in part because R did not have an interpreter.

90. The argument that the interview was unfair because there was no appropriate adult overlaps significantly, if not entirely, with the argument based on the absence of an interpreter. I consider that Swift J was right in *HAM*, having analysed the authorities, to say that there is no rule of law that a young person must have an appropriate adult in an age assessment interview. In particular, *Z v Croydon* is not a sound basis for any such supposed rule. All that this court could have decided in that case was that the absence of an appropriate adult was an arguable procedural lapse which made it appropriate to give permission to apply for judicial review in order for the merits of the age assessment to be considered at a substantive hearing. Whether an interview will be unfair if there is no appropriate adult will depend on a range of factors, which will vary from case to case. I also agree with Swift J that *R ((ZS) Afghanistan) v Secretary of State for the Home Department* is not binding on this point. In this case, for reasons similar to the reasons which the social workers gave to explain why they considered that they could interview R without an interpreter, they were also entitled to interview him without an appropriate adult. The Judge was wrong to substitute his own view and to decide otherwise.

91. In *Merton*, Stanley Burnton J described the relationship between two relevant assessments of credibility which are involved in many age assessments; that is, the credibility of the claimant's assertion about his age, and the credibility of other assertions he may make in the course of an interview. It is true that, in this case, the social workers did elicit a history from R and did reach some views about the extent to which he had volunteered, and withheld, relevant information. The interview therefore elicited both a history, and the material from which the social workers felt able to make judgments about R's appearance and demeanour. Having interviewed R,

however, the social workers' view about his age was based, if their reasons are correctly understood, not on an assessment that he had lied about his history and therefore had lied about his age, but on an assessment of how he looked and behaved. The causal impact of any assessment of the credibility of aspects of A's account of his history was limited. I accept Miss Rowlands's submission that, in two different passages of the judgment, the Judge significantly understated the force of the social workers' conclusion that R was not a child (see paragraphs 30 and 39, above). In the view of the social workers, who were therefore the primary decision-makers, R looked and acted as if he was much older than the 16-20 age bracket in which, the authorities suggest, there is usually room for two views (and therefore a role for an assessment of general credibility). In some cases, of course, the margin for error may be greater. Given the social worker's views in this case, giving R an opportunity to comment on three points on which they had formed a negative view of his account was unnecessary. The Judge was wrong to hold otherwise.

92. It follows that the Judge was wrong to quash the Decision for the reasons which he gave.

Conclusion

93. For those reasons, I would allow this appeal.

Lady Justice Falk

94. I agree.

Sir Launcelot Henderson

95. I also agree.