Neutral Citation Number: [2021] EWHC 2241 (Admin)

Case No: CO/2452/2020

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 6 August 2021

Before :

MR DAN SQUIRES QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

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Between :

The Queen on the application of M (By his Litigation Friend, Roxanne Nanton of the Refugee Council)	**Claimant**
- and -	
London Borough of Waltham Forest	**Defendant**

- -
- -

Philip Rule (instructed by **Osbornes Law**) for the **Claimant**
Catherine Rowlands (instructed by **Waltham Forest Legal Services**) for the **Defendant**

Hearing dates: 17 June 2021

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Approved Judgment

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email and release to Bailii. The date and time for hand-down is deemed to be Friday, 6 August 2021 at 10.30am.

Dan Squires QC, sitting as a Deputy High Court Judge:

Introduction

1. The Claimant is an Afghan national. He arrived in the UK in October 2019 and claimed to be aged 13/14. Given his claimed age, the Claimant was taken into the care of the Defendant, the London Borough of Waltham Forest. The Defendant conducted age assessments of the Claimant in May and October 2020. It concluded that he was, and had been in October 2019, an adult.

2. The Claimant seeks to challenge the Defendant's age assessments. He does so on a number of grounds that I consider below, but in essence the case turns on two key issues:

    i) Where an individual is not given an opportunity to deal with points regarded as adverse to their case while an age assessment is still at a formative stage (as required for the assessment to be "*Merton* compliant" pursuant to the minimum procedural safeguards set out in *R (B) v Merton London BC* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280, [2003] 2 FLR 888 and subsequent caselaw), is the process nevertheless lawful if material is later obtained which the relevant local authority considers strongly supports its view that the individual is an adult?

    ii) Given that the later obtained material relied on in this case was primarily information about an apparent lack of change in the Claimant's height and evidence about the development of his teeth, what weight can properly be given to such material in the age assessment process?

3. I set out the legal framework that governs those questions, and my conclusions, below. I am grateful to counsel for the clear and helpful way the rival cases were put orally and in writing.

Factual background

4. The Claimant is an Afghan national. He arrived in the UK, unaccompanied, on or around 2 October 2019. According to the Claimant he informed authorities he had been 13 when he left Afghanistan and was now 14. According to the Defendant he claimed to be 13 when he arrived in the UK. The Claimant had no documentation by which his age could be confirmed or ascertained. On 3 October 2019 the Claimant was placed in the care of the Defendant on the basis of his claimed age.

5. The Defendant was not convinced of the Claimant's age and commenced an age assessment process. On 4 February 2020 the Claimant was interviewed by two social workers ("the assessors"). Also present was an interpreter and an appropriate adult from the Refugee Council.

6. On 15 May 2020 the assessors finalised their first age assessment ("the May 2020 assessment"). They concluded that the Claimant was over 18. The conclusion was read out to the Claimant but he was not given the opportunity to comment on the assessors' adverse conclusions while they were at a formative stage. On 18 June 2020 the conclusion that the Claimant was an adult was communicated to the Home Office.

7. The reasoning underpinning the May 2020 assessment was set out in a detailed "Document for Age Assessment". The assessors described the Claimant's physical appearance, how he presented himself in the interview, and his description of his family and history. It recorded his account of his education and that he attended a Madrassa, but noted he "was unable to share when asked for how long he attended the Madrassa or what age he began attending". The assessment described the Claimant's journey to the UK, including travelling through Bulgaria where he said he was stopped and detained for approximately one month. He told officials in Bulgaria he was 18. When asked by the assessors why he had reported he was 18 when he was 13, it was recorded that he "raised his voice and stated that he was 13 years old as that is what his mother had told him… [and] that he only told [the Bulgarian authorities] he was 18 years old in order to be released from custody".

8. The May 2020 assessment stated as follows under the heading "analysis":

> "Age assessment cannot be concluded with absolute certainty as there are not any current methods that can determine age with 100% accuracy" (Age assessment Guidance Oct, 2015).
>
> [The Claimant's] physical appearance and demeanour during the course of this assessment was not solely used to inform his age assessment. His ethnic background (Afghanistan) was also taken into con (sic).
>
> The assessors are of the view that [the Claimant's] physical appearance and demeanour and level of independence is not that of a teenager of a similar age and information sourced from his foster carer … appears to contradict the age that [the Claimant] has shared through the interview.
>
> His physical appearance is not consistent with that of a teenager but of a young adult. He is of an average height with a slender build. His face appears to be clean shaven which suggest that he is well into puberty by developing facial hair. Both assessors are of the view that [the Claimant's] demeanour, facial features and body language indicate that of a young adult…. It is possible that the hardship he may have experienced could have impacted on his features making him look older. However, it is unlikely that [the Claimant's] mature appearance can be attributed to any lifestyle in his home country based on the information provided in the assessment. [The Claimant] gave no detail of physical activity that would have contributed to a mature physical muscular tone that it he is observed to have. During the assessment, [the Claimant] was unable to share certain key time frames and facts as expected. He was however confident about few important aspects which are the time of leaving Afghanistan, being 13 years of age (at the time he entered the UK) and also the exact length of his journey. [The Claimant] was unable to share the ages of any family members or friends neither how long he attended the Madrassa. On observation, [the Claimant] appeared to be avoidant in answering any questions that

> pertained to timeframes and ages of family members. [The Claimant] has mentioned in conversation to the foster carer that had been in the UK and in foster for approximately 6 months which is accurate. This demonstrates that [the Claimant] may have deliberately attempted to withhold information during the assessment relating his ability to understand timeframes with the purpose of misleading the assessors. Therefore, leading to the conclusion that [the Claimant] may have deliberately withheld information that would support a conclusion in this assessment of an age older than 13 yrs."

9. The assessors took the view that there was no purpose in putting any of their concerns to the Claimant for his comment prior to finalising their assessment. The assessors' conclusion was as follows:

> "This assessment has concluded that due to deliberate withholding of vital information by [the Claimant] and based upon the type of lifestyle that [the Claimant] described having in Afghanistan he is assessed to have reached his majority years. The assessment concludes that [the Claimant's] physical mature appearance cannot be attributed to his lifestyle. [The Claimant] also clearly has the ability to make references to timeframes however insisted in the interview that he could not. Based on observation and current views of professionals, the assessors have reservations about [the Claimant's] stated age. It's highly unlikely that if the assessors were to offer another meeting to go through the discrepancies highlighted during the assessment, [the Claimant] would have been able to provide more consistent account to inform their decision about his age."

10. Following the communication of the decision to the Home Office on 18 June 2020 the Claimant was moved from foster care to adult accommodation. Also on 18 June 2020 the Claimant's solicitors sent a letter before claim to the Defendant. The letter made a number of criticisms of the age assessment decision and the process by which it was reached, including that the Defendant had not followed a "minded to" procedure in which potentially adverse inferences were put to the Claimant prior to the finalising of the assessment as required for a *Merton* compliant process (see below). On 24 June 2020 the Defendant responded. It agreed, given the lack of a "minded-to" process, to "re-open [the Claimant's] age assessment … with two different assessors". In the interim the Defendant agreed to re-accommodate the Claimant as a child.

11. The Claimant's solicitors responded on 24 June 2020 stating that they expected the 15 May 2020 assessment to be "withdrawn" not "re-opened" and that the previous assessment would not be shown to the new assessors. There followed correspondence between the parties culminating in the Defendant writing on 1 July 2020 to state that because the Claimant did not have "a proper minded to procedure" they agreed that the "conclusion of the assessment is withdrawn" and a re-assessment would proceed "with new assessors who have not previously been involved with [the Claimant's] assessment and who have no views about his age". The letter stated, however, that the new assessors "will have access to the factual material gathered as part of the first assessment" and it was explained why that was considered appropriate.

12. On 13 July 2020 the Claimant issued judicial review proceedings. He sought primarily to challenge the Defendant's insistence on new assessors having sight of the May 2020 assessment in any fresh assessment.

13. On 18 August 2020 the Defendant wrote again to the Claimant's solicitors. They stated that, in order to resolve matters, they were proposing to provide the new assessors with a "redacted" copy of the original assessment, removing any comments about the Claimant's demeanour or credibility and the original assessor's analysis, leaving only what they considered to be factual matters recording what was said by the Claimant to the assessors. That was rejected on 20 August 2020 by the Claimant's solicitors. They stated that they did not consider "there should be any part of a previous flawed assessment looked at by new assessors". The Defendant wrote again on 4 September 2020. It proposed creating a document which contained "the facts as ascertained in the course of the assessment" which would be made available to the new assessors. A document to that effect was sent to the Claimant's solicitors. This too was rejected by the Claimant's solicitors by a letter of 11 September 2020 on the basis that "one cannot divorce the interview process from the failure to adhere to the processes that ensure fairness and Merton-compliance".

14. On 14 September 2020 permission was refused on the papers by John Bowers QC, sitting as a Deputy High Court Judge. He considered that it was not arguable that the Defendant, having withdrawn its age assessment, could not rely upon factual material obtained as part of the earlier assessment process in a new assessment.

15. The Claimant renewed his application for judicial review. At an oral hearing on 8 October 2020, Mr Mathew Gullick, sitting as a Deputy High Court Judge, gave the Claimant permission to proceed with his judicial review. Mr Gullick considered it to be arguably unlawful of the Defendant to provide information from the first age assessment to the assessors who were to conduct the fresh assessment. He also gave the Claimant permission to file an Amended Statement of Facts and Grounds by 26 October 2020.

16. On 23 October 2020 the Defendant wrote to the Claimant's solicitors. The Defendant explained that it was withdrawing its offer to conduct a new assessment in the light of recently obtained material. It will assist to set the Defendant's letter out in full. It explains the basis for the assessment document the Defendant eventually produced in October 2020, which is the relevant assessment for the purpose of the present challenge, and its relationship to the May 2020 assessment. The letter stated (emphasis added):

> "As you are aware, Waltham Forest has recently received fresh evidence which is relevant to our assessment of [the Claimant's] age.
>
> In accordance with the [Association of Directors of Children's Services Age Assessment Guidance], Chapter 7, where further information becomes available, that should be taken into consideration. The evidence has already been shared with you and [the Claimant] has had the chance to comment on it.
>
> As you are aware that evidence is

> 1) That [the Claimant] has not grown in the year between [October 2019 and September 2020]. It is implausible that a 13-14 year old boy would not grow in a year, especially having regard to the fact that he has arrived in the UK after an arduous journey and has been well fed and had settled accommodation.
>
> 2) That [the Claimant] has fully erupted wisdom teeth and has a significant degree of damage and caries to his molars. These facts have led the dentist he attended to query his age.
>
> Whilst we are aware of the difficulties in assessing age based on any one of these elements, *these two pieces of evidence, taken in conjunction with the evidence that led to the original assessment of [the Claimant] as being over 18, lead us to the conclusion that the local authority can now be sure that [the Claimant] is over 18. In our view, this is one of those cases identified by Stanley Burnton J [in Merton] where it is very obvious that a person is under or over 18 (here, of course, over) and where there is no need for prolonged inquiry.*
>
> *This new evidence has therefore led us to change our position. It is our view that no purpose will be served by re-opening the assessment as we had previously agreed to do. We therefore withdraw that agreement. The assessors have updated their earlier assessment in light of the new evidence and we attach a copy of that herewith.*
>
> We are of the view that this assessment renders your extant judicial review redundant and expect you to withdraw it…"

17. On 23 October 2020 the Defendant also produced an "updated" age assessment report ("the October 2020 assessment"). The updated assessment was completed by the same assessors who had undertaken the 15 May 2020 assessment, and it followed a further interview with the Claimant on 21 October 2020 at which the newly acquired evidence about his dental development and lack of height change was put to him.

18. The October 2020 assessment included almost all of the material from the May 2020 assessment quoted verbatim, with various updates added. In relation to the Claimant's "physical appearance" it was noted that the Claimant did not appear to have grown in the previous year. The assessment continued: "There is no direct correlation between height and chronological age. However, boys usually carry on growing until 16-17 years of age. To have no growth at all for one year is in our view an indication of maturity inconsistent with [the Claimant's] claimed age."

19. In the section of the assessment headed "health and medical assessment" additional text was added in relation to the Claimant's dental development. The assessment explained that the Claimant had been seen by a dentist on three occasions, most recently on 10 September 2020. It included a letter from the dentist to the Defendant, following the latter visit, in which the dentist stated "it seems that" the Claimant had "third molar /

wisdom teeth" which would "normally emerge between 17-21 years of age". The dentist also suggested that other aspects of the Claimant's teeth were "unusual" for a child who was 14. The assessment stated: "The fact that [the Claimant] has two wisdom teeth, which do not normally come through until 19 on average, 17 at the earliest, is a significant piece of information" and suggested the Claimant was older than his claimed age of 14/15.

20. The "analysis" section of the assessment contained the text set out above at para 8 quoted verbatim. It thus included the conclusion that the Claimant appeared to avoid answering questions regarding timeframes during the interview in February 2020, and that this was regarded as his deliberately withholding information that might suggest he then was older than 13/14. In addition further information was added from the Claimant's foster carers who considered he was over 18. The analysis continued "Now that the local authority has the evidence that [the Claimant] has not grown in a year, and that he has dental development consistent with someone much older than his claimed age, the view of the assessors is that no further investigation is needed."

21. The October 2020 assessment set out the assessors' conclusion. It essentially reproduced the conclusion of the May 2020 assessment (see above para 9). It added "The assessors' conclusion as to [the Claimant's] age is now strongly supported by the new evidence as to his teeth and lack of growth. It is also supported by the views expressed by the foster carers. Taking all the evidence in the round, the view of the assessors is that [the Claimant] is at least 18 years old and is probably 20-23 years old."

22. It is thus apparent that the October 2020 assessment, as the 23 October 2020 letter explained, did not involve a re-opening of the May 2020 assessment, nor did the Defendant seek to revisit or reconsider the May 2020 conclusion on the Claimant's age or the basis on which it was reached. Instead, the October 2020 assessment repeated, and relied upon, the findings of the May 2020 assessment about the deliberate withholding of information and the Claimant's physical appearance indicating he was over 18. It concluded that that earlier finding was now "supported" by the new evidence.

23. On 2 November 2020, following the receipt of the October 2020 assessment, the Claimant submitted an Amended Statement of Facts and Grounds. He sought to extend his challenge to include the October 2020 assessment. On 20 November 2020 the Defendant submitted Further Grounds for Defending the claim in which it asserted, *inter alia*, that the Claimant did not have permission to challenge the assessment that had been undertaken on 23 October 2020. On 10 December 2020 the Claimant applied to amend his Claim Form to include a challenge to the 23 October assessment. The Defendant responded on 15 December 2020. It invited the Court to strike out the claim relating to the May 2020 decision on the basis that a new decision had been taken on 23 October 2020 and any challenge to the previous decision was academic. The Defendant also invited the Court to permit the amendment of the Claimant's Grounds to challenge the October 2020 assessment, but then refuse permission to bring a judicial review claim on the basis that the grounds were unarguable in the light of the new evidence on dental development and height change. In the alternative, the Defendant contended that, if permission was granted, the case should be transferred to the Upper Tribunal to conduct a fact-finding exercise to determine the Claimant's age.

24. On 15 January 2021 David Lock QC, sitting as a Deputy Judge of the High Court, gave the Claimant permission to amend his Grounds in the form served on 2 November 2020. He refused the Defendant's application to transfer the case to the Upper Tribunal.

25. On 24 February 2021 the Defendant applied for an order that the Claimant "consent to and cooperate with an expert examination of his teeth", and that if he refused to cooperate his claim should be struck out. The application was heard by Lang J on 17 March 2021. She refused the Defendant's application. She noted that the Claimant's challenge was to the procedure which culminated in the decisions of May 2020 and October 2020 that the Claimant was an adult. She continued "the only evidence to be considered in the judicial review is the evidence which was before the decision makers at the relevant time. The court will not be undertaking its own age assessment. Thus fresh expert evidence will not be relevant to the exercise the court is to undertake."

Procedural matters

26. Before turning to the applicable legal framework, and the Claimant's grounds of challenge, I deal with two procedural matters that arose before me.

27. The first procedural issue, raised by the Defendant, is whether the Claimant, in fact, has permission to proceed with his challenge of the 23 October 2020 age assessment. As noted above, the Claimant was granted permission to proceed with his judicial review of the May 2020 assessment by Mr Mathew Gullick on 8 October 2020. He then amended his Statement of Facts and Grounds on 2 November 2020 to challenge the October 2020 assessment. The Defendant submitted on 10 December 2020 that while permission to *amend* the Grounds should be granted, permission to then *proceed* with them should be refused. On 15 January 2021 Mr David Lock QC gave the Claimant permission to amend his grounds but did not formally give him permission to proceed with the challenge. It seems to me that, in circumstances where the Claimant already had permission to challenge the earlier May 2020 age assessment, and was then given permission to amend his grounds to challenge the October 2020 assessment, it was probably implicit in Mr David Lock QC's order that he was also giving the Claimant permission to proceed with the amended grounds. In any event, and for the avoidance of doubt, I give permission to proceed with the amended grounds.

28. The second procedural issue is the determination of an application by the Defendant to rely on a witness statement of Pauline Mbari, a social worker employed by the Defendant, and various materials she exhibited. I indicated at the hearing that I would consider Ms Mbari's statement *de bene esse* and would set out my conclusion as to its admissibility in my judgment.

29. The judicial review was listed before me for hearing on 17 June 2021. On 20 May 2021 the Defendant filed with the court a witness statement of Ms Mbari. No application was made to admit the evidence and the Claimant objected to its admission. On 11 June 2021 the Defendant applied for permission to rely on the evidence. Ms Mbari's witness statement set out the chronology of the Claimant's visits to the dentist. It exhibited the Claimant's dental records, including x-rays of his teeth. It also exhibited an exchange of emails with Professor Roberts, a Visiting Professor at King's College London, who expressed his views of the Claimant's age based on his dental records, and an academic article by Professor Roberts and others from 2015 on dental development. Ms Mbari

also referred to other academic literature in the area and set out her views on the evidence regarding the Claimant's teeth.

30. The application to rely on Ms Mbari's evidence was made 6 days before the hearing of this judicial review. It includes material on the ability to assess age from dental records which, as set out below, is an area of considerable controversy. It also included purported expert views on the Claimant's age in the form of Professor Roberts' comments. The material on which the Defendant was seeking to rely was clearly evidence which, if admitted, the Claimant would need an opportunity to respond to if I was fairly to consider it. That was not possible given the timing at which the application to admit the evidence was made, and in my view it was far too late in the day to seek to introduce material of this kind. Furthermore, insofar as Ms Mbari's statement included her general views on dental development and of height change for adolescents, and thus her conclusions on the Claimant's age, it is difficult to see how much weight I could properly accord to it. Ms Mbari is not an expert and was not one of the social workers who carried out the age assessments of the Claimant in May or October 2020. If the age assessors' conclusions at to the Claimant's age were lawfully reached, that is the end of the matter. If they were not, it is difficult to see how the views of another social worker employed by the Defendant, who did not conduct the age assessment, would carry any significant weight. In any event, an application to admit that part of Ms Mbari's evidence, like the rest of her evidence, should have been made significantly earlier to give the Claimant a fair opportunity to deal with it. I therefore decline to admit her statement.

31. During the course of the hearing Ms Rowlands also sought to rely on further academic material concerning dental development which was not in the agreed trial bundle before me. The material had been placed before Lang J for the application dismissed on 17 March 2021. I do not consider that material presented for a previous application was properly admitted before me and fair notice would have been required if reliance was to be placed upon it. As with Ms Mbari's statement, I consider it too late in the day to introduce controversial evidence of this sort which would require an opportunity for rebuttal evidence if it was to be fairly considered.

Legal framework

Significance of the age assessment process

32. It is well recognised that assessing the age of individuals arriving, without documentation, in the UK poses challenges. That is so, in particular, where the individual may be only a few years older or a few years younger than 18. The age assessment process, and deciding with some accuracy whether a person is over or under 18, is nevertheless important. On one level, as with any age cut-off, the selection of 18 is arbitrary. It is, however, a cut-off that carries considerable significance as it determines whether an individual is, in law, an "adult" or a "child" from which a number of rights and obligations flow.

33. Those who are children have a clear interest in being correctly identified as such. There are important differences from the perspective of the individual if they are a child or an adult, including whether they are liable for immigration detention by the Home Office and other matters regarding their immigration status. There are also significantly different legal requirements imposed on local authorities in relation to children.

Pursuant to the Children Act 1989, local authorities are under a general duty to safeguard and promote the welfare of any "child" within their area who is in need (s 17), and can also be required to provide accommodation for such children (s 20). That has occurred in the present case where the Claimant has been treated as a child by the Defendant. Local authorities also have ongoing obligations to those who were children in their care after they turn 18 (s 23C). Thus even if a young person is now over 18, it will be important to determine whether they were a child when they entered the care of the local authority, as that may trigger ongoing obligations. As Thornton J observed in *R(AB) v Kent CC* [2020] EWHC 109 (Admin), [2020] 4 All ER 235 at para 19 "unaccompanied asylum-seeking children are some of the most vulnerable children in the country". Ensuring those who are children are correctly identified and receive appropriate support is thus of obvious importance.

34. It is also, however, of proper concern to the authorities responsible for the care of children, and for the immigration system more generally, to ensure that those who are adults are not incorrectly treated as children. As Underhill LJ noted in *R (BF (Eritrea)) v Secretary of State for the Home Department* [2019] EWCA Civ 872, [2020] 4 WLR 38 at para 55 (in a passage expressly endorsed by the Supreme Court : *BF (Eritrea)* [2021] UKSC 38 para 54), "it is a considerable burden on local authorities to have to find appropriate accommodation for [unaccompanied children], and that resource should not be wasted on those who obviously do not qualify for it." Underhill LJ continued (ibid):

> "It would bring the system into disrepute with local authorities and their staff and others involved (such as those providing foster care) if people who were obviously adults were accorded treatment and benefits intended for children. It is also of course easier for migrants with no genuine claim for asylum to abscond from a foster home or supported independent accommodation than from immigration detention."

An erroneous assessment that a person is a child is also undesirable for other reasons. It may lead to an adult being placed in foster care with vulnerable children or in a school surrounded by those who are, in fact, much younger than them. That has obvious safeguarding implications. It is therefore important from the authorities' perspective, just as it is for the individual being assessed, to ensure that, despite the difficulty of the exercise, age is determined accurately.

Merton-compliant assessments

35. In order to ensure as accurate as possible an assessment of age, there is now an established body of jurisprudence as to what is required of local authorities engaged in an age-assessment process. That does not mean I should lose sight of the fact that I am ultimately deciding whether the process in the present case was a fair and lawful one. Nevertheless, the starting point is the guidance given by the courts as to the process that ought to be followed when the age of an undocumented person who has arrived in the UK needs to be determined.

36. The applicable age assessment guidance was initially set out in *R (B) v Merton London BC*, cited above, and has been developed in later authorities. If the guidance is followed an assessment is termed *"Merton* compliant". As Thornton J observed in *R (AB) v Kent*

CC at para 32, "The law now proceeds on the basis that the most reliable means of assessing the age of a young person in circumstances where no documentary evidence is available is by a so-called '*Merton* compliant' assessment". Such an assessment contains what the courts consider to be the "minimum standards" required (ibid para 43) to secure fairness, and, as reliable as possible, a determination of age.

37. The requirements of a *Merton* compliant age assessment have been summarised in a number of authorities. It was recently and comprehensively set out by Thornton J in *R (AB) v Kent CC* at para 21:

> "*Purpose of the assessment*
>
> (1) The purpose of an age assessment is to establish the chronological age of a young person.
>
> *Burden of proof and benefit of the doubt*
>
> (2) 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.
>
> (3) The decision needs to be based on particular facts concerning the particular person and is made on the balance of probabilities.
>
> (4) There is no burden of proof imposed on the applicant to prove his or her age.
>
> (5) The benefit of any doubt is always given to the unaccompanied asylum-seeking child since it is recognised that age assessment is not a scientific process.
>
> *Physical appearance and demeanour*
>
> (6) The decision maker cannot determine age solely on the basis of the appearance of the applicant, except in clear cases.
>
> (7) Physical appearance is a notoriously unreliable basis for assessment of chronological age.
>
> (8) Demeanour can also be notoriously unreliable and by itself constitutes only 'somewhat fragile material'. Demeanour will generally need to be viewed together with other things including inconsistencies in his account of how the applicant knew his/her age.
>
> (9) The finding that little weight can be attached to physical appearance applies even more so to photographs which are not three-dimensional and where the appearance of the subject can be significantly affected by how photographs are lit, the type of the exposure, the quality of the camera and other factors, not least including the clothing a person wears.

Conduct of the assessment

(10) The assessment must be done by two social workers who should be properly trained and experienced.

(11) The applicant should be told the purpose of the assessment.

(12) An interpreter must be provided if necessary.

(13) The applicant should have an appropriate adult, and should be informed of the right to have one, with the purpose of having an appropriate adult also being explained to the applicant.

(14) The approach of the assessors must involve trying to establish a rapport with the applicant and any questioning, while recognising the possibility of coaching, should be by means of open-ended and not leading questions. Assessors should be aware of the customs and practices and any particular difficulties faced by the applicant in his home society.

(15) The interview must seek to obtain the general background of the applicant including his family circumstances and history, educational background and his activities during the previous few years.

(16) An assessment of the applicant's credibility must be made if there is reason to doubt his/her statement as to his/her age.

(17) The applicant should be given the opportunity to explain any inconsistencies in his/her account or anything which is likely to result in adverse credibility findings.

Preliminary decision

(18) An applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him. It is not sufficient that the interviewing social workers withdraw to consider their decision, and then return to present the applicant with their conclusions without first giving him the opportunity to deal with the adverse points.

The decision and reasons

(19) In coming to the conclusion the local authority must have adequate information to make a decision independent of the Home Office's decision.

(20) Adequate reasons must be given.

(21) The interview must be written up promptly"

Age assessments in "obvious" cases

38. One of the key issues in the present case is that, as both parties accept, a *Merton* compliant assessment is not required in every case. It is recognised that there will be instances in which it is so "obvious" a person is over or under 18 that no detailed assessment is needed (see *R (AB) v Kent CC* at paras 33-35; *R (BF Eritrea) v Secretary of State for the Home Department* at paras 54-55 (CA); and paras 55-56 (SC)). In *Merton* at para 27 Stanley Burnton J referred to cases in which "it is very obvious that a person is under or over 18". He continued "in such cases there is normally no need for a prolonged inquiry" (ibid). In obvious cases, age can be determined by what is sometimes described as an "abbreviated" assessment based on appearance and demeanour alone. In *R (AB) v Kent CC* at paras 46, Thornton J declined to give a fixed "margin of error for initial assessments by local authorities based on physical appearance and demeanour". She did not, for example, accept that there was a rule that unless a person appears to be over 25 a full *Merton* compliant assessment must invariably be undertaken (para 45). She did, however, conclude that, on the facts of *AB*, a person considered to be aged 20-25 in an abbreviated assessment conducted by a local authority was "too close to the cut off of 18 years" not to require a full *Merton* compliant assessment (para 56).

39. As I explain further below, the importance of following a *Merton* compliant process, where one is required, cuts both ways. It means, from the local authority's perspective, that, where the age assessment was conducted by two properly trained and suitably qualified social workers, and the *Merton* process has been followed, it will be difficult to impugn its conclusion. A court will be slow to accept the assessment was irrational or reached on the basis that insufficient weight was given to one factor over another. Conversely, where a *Merton* compliant process has not been followed, it may be difficult for a local authority to defend the conclusion it has reached on an individual's age. It will mean that the judgments made by the social workers conducting the assessment did not occur within the well-established framework the courts have created setting the minimum standards for securing a fair and accurate decision. While a failure to conduct a *Merton* compliant assessment in a non-obvious case will not inevitably, and as a matter of law, render the conclusion on age unlawful, it will be difficult for the local authority to defend it, and no case was cited before me in which such an assessment was accepted by the court to be lawful. Where a *Merton* compliant process was not followed it is therefore important to determine whether the local authority was entitled to conclude that a person was so obviously over 18 that a *Merton* compliant assessment could be properly dispensed with.

Dental and height evidence

40. As was made clear in *R (AB) v Kent CC* para 21(6)-(7), "physical appearance" is regarded as "notoriously unreliable" as a tool of age assessment, and save in "clear" or "obvious" cases should not be used as the sole basis to determine age. It is also clear that other "physical" methods of calculating age, such as use of dental records or changes over time in an individual's height, need to be approached with very considerable caution, and that, if used, it needs to be appreciated that there are clear limits to the weight that can be accorded to such evidence.

41. The courts have stressed on a number of occasions that there is no agreed upon and reliable anthropometric test that will accurately determine if someone is an adult. As

Stanley Burnton J observed in *R (B) v Merton London BC* at para 22, "for someone who is close to the age of 18, there is no reliable medical or other scientific test to determine whether he or she is over or under 18." That was in 2003. In 2020 Thornton J in *R (AB) v Kent CC* confirmed at para 52 that it remains the case that "There are no medical or scientific means for establishing the age of a young person with any precision." That applies to attempts to establish age by examining a person's dental records or changes in their height as it does to other physical tests.

42. It is true, as the courts have recognised, that teeth generally develop through childhood and until adulthood, with a person's third molar usually the last to emerge. As has been made clear, however, the ability accurately to assess a person's age, especially when they may be close to 18, from the development of their teeth is an area of significant controversy on which there is not a clear and reliable expert position. Experts disagree on what can be determined from dental records, and it is clear that different people's teeth can develop at different times and that dental maturity can be reached before a person is an adult. Indeed, the Defendant accepts in the present case that individuals can reach full dental maturation before they are 18 and at least from the age of 17. In *R (AS) v Kent County Council* [2017] UKUT 00446 (IAC) the Upper Tribunal considered different methods put forward to determine age from dental development. It expressed considerable scepticism about their ability accurately to determine age, and ultimately did not accept the various tests put forward by Professor Roberts, who the Defendant in the present proceedings sought to rely on, were sufficiently reliable as determiners of age. In particular the Upper Tribunal noted that while the key dental analysis being relied on could indicate a person has achieved dental maturity, it could not indicate when it was achieved (para 83). Further, the evidence suggested that there is variance in the achievement of dental maturity across different ethnic populations, as well as between different individuals, which make any generalisations difficult (ibid).

43. The courts have taken a similar approach to evidence of height change. It is recognised that children generally grow during adolescence and cease to grow when they reach adulthood. But using growth or lack of growth to reach definitive determinations of age also needs to be approached with considerable caution (see *R (AK) v Birmingham City Council* [2013] UKUT 00307 (IAC) para 48). Again there is no clear expert position that the fact a person has not grown over the course of a year, or some other length of time, establishes that they must be over 18, and the Defendant accepts in this case that boys may stop growing when they are 16-17.

44. That said, it is not the case that *any* reliance upon evidence regarding changes in height, or the development of an individual's teeth, involves a legally irrelevant consideration, such that a decision-maker taking such material into account is inevitably acting unlawfully. Provided the requisite care is taken with the evidence, and that it is considered along with other material and is not accorded more weight than the current state of scientific knowledge can bear, it is evidence a decision-maker may take into account in conducting an age assessment.

45. In *R (AK) v Birmingham City Council* the Upper Tribunal noted that evidence an individual was continuing to grow would provide some support for a claim he was under 18 (para 46). The Upper Tribunal also noted at para 48 that evidence that the claimant's "molar teeth had completed the process of eruption by [a particular date] indicates that he was more likely to be close to adulthood by that date rather than as much as 3.5 years from the age of 18 years as he himself claims." In its conclusion on the claimant's age

in *AK*, the Upper Tribunal noted that its age assessment was "consistent with the evidence of the emergence of his molar teeth" (para 67). In *R (AM) v Solihull Metropolitan BC* (AAJR) [2012] UKUT 00118 (IAC) the Upper Tribunal at para 17 observed that "Where … accurate measurements of the claimant's height and weight are available extending back over a considerable period of time (say 18 months or more) and show no, or no significant, change" that will support a conclusion an individual is over 18. The Upper Tribunal continued at para 18:

> "it does appear that it would be right to say that the full emergence of the third molar is typically a characteristic of adulthood rather than adolescence. It would be quite wrong to say any more than that. We are, we hope, fully aware of the dangers of misuse of material of this sort. But [the full emergence of the third molar along with a lack of growth] seem to us to be so characteristic of the period of adolescence having finished that it may be right to give them some weight, although they will, we think, never be of any help in picking an age within the teenage years."

46. The position on the authorities, and the evidence before me, is thus as follows:

i) Decision-makers need to be aware of the clear limitations of any evidence on dental development or on height changes as a way of assessing age.

ii) Provided the limitation of the evidence is understood, however, it is not legally irrelevant so as to render any decision that has considered it necessarily flawed. I see no reason, as in *AM* and *AK*, why such evidence could not be considered to see if it supports other evidence on age obtained through a *Merton* compliant process.

iii) On the current state of the medical and scientific knowledge (at least insofar as that has been considered by the courts and presented in admissible evidence before me), it is difficult to imagine cases in which height and/or dental evidence will suffice, on their own, to determine whether someone is a few years over or a few years under 18. While dental maturation or a lack of growth may indicate that a person is within a few years of 18, it cannot definitively determine whether the person is, say, 19 as opposed to 16/17.

iv) A local authority may be able to rely on dental and height evidence to cast doubt on a claimed age far below 18, and to support other evidence on age obtained through a *Merton* compliant process. It is difficult to see, however, how a local authority will be able to justify avoiding undertaking a *Merton* compliant assessment of a person purely on the basis of dental and/or height evidence. The evidence before me and the relevant caselaw does not suggest that dental and height evidence, taken alone, can indicate so clearly that a person is over 18 that no further inquiries are needed. To put it another way, it cannot be said on the basis of such evidence that a case falls within the category in which it is so "obvious" that a person is an adult that a *Merton* compliant assessment can be dispensed with.

Grounds of challenge

47. The Claimant has nine grounds of challenge. A number of them overlap, however, and I have sought to group the grounds together where possible.

Grounds 1 and 2: procedural fairness / appearance of bias

Parties' arguments

48. The Claimant claims that the process adopted by the Defendant to assess his age was procedurally unfair and/or was tainted by the appearance of bias. Essentially, the Claimant's case is that the May 2020 assessment was unfair as he was not given the opportunity, when the decision was still at a provisional stage, to deal with the adverse findings that the social workers conducting the assessment had made about him. He contends that meant that the May 2020 assessment was flawed. It is his case that the process which then followed, by which the Defendant initially proposed to conduct a re-assessment but with some of the material from the first assessment before the second decision-maker, and then withdrew that proposal entirely and simply added to the first assessment, was not a fair one. In the alternative, though to a significant extent overlapping, it is said that the process the assessors followed gave the appearance of unfairness or bias given the reliance in October 2020 on the earlier May 2020 assessment.

49. The Claimant also suggested that the case illustrated systemic unfairness by the Defendant and referred to authorities on the operations of systems which give rise to the risk of illegality (see for example *R (Howard League) v Lord Chancellor* [2017] EWCA Civ 244. [2017] 4 WLR 92). There was, however, no evidence before me that the process adopted in this case was part of a wider system by which age assessments are conducted by the Defendant. To the contrary, the process appears to have been a response to the manner in which the Claimant's particular case arose and unfolded. I have no evidence the process followed here has been adopted in any other case, let alone that it reflected some wider and unlawful systemic practice for which the Defendant is responsible.

50. The Defendant's position is that the process it adopted, taken overall, was a fair one. Its case is that the question of whether, if a fresh assessment had been conducted by different social workers in June-September 2020, they should have seen any part of the first age assessment is now irrelevant. The issue was overtaken by events when the Defendant withdrew the offer to conduct a second assessment and decided it would not re-open the May 2020 assessment. The Defendant's case is that the information that emerged in September/October 2020 about the Claimant's teeth and his lack of growth meant there was no need to re-open the May 2020 assessment and the social workers who conducted that assessment were entitled to rely upon it and simply add the additional material to the earlier assessment, The Defendant's case is that such was the strength of the dental and height evidence that emerged in September-October 2020 that that was not an unlawful process taken overall.

Analysis

51. I agree with the Defendant that I do not need to, nor should I, speculate on what would have been a lawful process had the Defendant re-opened the May 2020 assessment in

June-September. Whether or not it would have been a fair process, where a first assessment is flawed, to show that assessment to assessors conducting a fresh second assessment, is of historical interest only. That is not what ultimately happened. Furthermore, I do not consider that there is some rule in this context which it would be helpful to articulate in the abstract as the Claimant invites me to do. In some cases it may be unfair to show factual material gathered in a flawed first assessment to later assessors, but it is not clear that will inevitably be so in every case.

52. The issue before me is a different one. While the Defendant initially offered to undertake a re-assessment of the Claimant's age using different assessors, it was not possible to agree on the manner in which that was to be conducted and the offer to re-open the assessment was then withdrawn by letter on 23 October 2020. By then, from the Defendant's perspective, matters had moved on and information about the Claimant's teeth and height had been obtained. As was made clear in the 23 October 2020 letter, and having referred to the new evidence, the same assessors who conducted the May 2020 assessment simply considered the new evidence and "updated their earlier assessment in the light of [it]".

53. The case before me in relation to fairness turns then on two questions. Was the May 2020 age assessment flawed? If so, did that taint the conclusion of the October 2020 assessment to such an extent that it should be regarded as having been unfairly conducted, or was the Defendant entitled to conclude that the new evidence was so compelling it could simply update the May 2020 assessment to incorporate it?

Fairness of May 2020 assessment

54. As to the first question, it seems to me clear that the process by which the May 2020 age assessment was undertaken was not *Merton* compliant and its conclusion not fairly reached. It an important element of a *Merton* compliant assessment that "An applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him" (see *R (AB) v Kent CC* para 21(18)). The reasons for that are obvious. Where a decision-maker is considering making a decision based upon assessments of an individual's credibility, or intends to reach adverse conclusions based on disputed facts, there is a clear value in eliciting the individual's comments before a final decision is reached. The individual may be able to answer the assessors' concerns, correct errors or clear up factual misunderstandings.

55. In the present case the conclusion reached in the May 2020 assessment was premised, in large part, on the view taken by the assessors of the Claimant apparent "deliberate withholding of vital information". In essence the assessors concluded that the Claimant was not sufficiently forthcoming about matters which would enable his age to be determined, and they believed that was a deliberate attempt to hide his true age. A key basis for the conclusion that the Claimant was over 18 was that he was "unable to share when asked for how long he attended the Madrassa or what age he began attending" and his being "unsure of the ages of his siblings" (though it was, in fact, recorded that the Claimant stated he had a brother aged approximately 10 or 11 years old and a sister aged approximately 8). The assessors believed that the failure to provide the information was not because the Claimant was unaware of it or had misunderstood what he was being asked, but because he was deliberately withholding information to ensure his true age could not be calculated. The assessors concluded that there was no purpose

in putting this to the Claimant as it was "highly unlikely that if the assessors were to offer another meeting to go through the discrepancies highlighted during the assessment, [the Claimant] would have been able to provide more consistent account to inform their decision about his age."

56. That is not a fair *Merton* compliant process. Where it is proposed to take a decision on the basis that a person is believed to have "deliberately withheld information", or that there are "discrepancies" or inconsistencies in their account, that is precisely the kind of situation in which fairness requires the person be able to comment prior to a final conclusion being reached. They may have answers to the assessors' concerns and fairness requires they be permitted to respond to the concerns before a final decision is taken. Indeed, in the present case it is not clear what "discrepancies" or lack of "consisten[cy]" the Defendant was referring to, and it is not clear why it was said the Claimant was unsure of the ages of his siblings. That in itself could have been subject to comment if the matter had been raised with the Claimant.

57. There may perhaps be some exceptional case where discrepancies in the account a person gives, or the deliberate withholding of information, is so stark, and so obviously unanswerable, that, contrary to the *Merton* requirements, there is no purpose in allowing the person to comment. The courts are however very wary about accepting that a fair process is incapable of affecting the result of a decision. The classic exposition is from the judgment of Megarry J in *John v Rees* [1971] Ch 345, 402: "As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change." Certainly, in the present case, it is difficult to see how the assessors could have properly concluded that, if the Claimant was told of the concerns the assessors apparently had, that he could have had no possible answers to them. In my view it is clear that the May 2020 assessment did not satisfy the requirements of a *Merton* compliant process, and the decision taken on the basis of it did not meet the minimum standards of fairness required in this context.

Fairness of October 2020 assessment

58. The question, then, is whether the October 2020 assessment was nevertheless fair, and, in effect, cured or expunged any earlier unfairness of the May 2020 process.

59. The context here is important. The age assessment process calls for exacting standards of procedural fairness. That is apparent from the common law having developed an unusually detailed and prescriptive series of minimum requirements for a fair process. As I have indicated, that does not mean that any departure from the *Merton* requirements, however minor, will inevitably render a decision unlawful. But the starting point is that where a *Merton*-compliant assessment is required, but not properly undertaken, the resulting decision on age is likely to be found to be unlawfully taken. The detailed and prescriptive process for age assessment partly reflects the courts' recognition of the importance of ensuring age assessment decisions are correct (see above at paras 33-34). The detailed process also reflects the difficulty of conducting age assessments in all but obvious cases. The process can involve assessing the age of someone who may be a few years older or a few years younger than 18, who may have arrived in the UK undocumented, may speak little or no English and whose culture,

upbringing and frames of reference may be unfamiliar to those assessing their age, and where, as set out above, there are no clear scientific means to determine age. Ultimately the age assessment exercise relies upon social workers, who speak to the individual and examine the relevant evidence, to use their experience and judgment to make an evaluation of age. In relation to such an inevitably subjective and impressionistic decision, the *Merton* compliant process is important. It can ensure all relevant material is properly gathered and fairly considered, and that there is at least a clear framework by which the legality of the decision-making can be judged.

60. What that means for the present case is that if, as I have concluded, the May 2020 assessment did not follow a fair and *Merton* compliant process, I need to be very careful to ensure that any further assessment was not tainted by, or did not incorporate, the earlier unfairness. It is therefore important to identify what was being done in the October 2020 assessment, and how it related to, or relied upon, the May 2020 assessment.

61. It is clear from the Defendant's letter of 23 October 2020 that the October 2020 assessment was not purporting to be a re-consideration of the Claimant's age. To the contrary, as the letter stated, there was considered to be "no purpose … served by re-opening the [May 2020] assessment". That was because the Defendant considered that the new evidence about the Claimant's teeth and height change was so compelling that there was no need to revisit the May 2020 decision. The assessors who conducted the May 2020 assessment, therefore, simply "updated their earlier assessment in light of the new evidence". It is also clear what occurred from reading the October 2020 assessment itself. The assessors relied almost entirely on their May 2020 report on the Claimant's physical, personal, social and emotional presentation as well as his account of his family and background and his journey to the UK. The October 2020 assessment repeated verbatim the conclusions from the May 2020 assessment of the Claimant's age based on his "deliberate withholding of vital information" to hide his true age, his "physical mature appearance" and the "discrepancies" and lack of "consistent account".

62. It is true that the Claimant was given the chance to read through the October 2020 assessment as some point after he was re-interviewed on 21 October and before the assessment was finalised on 23 October. This is not a matter on which Ms Rowlands placed any reliance. She did not suggest that any ability in the October 2020 assessment to comment on the May 2020 assessment cured the earlier defect in the process. That is not surprising. The difficulties of processes that permit representations only after a decision has been reached are well-recognised. As the Court of Appeal held in *R (SP) v Secretary of State for the Home Department* [2004] EWCA Civ 1750 at para 58:

> "The best time to check on the factual basis [of a decision] by asking for the [affected person's] comments is before the decision is made. [O]nce a decision is made, it is difficult to change it. This is particularly so when a decision has been made on a factual basis and when the person subject to the decision seeks to persuade the decision maker, after the decision has been made, that the factual basis on which he acted is wrong. Inevitably the decision maker will be reluctant to conclude that his original decision was wrong. Simon Brown LJ in [R v Secretary of State for the Home Department ex p Hickey [1990] WLR 734, 744] made the point that 'it is difficult to suppose that

> [a decision maker] can remain as open-minded as if no clear decision has been taken'."

That is why a *Merton* compliant process requires concerns to be raised with an individual *before* the assessment is complete, and at a point at which the assessment is still at a formative stage. It does not suffice if individuals are given the chance to comment after a decision is finalised.

63. The difficulties, however, are more fundamental in this case. By the time of the October 2020 assessment, the Defendant had decided it was not re-opening the May 2020 assessment. It was not therefore seeking to revisit the basis for its earlier decision. The Defendant stated in the letter of 23 October 2020 that doing so would serve no purpose in the light of the new material. The October 2020 assessment therefore proceeded on the basis that the May 2020 assessment had correctly concluded that the Claimant was deliberately withholding information to conceal his true age and that there were discrepancies and inconsistencies in his account which formed the basis for the conclusion he was over 18. The October 2020 assessment did no more than consider whether that earlier decision was now supported by the new evidence. It was not seeking the Claimant's representations on whether to re-open the findings of the May 2020 assessment.

64. The way in which the October 2020 decision was thus defended before me was not that it cured any earlier unfairness. It was that the strength of the evidence concerning the Claimant's dental records and apparent lack of growth over the previous year was so compelling that there was no need to revisit the May 2020 assessment, and, in effect, that it did not matter that the May assessment had not been *Merton* compliant. The conclusion that the Claimant was over 18 could simply be confirmed. The Defendant's position is summarised in the letter of 23 October 2020. It stated that taking the evidence about the Claimant's lack of growth and his wisdom teeth "in conjunction with the evidence that led to the original assessment of [the Claimant] being over 18, lead us to the conclusion that the local authority can now be sure that [the Claimant] is over 18". The letter continued "In our view, this is one of those cases identified by Stanley Burnton J [in *Merton*] where it is very obvious that a person is … over 18 … and where there is no need for prolonged inquiry."

65. It is correct, as the Defendant suggested, that a *Merton* compliant process need not be followed if the evidence makes it is "very obvious" that the individual is over 18. The difficulty for the Defendant, as set out above at paras 40-46, is that dental and height evidence may *support* other evidence indicating an individual is over 18, but it cannot, in itself, properly lead to a conclusion that an individual is so obviously an adult that a *Merton* compliant process is not required. The reason for that is clear from the present case.

66. The Defendant estimated the Claimant's age as of October 2020 to be 20-23, meaning he would have been aged 19-22 when he arrived in the UK. That conclusion was based upon the non-*Merton* compliant assessment of May 2020 taken with the dental and height evidence and the views of the Claimant's foster parents (though it is not clear any significant weight was accorded to the latter given that it was discussed only briefly in the October 2020 assessment and was not mentioned at all in the 23 October 2020 letter where the Defendant set out the "new evidence" which obviated the need to re-open the May 2020 assessment). The question, then, is whether the Defendant is right

that the dental and height evidence made it so obvious the Claimant was over 18 that a *Merton* compliant process was not required. I do not consider that to be correct. Even on the Defendant's analysis, and even if one puts aside its controversial nature, the dental and height evidence suggested no more than that the Claimant may not have been 14/15 and was probably over 16/17 in October 2020 (and thus over 15/16 in October 2019). That does not establish it was "very obvious" the Claimant was an adult. Once account is taken of the considerable caution required in using evidence of dental development and height change as determiners of age, it becomes clearer still, in my view, that the evidence obtained in September / October 2020 was not so compelling that it could remove the need for a *Merton* compliant process.

67. The Claimant relied upon observations of Ms Alexandra Marks QC, sitting as a Deputy High Court Judge in *R (GE (Eritrea)) v Secretary of State for the Home Department* [2015] EWHC 1406 (Admin). At para 90 she described herself as "troubled" by the fact that, in the case before her, an initial, and non-*Merton* compliant, assessment, was presented to assessors carrying out a second age assessment. Ms Marks QC noted (ibid) "I see no good reason for providing this information to the assessors: the risks of introducing unconscious bias, and compromising the independence of the assessors' own conclusions, seem to me to be obvious." The case was considered by the Court of Appeal (see [2017] EWCA Civ 1521). Sir Ernest Ryder at para 33 observed that "Although not an essential component of her decision on the second age assessment, I have considerable sympathy for the judge's additional conclusion that the second age assessors were aware of the previous age assessments … I would be minded to agree with the judge that the second age assessment was tainted by the unlawfulness of the first age assessment." In the case before me, not only did the assessors conducting the October 2020 assessment have the May 2020 non-Merton compliant assessment before them, but they were the same assessors and were expressly relying upon their own earlier flawed assessment. For that to be lawful the evidence obtained in September/October 2020 would have to be so strong that, in itself, it suggested it was sufficiently obvious the Claimant was over 18 that a *Merton* compliant process was not needed. As set out above, I do not consider that to be the case.

68. I do not suggest that there were no circumstances in which the October 2020 assessment, including if conducted by the same social workers who undertook the May 2020 assessment, could have been fairly undertaken. I also do not doubt that the new evidence obtained in September/October 2020 cast doubt upon the Claimant's claimed age even if it could not establish he was an adult. To constitute a fair process, however, it required the assessors, at least, to recognise the flaws in the May 2020 assessment and re-open it to ensure that they fairly considered whether the conclusion they had reached about the apparent inconsistencies and discrepancies in the Claimant's account and his deliberately withholding information could be properly maintained. If so, it may have been lawful to rely on the additional material obtained in September/October 2020 to support the conclusion. That did not, however, occur. The May 2020 assessment was not reconsidered or re-opened. It was simply relied upon and incorporated into the October 2020 assessment, and at no stage was a *Merton* compliant assessment conducted. I consider that not to be a lawful age assessment process.

Grounds 3 and 4: best interests of the child / breach of the Human Rights Act 1998

69. It is said by the Claimant that the process by which the Defendant undertook the age assessments breached a requirement to treat the best interests of the child as a primary

consideration. It is also said that the Defendant's age assessments breached Articles 6 and 8 of the European Convention of Human Rights.

70. Mr Rule accepted that whether age assessment processes engage Article 6 and 8 is not straightforward (see for example the discussion in *R (WA (Palestinian Territories) v Secretary of State for the Home Department* [2021] EWCA Civ 12; [2021] 1 WLR 2117). That is not, however, a matter which it is necessary for me to decide. That is because it is difficult to see what Article 6 and 8, or indeed any requirement to treat the best interests of the child as a primary consideration, add to the Claimant's complaint of procedural unfairness at common law, and nothing specific was identified by Mr Rule. If the age assessment process was fair at common law, and complied with the requirements set out in *Merton* and the subsequent caselaw, and lawfully concluded that the Claimant was an adult, it is difficult to see how there will have been a breach of Article 6 or 8 even if the rights they contain were engaged. And, given that in that scenario the Claimant will have been lawfully and fairly found to be an adult, there is no "child" whose best interests fall to be considered. Conversely, if the age assessment process was found to be procedurally unfair at common law, or otherwise failed to comply with the *Merton* guidance, nothing was identified in Articles 6, 8 or the requirement to treat the best interests of the child as a primary consideration that would add to the case.

Ground 5: failure to comply with established Merton procedures and flaws in the assessment exercise

71. The failure to give the Claimant an opportunity to deal with the adverse conclusions in the May 2020 assessment when they were still at the formative stage, as an aspect of *Merton* compliance, has been dealt with above. In addition, the Claimant makes a series of other complaints about the assessment process. These were: (i) the Defendant placed undue and improper reliance upon physical appearance and demeanour; (ii) the Defendant failed to give sufficient regard to relevant facts or considerations in the Claimant's favour (the Claimant having acne, some suggestion his voice might be breaking, his vulnerability and mental health, there being consistency in his account of his knowledge of his age) as well as relying on incorrect information pertaining to Bulgaria; (iii) the Defendant failed to take account of "cultural, racial and social considerations"; (iv) the Defendant failed to conduct sufficient enquiries in relation to the Claimant's height; (v) the Defendant failed to seek to elicit an account from the Claimant by building rapport or trust with him; and (vi) the Defendant wrongly imposed a burden on the Claimant to prove he was not a child and failed to give him the appropriate benefit of the doubt.

72. I deal with each in turn below, but in summary my view is that none of the complaints constitute freestanding grounds, independent of the claim of procedural unfairness already considered, which establish that the assessments conducted by the Defendant were unlawful.

(i) Reliance on appearance and demeanour

73. It is well-recognised that care is needed in giving weight to physical appearance and demeanour as a means of assessing age (see, for example, *R (AB) v Kent CC* para 21(6)-(8)), and that, except in clear cases, age should not be determined by physical appearance alone (*R (B) v London Borough of Merton* para 37). It is also clear, however,

that appearance and demeanour are not legally irrelevant (see *R (B) v London Borough of Merton* para 20) and may be taken into account in conjunction with other considerations. Furthermore, in the present case the evidence about presentation and demeanour was that of the Claimant's foster carers, not simply the views of the assessors following an interview. As the Upper Tribunal has made clear, although not necessarily dispositive, that kind of evidence form someone who knows the individual carries more weight than "observations made in the artificial surroundings of an interview" (see *R (AM) v Solihull Metropolitan BC* [2012] UKUT 118 (IAC) para 20).

74. In this case the Claimant's general demeanour (as distinct from the view that the Claimant may have been deliberately withholding information about his age considered above) and the Claimant's general physical appearance (as distinct from the observations about his height and teeth considered below) were not the sole factors considered by the Defendant. I do not consider that the weight given by the Defendant to appearance and demeanour, had the assessment otherwise been *Merton* compliant, was irrational or otherwise unlawful.

(ii) Failure to give sufficient regard to relevant factors and reliance on incorrect information

75. The Claimant claims that the Defendant failed to consider his mental health and a suggestion his voice might have been breaking. Both were referred to in the age assessment. The fact that the Claimant may consider these matters should have been given greater weight, or that the assessments should have mentioned that at the time a Placement Plan was written for the Claimant dated 3 October 2019 he had acne, would not be a basis for finding an otherwise lawful age assessment to be unlawful. If an otherwise *Merton*-compliant process was followed, absent irrationality, the weight to be given to these kinds of factors are for the decision-maker.

76. Similarly, the fact that the assessors observed that it was unlikely the Claimant would have been released from prison in Bulgaria if the authorities there considered him to be a minor was not an irrational observation. The assessors were aware that the Claimant claimed he had falsely informed the Bulgarian authorities he was 18 to secure his release, and it is not irrational to observe that that claimed age was evidently not considered unrealistic by the Bulgarian authorities. Similarly, there is no basis for finding the assessors irrationally failed to give sufficient weight to the fact that the Claimant had given a consistent account of how he knew his age. The latter was recorded in the age assessment, and, again, if an otherwise *Merton* compliant process was conducted, the fact the Claimant asserts that more weight should have been given to these factors does not render the decision unlawful.

(iii) Failure to take account of "cultural, racial and social considerations"

77. The suggestion that the assessors failed to take account of "cultural, racial and social considerations" relates primarily to the assessors' recording of the Claimant's account of his family and background in Afghanistan and in particular the assessors' belief that the Claimant was deliberately declining to give information pertaining to time frames that would have allowed the assessors to calculate his age. That has already been dealt with pursuant to Grounds 1 and 2 of the claim, and it is difficult to see what this ground adds to the claim.

78. If the Claimant had had the opportunity to deal with the relevant points before the May 2020 assessment was finalised, and if he had a response, whether relating to a failure to appreciate cultural, racial and social considerations or otherwise, he could have raised it. As set out above, I consider the failure to provide that opportunity rendered the May 2020 assessment process unfair, and that that was not cured by the October 2020 assessment process. Insofar as the Claimant is seeking to raise these matters as a separate and freestanding ground of challenge that is presumably on the basis that the weight given to "cultural, racial and social considerations" was one which no rational decision-maker would accord. That has not been made out in my view.

(iv) Failure to conduct sufficient enquiries into the Claimant's height

79. The Claimant alleges a breach of the duty set out in *Secretary of State for Education and Science v Tameside MBC* [1977] 1 AC 1014 to make reasonable enquiries in relation to his height. The Claimant's height was recorded at an Initial Health Assessment as being 159 cm in October 2019. He then had a second health assessment on 2 September 2020 and was found again to be 159 cm tall. It was, however, also recorded in the May 2020 assessment, following the interview with the Claimant in February 2020, that the Claimant appeared to the assessors to be "approximately 5 foot 5 inches tall". That would make him 165 cm tall. Mr Rule submitted that the assessors failed to make reasonable enquiries into the Claimant's height on the basis that he had apparently grown 6 cm between October 2019 and February 2020.

80. I do not consider there is anything in this ground. It is clear that the recording of the Claimant as being "approximately 5 foot 5 inches tall" is simply the assessors' impression of his appearance and does not purport to be an accurate measurement of height. Subject to a *Wednesbury* challenge, it is for decision-makers and not the court to decide whether further steps taken to gather information are reasonably required to discharge a *Tameside* duty (see *R (Balajigari) v Secretary of State for the Home Department* [2019] EWCA Civ 673, [2019] 1 WLR 4647 at para 70). I do not consider that the Defendant's failure to make further enquiries of the assessors' impression of the Claimant's height was irrational. His height was measured in October 2019 and September 2020, and it was those measurements on which the Defendant relied.

(v) Failure to build rapport with the Claimant

81. The Claimant claims that the Defendant failed to build a rapport or trust with him in the interview process. The requirement pursuant to the *Merton* guidelines, as summarised in *R (AB) v Kent CC* at para 21(14), is for assessors to "*try* … to establish a rapport with the applicant" (emphasis added) and "any questioning, while recognising the possibility of coaching should be by means of open-ended and not leading questions." The requirement is thus to *attempt* to establish rapport, not to *succeed* in doing so. The reason for that is obvious. Rapport is a two-way process, and whether assessors succeed in establishing rapport will depend as much on the assessee as the assessors. Provided the assessors attempt to build rapport and trust, they have complied with the applicable *Merton* requirement.

82. Mr Rule referred to various points in the assessment report where it is recorded that the Claimant "sat with his arms crossed and his head held low" or that he clutched his jacket to his chest. Other parts of the assessment, however, record that the Claimant "did not appear nervous during the assessment", that he was "polite in his manner and

demeanour", that "he maintained eye contact at times" and was "expressive and articulate during the latter part of the assessment." I am not able to conclude from the parts of the assessment relied on by the Claimant that the assessors failed to try to build a rapport with him. Whether a relationship of rapport and trust was ultimately established is another matter, but there is no evidence before me that the assessors unlawfully failed to attempt to establish such a relationship.

(vi) Failure to apply the benefit of the doubt and wrongful imposition of a burden

83. The Claimant contends that the Defendant failed to give him the benefit of any doubt and wrongfully imposed a burden on him to prove he was a child. The Claimant relies on *R (AS) v Kent CC* [2017] UKUT 446 at para 20 where it was stated that:

> "[the] application of the benefit of the doubt is nothing more than an acknowledgement that age assessment cannot be concluded with 100% accuracy, absent definitive documentary evidence, and is in the case of unaccompanied asylum-seeking children who may also have been traumatised, unlikely to be supported by other evidence. On that basis, its proper application is that where, having considered the evidence, the decision maker concludes there is doubt as to whether an individual is over 18 or not, then in those circumstances, the decision-maker should conclude that the applicant is under 18."

The Claimant contended that this approach should have been adopted in his case and the application of any onus upon him to establish his age was wrong.

84. This ground of challenge is not made out in my view. On a fair reading, the Defendant's assessments do not indicate that the assessors required the Claimant to prove he was a child, or failed to recognise that age assessments are inevitably not entirely accurate and therefore to accord the benefit of any doubt to the Claimant. To the contrary the age assessment expressly recorded that "age assessment cannot be concluded with absolute certainty as there are not any current methods that can determine age with 100% accuracy." The assessors view (in the October 2020 assessment) was that the Claimant was "clearly and obviously over 18" and was "probably 20-23 years old". There is no suggestion that the assessors concluded that it was for the Claimant to prove he was a child or failed to accord him the benefit of any doubt. The assessors simply concluded, on the evidence before them, that the Claimant was not a child, and they did not have any doubts about that conclusion. Whether that conclusion was right or wrong, or based on according improper weight to some particular element of the evidence or was reached in a procedurally unfair way, is raised by other grounds. I do not consider, however, that the Defendant's conclusion was reached because of a misunderstanding of the burden of proof or a failure to appreciate that age assessments are not 100% accurate.

Ground 6: failure to adhere to policy or practice

85. Ground 6 is that the Defendant failed to comply with Chapter 7 of the Association of Directors of Children's Services ("ADCS"), *Age Assessment Guidance* (2015). The breach of Chapter 7 is not particularised. As I understand the Claimant's case, it is that, if the Defendant wished to rely on the new material received after the May 2020

assessment was complete (concerning the Claimant's teeth, lack of growth and the views of his foster carers), the Defendant was required by the guidance to conduct a "fresh full assessment".

86. I do not consider that the ADCS guidance requires a "fresh full assessment" whenever new evidence is obtained. The guidance states (emphasis added) "Where [assessors obtain new material and] believe that *a significantly different conclusion might be reached* and that the child or young person may be notably older or younger than initially assessed, then a new assessment should be undertaken." In this case the assessors believed that new information confirmed their previous age assessment, namely that it made clear that the Claimant was, indeed, an adult. They did not consider they had received new information which might lead to a "significantly different conclusion". The ADCS guidance does not state that in those circumstances a new assessment is required, let alone a "fresh full assessment" (by which it is understood the Claimant means a *de novo* assessment conducted by different assessors with no sight of the earlier assessment). Whether the Defendant was entitled to rely on the new evidence in the way that it did and whether it failed to conduct a *Merton* compliant assessment, has already been considered, but there is no separate breach of Chapter 7 of the ADCS guidance in my view.

Ground 7: error of fact

87. The Claimant asserts that the Defendant made a "fundamental error of fact" in misunderstanding the evidence about his height and dental development.

88. Insofar as it is alleged that the Defendant accorded incorrect weight to the dental and height evidence, or that the assessors did not have expert qualifications to evaluate it, that is dealt with pursuant to Ground 8. As to error of fact, the basis on which an error of fact can form a ground of judicial review was set out in *E v Secretary of State for the Home Department* [2004] EWCA Civ 49. As the Court of Appeal in *E* made clear at para 66, an "error of fact" requires showing there was a "mistake as to an existing fact" which "must have been 'established', in the sense that it was uncontentious and objectively verifiable." The Claimant does not point to any "uncontentious and objectively verifiable" error made by the Defendant. The fact that the Claimant may believe too much weight was given to the evidence on height and dental development, or that it was outside the assessors' expertise or was simply wrongly interpreted, may give rise to other errors of law. It does not, however, found an "error of fact" so as to constitute a permissible and discrete judicial review ground.

Ground 8: weight attributed to height and dental evidence

89. The Claimant objects to the Defendant's treatment in the October 2020 assessment of the evidence concerning his height and dental development. As Mr Rule explains in his skeleton, the Claimant's case is that the Defendant's officers "purport to attribute relevance or weight to matters of a medical and scientific nature the evaluation of which is outside of any asserted expertise possessed by a social worker." He argues that the Defendant ignored the jurisprudence establishing that assessment of age on the basis of height and dental development is "unreliable and not capable of … determining … chronological age", and states that "Non-expert opinion [of social workers] is *a fortiori* more dangerous than unsubstantiated expert opinion … in this field". The public law

error identified is that the Defendant failed "to take account of material factors, and/or [was] unreasonable or irrational" in the weight given to the dental and height evidence.

90. As set out above, decision-makers undoubtedly need to be aware of the limitations of evidence on dental maturity and height change in assessing age. Provided the limitation of the evidence is understood, however, it is not legally irrelevant so as to render a decision inevitably flawed if such material is taken into account. That is apparent from the Upper Tribunal decisions in *R (AK) v Birmingham City Council* and *R (AM) v Solihull* (see above paras 44-46). In both cases evidence of dental maturity and height change were considered, at least to see if it supported other evidence on age.

91. In the present case the Defendant referred in the October 2020 age assessment to a letter from the dentist who had seen the Claimant. He wrote to the Defendant to express his concerns as to the correctness of the Claimant's claimed age of 14. The dentist stated "At [the Claimant's] visit here 10.09.2020, I mentioned to his carer that wisdom teeth, the third molar teeth, and the last adult teeth to come through, normally emerge between 17-21 years of age. The average being at 19 years of age." The dentist continued "According to the dental charting, it seems that the [Claimant's] upper left and upper right third molar/wisdom teeth are through." The letter also noted that the Claimant's second molars were "grossly carious and broken down". The dentist considered that based on this evidence the Claimant's age of 14 "could be questioned". He stated, however, that "To make it an official statement from me to this effect, I would have to have another look". The age assessors stated in the October 2020 assessment "We have taken careful note of this evidence. The fact that [the Claimant] has two wisdom teeth, which do not normally come through until 19 on average, 17 at the earliest, is a significant piece of information". The assessors also referred to the Claimant's apparent lack of growth between October 2019 and September 2020 and concluded that the evidence on the Claimant's teeth and height supported their conclusions as to his age,

92. I do not consider it *per se* unlawful for the assessors to have taken into account the evidence that had been provided by the Claimant's dentist or the evidence that he had not grown over the previous year. I also do not accept that social workers, by reason of not being medical or dental experts, are not permitted to take account of information concerning the emergence of third molars and a lack of change in height. As set out above, the Upper Tribunal in *AK* and *AM* accepted that a lack of growth over an extended period and fully erupted wisdom teeth may suggest a person is, at least, approaching, 18. I can see no reason why social workers, provided they understand the limitations of the evidence they are considering, cannot take that into account in assessing age. The question will be, as in any other public law context, whether a decision-maker has given too much weight to some particular piece of evidence, or whether they have failed properly to understand the evidence or overlooked its limitations.

93. Ultimately, in the present case, it is not possible to determine the challenge to the Defendant's reliance upon dental and height evidence separately from the conclusions it reached in the May 2020 assessment. The Defendant stated in its letter of 23 October 2020, in relation to the dental and height evidence, that it was "aware of the difficulties in assessing age based on any one of these elements" and that the evidence was being taken "in conjunction with the evidence that led to the original [May 2020] assessment". That was reflected in the October 2020 assessment which relied upon the May 2020 conclusion and stated that it was merely "supported by the new evidence" on height

change and dental development, not that the new evidence was replacing the earlier conclusion or the basis for it. The challenge to the use of the height and dental evidence therefore needs to be considered with my determination on Grounds 1 and 2 and the relationship between the May and October 2020 assessments. I have concluded that the May 2020 assessment was not lawfully undertaken and that that could not be cured by reliance upon the dental and height evidence. If, however, and contrary to my findings on Grounds 1 and 2, the Defendant had conducted a *Merton* compliant assessment in May 2020, and then taken that in conjunction with the dental and health evidence as supportive of the conclusion that the Claimant was under 18, that may have been lawful. While the Defendant's purported reliance on the dental and health evidence therefore did not obviate the need for a *Merton* compliant assessment, I do not consider that the reliance on the evidence, in itself, was unlawful so as to give rise to a separate and freestanding basis for allowing the judicial review.

Ground 9: fact-finding exercise

94. Pursuant to Ground 9, the Claimant contends that if his claim is not successful on Grounds 1 to 8, or otherwise no fresh assessment by the Defendant is ordered, the case should be transferred to the Upper Tribunal for a fact-finding hearing. That does not give rise to a separate ground of challenge for me to determine, but is relevant to remedy to which I now turn.

Remedy

95. For the reasons set out above, in my view the age assessment process completed by the Defendant in May and October 2020 was procedurally unfair. There are three possibilities in terms of remedy: (1) to decline any relief pursuant to s 31(2A) of the Senior Courts' Act 1981 on the basis that it is "highly likely" that the outcome would have been substantially the same if the process had been fairly undertaken; (2) to transfer the matter to the Upper Tribunal to determine the Claimant's age; or (3) to remit the matter to the Defendant to conduct a further age assessment.

96. The Defendant submits that I should decline any relief, but in the alternative I should transfer the case to the Upper Tribunal. The Claimant submits that I should remit the matter to the Defendant, but, if that is rejected, he accepts the matter should be transferred to the Upper Tribunal.

97. As to the Defendant's submission that I should decline relief on the basis of s 31(2A) of the 1981 Act, the relevant section provides: "The High Court— (a) must refuse to grant relief on an application for judicial review… if it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred." At common law the test for refusing relief on the basis that any illegality made no difference was the *Simplex* test (see *Simplex GE v SSE* (1989) 57 P & R 306). It required a defendant to show that it was "inevitable*"* the same decision would have been reached if a lawful process was followed. The test is different where s 31(2A) applies as the defendant only needs to show it is "highly likely" a legally taken decision would have been the same. Nevertheless, even under s 31(2A), "the threshold remains a high one*"* (see *R (PCSU) v Minister of the Cabinet Office* [2017] EWHC 1787 at para 89 per Sales J).

98. I am not able to conclude that it is "highly likely" that the outcome in the present case would have been the same if a *Merton* compliant assessment had been carried out in May and October 2020. As the authorities have made clear, while there are cases in which a *Merton*-compliant assessment can be dispensed with, that is only where it is so obvious the person is over or under 18 that such assessment would serve no purpose (see above at paras 38-39). As I have indicated, that does not apply here. Indeed, even on the Defendant's assessment the Claimant's age was 19-22 when he arrived in the UK in October 2019. That is too close to the cut-off point of 18 to obviate the need to conduct a full and *Merton*-compliant assessment, and I am unable to conclude that if such an assessment had been conducted it is "highly likely" the outcome would have been the same.

99. The next question is whether I should remit the matter to the Defendant to conduct a further age assessment, or transfer the case to the Upper Tribunal to determine the Claimant's age.

100. Following the decision of the Supreme Court in *R (A) v Croydon LBC* [2009] UKSC 8, [2009] 1 WLR 2557, it is clear that whether a person is a "child" is an objective question of precedent fact, and ultimately a matter for the court to determine in cases of dispute. The practice is for that determination to be made by the Upper Tribunal. The threshold for a judicial review to be granted permission on the basis of a factual dispute on age, and then transferred to the Upper Tribunal, is whether the "material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested hearing" (*R (FZ) v Croydon LBC* [2011] EWCA Civ 59 at para 9). As the Upper Tribunal observed in *R (AM) v Solihull MBC* at paras 11-12, permission for a factual challenge in an age dispute case is "readily obtainable" and is "not to be refused simply on the basis that the evidence appears to the single judge not to be worthy of credit".

101. I am concerned at this stage with the question of transfer to the Upper Tribunal, rather than permission to bring a judicial review, but the same test is applicable. Unless I am able to conclude that the Claimant's case, taken at its highest, could not properly succeed at a contested hearing before the Upper Tribunal, it is at least amenable to transfer. I consider that that relatively low threshold is met in this case. While there is evidence to suggest that the Claimant may be over 18, its weight is limited by the fact that there has not been a *Merton* compliant process and much of it points to the Claimant being older than 13/14 but not necessarily that he was 18 as of October 2019. I consider that, if the Claimant's evidence is taken at its highest, it is sufficient for the matter to be transferred to the Upper Tribunal.

102. The Claimant contends that, even though I have the discretion to transfer the case to the Upper Tribunal, I should not exercise it. The Claimant contends that I should remit the case for the Defendant to conduct a further age assessment as otherwise he would have "lost a stage" in the process to which he is entitled, namely a *Merton*-compliant assessment by the Defendant. Mr Rule submitted that a hearing before the Upper Tribunal would take longer to arrange than a further assessment, and it would be stressful for the Claimant to have such a hearing. The Defendant urges me, if I have reached this stage, to transfer the case to the Upper Tribunal. Ms Rowlands submitted that the matter should not be remitted for another assessment by the Defendant. She submits that it will be very difficult for rapport to now be built between the Defendant's assessors and the Claimant given what has happened between the parties since February

2020, and that the most likely outcome, if I remit the matter, is further disputes and litigation, and most likely another judicial review, which would probably end up in the Upper Tribunal in any event.

103. I agree with the Defendant on this point. I consider the most appropriate order is for the case to now be transferred to the Upper Tribunal to determine the Claimant's age. I can see little prejudice to the Claimant in doing so. He is currently being treated as a child by the Defendant and there is no indication it intends to take a different stance pending any determination by the Upper Tribunal (and if it did so indicate the Claimant would be able to apply for interim relief). If the Upper Tribunal determines that the Claimant is, in fact, a child he will continue to be so treated. If it finds he is not a child, and was not a child in October 2019, that will be the end of the matter. I appreciate that means that the Claimant will not have had a fully *Merton* compliant assessment conducted by the Defendant, and that it is possible that if a further assessment were conducted the Defendant would conclude the Claimant is a child. In my view, however, and for the reasons Ms Rowlands gives, I consider there is a substantial risk that a further assessment will not resolve matters, and that there will be yet further litigation which will probably end, in any event, before the Upper Tribunal. Where there is a court with expertise in this area, able to determine once and for all the Claimant's age, it seems far preferable that that now occur given the history of this case.

104. If there is a hearing before the Upper Tribunal, many of the issues ventilated before me can be raised and resolved. The Tribunal can consider any evidence concerning the Claimant's dental records and height that the Defendant seeks to adduce. The Claimant can no doubt question the relevance of such evidence or the weight that should be attached to it. Similarly, the parties can make whatever submissions they consider appropriate about the weight that should be given to evidence that has been obtained from the assessments conducted by the Defendant to date. These will all be matters for the Upper Tribunal which I would hope will be able to resolve the case and finally make a determination of the Claimant's age. That is preferable in my view to requiring the Defendant to undertake a third age assessment with all the risks of further disputes that entails.

Conclusion

105. For the reasons given above, I find that the Defendant has not lawfully assessed the Claimant's age. The May 2020 assessment was conducted in a procedurally unfair manner, and that unfairness was not removed or cured by the October 2020 assessment, which simply incorporated and built upon the earlier assessment. I therefore allow the judicial review on that ground. I do not, however, allow the judicial review on the Claimant's other grounds of challenge. They do not, in themselves, indicate that the Defendant has acted unlawfully. While some of the grounds overlap with the claim of procedural unfairness, I do not consider, separately from it, they give rise to a freestanding basis for allowing the judicial review. For the reasons set out above, I also reject the Claimant's submission that the matter should be remitted for a further and third assessment by the Defendant. I consider that, on balance, the most appropriate relief is for the matter now to be transferred to the Upper Tribunal to carry out the necessary fact-finding determination of the Claimant's age.