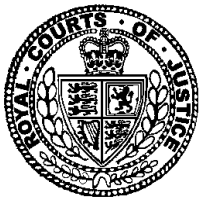

Neutral Citation Number: [2022] EWHC 98 (Admin)

Case No: CO/428/2021
CO/524/2021

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 19/01/2022

Before :

BEFORE THE HONOURABLE MR JUSTICE HENSHAW

- -

Between :

THE QUEEN **on the Application of** **(1) MA** **(by his litigation friend Roxanne Nanton of the Refugee Council)** **(2) HT** **(by his litigation friend Francesco Jeff of the Refugee Council)**	**Claimants**
- and -	
(1) COVENTRY CITY COUNCIL **(2) SECRETARY OF STATE FOR THE HOME DEPARTMENT**	**Defendants**
- and –	
KENT COUNTY COUNCIL	**Interested Party**

- -

SHU SHIN LUH and **ANTONIA BENFIELD** (instructed by **Instalaw Solicitors**) for the **Claimants**
DEOK JOO RHEE Q.C. and **WILLIAM IRWIN** (instructed by **Government Legal Department**) for the **Second Defendant**
The First Defendant and the Interested Party did not appear and were not represented

Hearing dates: 20-21 October 2021
Further written submissions received 1 December 2021
Draft circulated to the parties: 11 January 2022

- -

Approved Judgment

Mr Justice Henshaw:

(A) INTRODUCTION

1. By these claims MA and HT ("***the Claimants***") challenge or challenged the lawfulness of:

   i) the Kent Intake Unit Social Worker Guidance ("***the Guidance***"), pursuant to which they were each assessed by social workers on the basis of a 'short' age assessment ("***the KIU age assessments***") to be adults, the assessments having been carried out in respect of each of MA and HT on the date on which he was apprehended, viz 15 December 2020 and 10 January 2021 respectively;

   ii) the subsequent decisions by the Second Defendant ("***SSHD***"), taken following and on the basis of the KIU age assessments, to treat each of the Claimants as an adult ("***the Contested Decisions***"), those decisions having been taken on the date of the assessment as indicated above; and

   iii) their detention both (a) pending the carrying out of the KIU age assessments and (b) thereafter for 3 days at Yarl's Wood (in the case of MA), and for 4 days at Tinsley House (in the case of HT), following which they were dispersed to the First Defendant's area on 18 December 2020 and 14 January 2021 respectively.

2. As set out in their respective Detailed Statements of Facts and Grounds, the bases of the Claimants' challenges are as follows.

   i) Ground 1: The SSHD acted unlawfully in disputing the Claimant's age for the purpose of his asylum claim on the basis of the KIU age assessment, which is not *Merton* compliant [i.e. in accordance with the principles set out in *R (B) v London Borough of Merton* [2003] 4 All E.R. 280, [2003] EWHC 1689 (Admin) ("***Merton***") and subsequent cases] and is not conducted in accordance with the SSHD's own published guidance, "*Assessing age*". Contrary to that guidance, the SSHD acted unlawfully in failing to refer the Claimant to a local authority for a full *Merton* compliant age assessment, on the basis that this was a case that under the policy required a full assessment to be conducted.

   ii) Ground 2: The Guidance is unlawful on the basis that it is incompatible with *"Assessing age"* and further on the basis that it fails to adequately take account of the Court of Appeal judgment in *BF (Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872 [since reversed by the Supreme Court as noted later]; and therefore failing to specify that "*clearly an adult*" must be an equivalent threshold to "*significantly over 18*". The Guidance is further unlawful due to the absence of provision in the policy for there to be a requirement for a form IS97M which relies upon a KIU assessment to state that expressly: absent which there is a high degree of likelihood of a lack of clarity as to who conducted the assessment, such that an individual assessed by Kent Intake Unit ("***KIU***") is unable swiftly to challenge that assessment. The policy should make clear that the assessment was conducted by KIU social workers (who are employed by the Home Office) and not Kent Social Services. The Guidance and the assessments in this case are further unlawful for failing properly to discharge the SSHD's duty under section 55 of the Borders,

Citizenship and Immigration Act 2009 to promote and safeguard the best interests of children.

iii) Ground 3: [MA] The SSHD unlawfully detained the Claimant at the KIU in circumstances where he had not been the subject of a *Merton* compliant age assessment and therefore should not have been detained under immigration powers. [HT] In the light of the fact that KIU age assessments are routinely conducted in a detained environment, in the absence of a *Merton* compliant assessment, the Claimant has been unlawfully detained.

3. The gist of the Claimants' challenges is as follows. Since September 2020, the SSHD has been detaining newly arrived unaccompanied young people at the KIU, a short-term detention holding facility at Dover port, and carrying out short assessments of their age using social workers whom she has employed. These assessments are conducted *inter alia* where the young person's claimed age is in doubt but the SSHD's officers do not consider that their physical appearance and demeanour very strongly suggest that they are significantly over the age of 18.

4. The procedure is said to be contrary to the SSHD's policies, and to law, because:

i) the age assessment is carried out whilst the young person is detained under immigration powers, contrary to established Home Office policy which states that age disputed young people must not remain in detention pending a *Merton* compliant age assessment;

ii) the assessment takes place within hours or a day of the young person's arrival into the UK, often after a long and traumatic journey by small boat or in the back of the lorry;

iii) the Guidance directs social workers to assume that young people who require age assessment at the KIU are *"potentially clearly 18 and over"* and to carry out only truncated age assessments which last no more than an hour, which (it is alleged) fails to afford the *"benefit of the doubt"* (i.e. to presume childhood to all age disputed children who require an age assessment because their physical appearance and demeanour does not very strongly suggest that they are significantly over 18, unless and until the assessment concludes otherwise and is *Merton*-compliant);

iv) no independent appropriate adult is offered to the age disputed young person at the assessment with social workers in a position of authority, at a time when they have just arrived in the UK, without adult family members, unfamiliar with the processes and practices here, and unaware of their rights; and

v) the evidence shows that no or no proper opportunity is given to the young person to know the adverse matters taken against them in a minded-to process and to have a fair opportunity to provide corrections, clarification and further information before a final decision on age is reached.

5. Each of the two Claimants was subject to a KIU age assessment when they arrived into the UK through Kent after difficult journeys to the UK. The First Claimant, MA, is a Kuwaiti Bidoon, whose claimed date of birth is 15 June 2004, who arrived in Kent

following a long and difficult journey from France in the back of a lorry; was picked up by Kent police at a petrol station just after midnight on 15 December 2020 after asking for "*help*". His age assessment was carried out at around noon the same day, lasted for 42 minutes and concluded that he was 20 years old. MA's evidence is that he was not offered the opportunity to have an independent appropriate adult present at the assessment, was not given any opportunity to know what adverse matters the social workers were minded to rely upon to conclude he was older than claimed; and was not given any opportunity to provide clarification, corrections or further information about his age. Shortly afterwards, he was transferred to Yarl's Wood Immigration Removal Centre for three days, before being released to adult asylum support accommodation in Coventry.

6. The Second Claimant, HT, is an Iranian national, who claims to have been born on 6 May 2003, and to have been 17 on arrival in the UK. He was rescued at sea following a long journey in a rubber dinghy across the English Channel, at around 10.30am on 10 January 2021. His age assessment took place at 2.05pm the same day, lasted for an hour, and concluded that he was 21 years old. HT's evidence is that he did not have the opportunity to have an independent appropriate adult, to know what adverse matters the social workers were minded to rely upon to dispute his age, or to provide clarification, correction or further information about his age. On the evening of the same day, HT was transferred to Tinsley House Immigration Removal Centre for five days, before being put in adult asylum support accommodation in Coventry. During his detention at Tinsley House, the SSHD made a decision that his case was suitable for inadmissibility action under Immigration Rule 345A, a provision that applies only to adults and not children, and a notice of intent was sent to that effect.

7. Permission to apply for judicial review was granted by Foxton J on 11 May 2021. The First Defendant, Coventry City Council, subsequently decided to accept HT's claimed age, and to carry out a fresh age assessment in MA's case. Coventry also confirmed that both Claimants would continue to receive statutory care and support under the Children Act 1989 from the local authority.

8. The SSHD served Detailed Grounds of Defence on 31 August 2021, which among other things indicated that the Contested Decisions had been withdrawn following the identification of procedural errors. The SSHD agreed to make fresh decisions as to the Claimants' ages following and in the light of the age assessments to be carried out by Coventry.

9. Also on 31 August 2021, the SSHD sought to strike out the Claimants' challenges to the Guidance, and transfer their unlawful detention claims to the general Queen's Bench list, on the grounds that the above concessions rendered the public law claim academic. The Interested Party, Kent County Council ("***Kent CC***"), supported that application. Lang J dismissed the application (with costs) on 4 October 2021, stating *inter alia*:

> "I agree with the submissions made by the Claimants in their Note that the unlawful detention claims ought to be determined by the Administrative Court at the hearing on 20 and 21 October 2021. They do not turn on disputed issues of fact for which a QB or County Court trial procedure is better suited. They turn on public law issues as to the lawfulness of the relevant policies, which the Administrative Court is better equipped to determine."

10. In HT's case, the SSHD on 13 October 2021 agreed to accept his claimed age, on the basis of *inter alia* expert evidence dated 15 July 2021 served on the SSHD on 6 October 2021 as part of the Claimants' contested application to rely on further evidence (to which I revert later).

11. Following the hearing before me, the SSHD on 1 December 2021 provided post-hearing clarifications, including reference to information received by the SSHD that Coventry City Council has now carried out an age assessment of MA and concluded that he is at least 21 years of age. The assessment process comprised three assessment interviews carried out on 18, 19 and 26 October, two 'minded to' meetings on 27 and 28 October 2021, and an 'outcome meeting' on 11 November 2021 at which MA was informed of the result of the age assessment and provided with copies of the age assessment (information sharing) pro forma and the full age assessment. Copies of those documents were provided to me.

12. Before me, the SSHD took the position that:

    i) apart from the claims for unlawful detention, the claims are academic and fall to be dismissed;

    ii) in light of the developments outlined above, the (free-standing) challenge to the Guidance has been rendered academic in these cases;

    iii) to the extent that the Claimants separately seek to 'challenge' the KIU age assessments, they are not in themselves public law decisions that can attract the supervisory jurisdiction of the court on a claim for judicial review;

    iv) the court should not readily determine issues which are academic as between the parties. The fact that the Guidance continues to be operated is not in itself a good reason for the court to determine the lawfulness of the Guidance;

    v) in any event, the SSHD has a cogent defence of the Guidance;

    vi) the SSHD is, moreover and in any event, preparing to publish updated versions of the Guidance, her policy "*Assessing age*" and related materials. Any challenge to the Guidance may more appropriately be considered in a future a case against the Guidance as updated;

    vii) subject to those points, the focus in accordance with Lang J's order of 4 October 2021 should be on the lawfulness of the Claimants' detention, and it is only through that prism that the Claimants' contentions about the lawfulness of the Guidance (to the extent they bear on the lawfulness of their detention) need to be addressed; and

    viii) as Lang J noted, the unlawful detention claims do not turn on issues of fact: which must be correct on the basis that the Claimants' unlawful detention claim is not predicated on their claimed or accepted ages or the specific facts and circumstances of each of their cases. The SSHD understands the Claimants not to rely on any case-specific matters save by way of illustration of the general points they are levelling against the Guidance.

13. Focussing on the relevance or otherwise of the lawfulness of the Guidance to the remaining disputes between the parties, the SSHD submits that:

i) The Claimants are not seeking to bring a claim for unlawful detention based on their claimed ages. Rather, they are seeking to challenge (a) their detention pending the KIU age assessments and (b) their detention thereafter – on the basis that the SSHD acted contrary to her own polices and/or in reliance on a process which cannot produce *Merton*-compliant age assessments.

ii) The Claimants were each detained at KIU for less than 1 day:

a) in MA's case, for a period of some 14 hours, between 1.35am and 3.19pm on 15 December 2020: with a welfare interview carried out between 2.25am and 2.50am and thereafter the KIU assessment carried out between 12.15pm and 12.57pm; and

b) In HT's case, for a period of 8 hours, between 12pm and 8pm on 10 January 2020: with the KIU assessment carried out between 2.05pm and 3.05pm.

iii) On the basis that the Claimants cannot sensibly challenge their detention for the purposes of carrying out routine examinations and processing (see further below), the relevant time period in issue for the purposes of their unlawful detention claim further reduces.

iv) Thereafter, and on the basis of the Contested Decisions, MA and HT were detained at Yarls Wood and Tinsley House - for 3 days and 4 days respectively. As the SSHD has withdrawn the Contested Decisions, it is accepted that their detention at Yarls Wood and Tinsley House was without a lawful basis – regardless of the *Merton*-compliance (or otherwise) of the KIU age assessments on which the Contested Decisions were based, and regardless of whether they were an adult or a child at that time.

v) In these circumstances, the real (and narrow) focus on the Claimants' claim for unlawful detention is in respect of that part of their detention at KIU where they were held for the purposes of their referral to the KIU social workers.

vi) The relevant power, for the purpose of this aspect of the unlawful detention claims, is that under Schedule 2 § 16(1) to the Immigration Act 1971, under which a person who may be required to submit to examination under Schedule 2 § 2 "*may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter*". Schedule 2 § 2 provides that:

> "(1) An immigration officer may examine any persons who have arrived in the United Kingdom by ship ... for the purpose of determining –
>
> (a) whether any of them is or is not a British citizen; and

> (b) whether, if he is not, he may or may not enter the United Kingdom without leave;
>
> (c) whether, if he may not -
>
> (i) if he has been given leave which is still in force,
>
> (ii) he should be given leave and for what period or on what conditions (if any), or
>
> (iii) he should be refused leave; and
>
> (d) whether, if he has been given leave which is still in force, his leave should be curtailed."

vii) In holding the Claimants at KIU for the short time they were there (less than 1 day), the Secretary of State was exercising her power under § 16(1). In *R (AN and FA) v Secretary of State for the Home Department* [2012] EWCA Civ 1636, it was common ground and was accepted by the court that it would be permissible to detain even unaccompanied children for a short period, subject to the constraints referred to in that judgment.

viii) The SSHD's policies quite properly state that age disputed individuals, (where their claim to be a child is given the benefit of the doubt) are not to be detained pending the carrying out of a (local authority) *Merton* compliant assessment. This makes patent sense given the length of time it can take for a *Merton* compliant age assessment to be carried out by the relevant local authority and the fact that those whose claim to be a child is in doubt should not be detained pending that assessment, which may take several weeks to organise and carry out.

ix) However, the SSHD's policies do not preclude a decision being made (in the course of the individual being processed at a short-term holding facility) that their claim to be a child should not be given the benefit of the doubt – because either (a) immigration officials consider that they appear to be 25 years of age or over or because (b) trained social workers (located on site) consider – following a 'short' *Merton*-compliant age assessment – that they are "very clearly" over the age of 18, and that assessment has been accepted by immigration officials. Both are situations where the individual is not then given the benefit of the doubt and may properly be treated as an adult.

x) The Claimants' contentions that the carrying out of such 'short' assessments is contrary to the SSHD's policies, and that they are (necessarily) not *Merton*-compliant, are unsustainable, and:

> "As such, the Claimants' detention at KIU so as to permit the KIU social workers to carry out a 'short' age assessment if considered appropriate, were not 'tainted by public law error' (*R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12, per Lord Dyson, at paras 68, 69 and 88),'*material to the decision to detain*' (ibid, per Baroness Hale, at para 207)."

14. The Claimants, on the other hand, contend that there is an extant dispute as to (a) what constitutes a *Merton*-compliant age assessment for the purposes of the Guidance, and (b) whether, properly construed, that Guidance was applied lawfully in each Claimant's case. Further, they say this is a point of significant public importance as it is clear from the evidence that the Guidance has not only affected the Claimants but many other newly arrived unaccompanied children who have, as a result of the policy, been assessed to be adults, detained wrongly as adults, and denied statutory care and support (until such time as they were able to access legal advice and assistance); and that it continues to affect unaccompanied children who are newly arrived into Kent and detained at the KIU.

15. The SSHD's submissions recorded at § 13(v), (ix) and (x) above implicitly accept that the lawfulness of the Guidance has at least some bearing on the lawfulness of the Claimants' detention because they were, at least in part, detained for the purpose of KIU age assessments pursuant to the Guidance. If and to the extent that detention is prolonged by reason of an interview or other process which is not itself necessary, then it will be unlawful (see, e.g., *AN and FA v SSHD* [2012] EWCA Civ 1636, *VS v SSHD* [2014] EWHC 2483 (QB) § 96, (affirmed at [2015] EWCA Civ 1142 § 39). The same must in my view apply to a period of detention necessitated only by an assessment process which is inherently unlawful in the sense that it lacks essential safeguards without which it should not proceed at all. In the hearing before me, I understood the SSHD to accept there to be a surviving issue as to the legality of detention at the KIU for the purpose of short assessments pursuant to the Guidance.

16. The SSHD made the separate point that this issue was not "squarely" set out in the Claimants' Grounds. However, I am satisfied that the Grounds squarely challenge the Guidance, link the legality to the legality of the Guidance, and are sufficiently broad to encompass both the detention after the assessments and detention before and during the assessments in order for the assessments to take place.

17. As to the substance of the dispute, for the reasons set out below, I have concluded that the Guidance in its current form, and the age assessments carried out in relation to the Claimants, were not lawful in the particular respects I have identified; and that if and insofar as the Claimants' detention was lengthened for the purpose of carrying out those assessments, it was unlawful.

(B) FACTUAL BACKGROUND

18. The SSHD operates the National Asylum Intake Unit (NAIU) which is responsible for registering a large number of the asylum claims in the UK through a screening process. The NAIU has three sites, namely the Asylum Intake Unit in Croydon, the KIU in Dover and the Midlands Intake Unit. Whereas the other two asylum intake units are non-detained, the KIU is a short-term detention holding facility located within the Port of Dover. The Guidance notes that "*[t]hose arriving at the unit [KIU] will already be detained"* (p.14).

19. In response to increased pressures on Kent CC's children's services (which arose in the summer of 2020 due to the increase in the number of small boat arrivals), the SSHD introduced a number of measures to alleviate the situation. In the first place, officials from the Home Office worked closely with Kent CC to establish a team of Home Office funded social workers to support Kent CC in carrying out a backlog of outstanding age

assessments in respect of those who had been referred to Kent CC under the process outlined in "*Assessing age*".

20. However, in mid August 2020, Kent CC announced that it had *"reached capacity for the care of unaccompanied children"* (apart from British children), and would refuse to receive any newly arrived unaccompanied children into its care and to provide statutory care and support to them under the Children Act 1989. This included a refusal to take age disputed children into its care pending an age assessment.

21. The SSHD did not then seek to refer young persons to other local authorities in the South East or elsewhere in the UK under the National Transfer Scheme (though I should make clear that there was no evidence or argument before me as to whether or not that would have been feasible). Instead, the Home Office contracted another team of suitably qualified social workers to work alongside Home Office officials in the KIU to provide social worker support and advice in relation to unaccompanied children, and to those claiming to be unaccompanied children but whose claimed age is doubted. The social workers are professionals supervised by senior social workers in the Home Office Safeguarding Advice and Children's Champion team. This arrangement was set out in the Guidance. The Guidance was devised to operate alongside and within the "*Assessing age*" guidance. The current (and material) version of the KIU Guidance is version 2 which was published on 3 December 2020.

22. The underlying rationale for the Guidance was the need to ensure, as far as possible, that individuals being referred to local authorities for age assessments (whether Kent CC or other local authorities) are children or likely to be children. Furthermore, it was considered that identifying adults as early as possible in the process would reduce the safeguarding risk of placing adults alongside children. In addition, where children are identified, the Guidance allows for social workers to support the KIU safeguarding processes.

23. The SSHD contends that the Guidance operates by providing immigration officers with the benefit of social worker input in appropriate cases to support and strengthen decision-making. In particular, it was considered that the introduction of a small group of social workers, based at KIU, would minimise the risk of transferring adults to local authorities, by identifying those individuals who might not meet the '25 years and over' threshold for immigration officers (introduced following the judgment of the Court of Appeal in *BF (Eritrea)* and as set out in "*Assessing age*") but were assessed to be 'clearly an adult' on the basis of a less prolonged social worker assessment.

24. I set out the detailed contents of the Guidance, so far as relevant, in more detail in section (D) below.

25. As to the facts of the Claimants' particular cases, I have given a short outline in §§ 5 and 6 above. The brief factual summaries set out at the beginning of the Claimants' respective Grounds are as follows:

> MA:
>
> "The Claimant is a Kuwaiti Bidoon who claims to be a child of 16 years of age (born on 15 June 2004). He entered the UK on 14 December 2020 as an unaccompanied asylum-seeker. He was

apprehended by immigration officials and taken to Kent Intake Unit ("KIU"). On 15 December 2020, he was the subject of a short-form age assessment conducted by two social workers who are employed by the Home Office and embedded within the KIU. The social workers disputed the Claimant's age and considered him to be an adult of 20 years of age and attributed a date of birth to him of 15 June 2000. This date of birth has been used by the Home Office for the purpose of his asylum claim and consequential decisions including a decision that the Claimant is liable for detention (Bail 201) and to provide him with asylum support accommodation under section 95/98 of the Immigration and Asylum Act 1999 ("IAA 1999").

The Claimant was then dispersed to reside in asylum support accommodation pursuant to s.98 IA 1999 at the Coventry Hill Hotel, Coventry where he remains. The Claimant came to the attention of the Refugee Council who referred him to the Second Defendant ("Coventry") on 23 December 2020 as a putative child in need in their local area. Coventry questioned the referral on the basis that the Claimant travelled through Kent but failed to provide a substantive response. The Claimant's solicitors were then instructed and sent a letter before action to the Defendant on 4 January 2021. Coventry responded on 7 January 2021 that the Claimant had been age assessed by "Kent Council" and found to be 20 years of age such that Coventry was not the "designated authority" for the purpose of this challenge. On 21 January 2021, Coventry provided the Claimant's solicitor with an age assessment conducted by social workers described by Coventry as "social workers who are contracted by the home office to carry out such age assessments with the full legal accountability resting with Kent Council."

HT:

"The Claimant is an Iranian national who claims to be a child of 17 years of age (born on 6 May 2003, converted from 16/02/1382 in the Persian calendar). He entered the UK on or around 9 January 2021 as an unaccompanied asylum-seeker. He appears to have been apprehended by immigration officials and taken to Kent Intake Unit ("KIU"). It is understood that on 10 January 2021, the Claimant was the subject of a short form assessment conducted by social workers employed by the Home Office at KIU and deemed to be an adult, born on 6 May 1999 such that he would presently be 21 years of age. This date of birth has been used by the Home Office for the purpose of his asylum claim and consequential decisions including an IS97M that confirms that he will be treated as that age on the basis of "A Merton complaint local authority age assessment" and an ILL EN notification of liability for deportation. The Claimant has been since provided

> with asylum support and accommodation under section 95 of the Immigration and Asylum Act 1999 ("IA 1999").
>
> The Claimant was dispersed to reside in asylum support accommodation pursuant to s.98 IA 1999 at the Coventry Hill Hotel, Coventry where he remains. The Claimant came to the attention of the Refugee Council and the Claimant was referred to the First Defendant ("Coventry") on 20 January 2021 as a putative child in need in their local area. Coventry responded on 21 January 2021 requesting further information on the Claimant and a response was provided by return. Coventry responded asserting that the Claimant had been the subject of "a Merton Compliant Age Assessment […] completed by Social Workers who are contracted by the Home Office to carry our such age assessments with the full legal accountability resting with Kent Council."

26. MA's evidence is that he had travelled in a lorry for two days before entering the UK late in the night on 14 December 2020. He was found by police in the early hours of 15 December 2020 and was taken to the KIU at 1.35am. He was interviewed by an immigration officer at 2.25am before being held at the KIU until the age assessment commenced at 12.15pm.

27. In relation to the age assessment interview, MA in his first witness statement states:

> "I think the day after I arrived I had meetings about my age. I had not eaten or drank properly for around 2 months at this time and I was very shocked and sad about not [sic] being separated from my mother. I cannot remember them asking whether I was okay because I was just so tired, I only remember being asked many many questions.
>
> 17. I have gone through the assessment carried out by the Home Office with my solicitors and I do not agree with some of the things that are said in it.
>
> 18. I am not sure why I said my mother told me my age 2 years ago, I was very tired at this time so I may have made a mistake during the meeting. My mother told me my date of birth when I was very young, and in around 2013 or 2014, when we were living in Greece, we started to celebrate my birthday each year.
>
> 19. They say I said I did not have a SIM card so they could not contact my mother but I lost my phone in the journey from Greece. It was not that it did not have a SIM card in the phone I had, but that I did not have my mother's number as it was someone else's phone. I did not think I would need my mother's number as she was meant to be in the loading truck with me.

> 20. As I said before, I worked from a young age, but only helping out, I did not do anything too complicated or physical because I was quite young.
>
> 21. The meeting only lasted a short time and I was not given the chance to talk about any of the issues they had, I had only just arrived and I was very tired and so I was not certain of what happened or what was said.
>
> 22. The interpreter was there, but they were only on the phone and there was no one there to look out for me, just the two people who were asking me many questions. It was a very difficult experience."

He elaborates on this to a degree in his second witness statement.

28. HT's evidence is that he had entered the UK by boat, after a terrifying 7-8 hour journey, during which time he was wet and freezing. He entered the UK after being rescued at 10.30am, was taken to the KIU at 12 noon and the assessment commenced at 2.50pm.

29. In relation to the age assessment interview, HT in his first witness statement states:

> "… around 3-5 hours after I arrived in the afternoon, I was taken to a room, there was a man and a woman and an Iranian woman on the phone who was interpreting. They told me that they were from the Home Office and would ask me questions about my age. The meeting lasted 30-40 minutes. They asked me some questions but did not really give me much time to talk, and then they told me that they think that I am 22. I told them I explained everything and told them the truth. I found that the interpreter was rude, and I requested a different interpreter but they wouldn't let me have one and they ended the meeting. They did not give me a chance to address any of the issues that they had or why they thought I was not my age."

He elaborates on this to a degree in his second witness statement.

30. When granting interim relief in each of these two cases, Lang J observed that:

    i) in MA's case, that *"the Kent Intake Unit ("KIU") assessment was a short form assessment. Arguably, it was not Merton compliant, nor did not purport to be. The assessment took place while the Claimant was detained at a screening facility; there was no appropriate adult present; and there was no 'minded to' procedure. Rarely, there are clear cases where a full Merton assessment is not required."* Given the claimed age of 16 and the assessed age of 20, Lang J considered that *"the Claimant has a strong case for saying that the margin of error was too close to 18 to be safely relied upon without a full assessment"*; and

    ii) in HT's case, that *"the KIU assessment was not, and did not purport to be, Merton compliant"* and "*arguably, this is not a clear and obvious case where a*

full Merton assessment is not required. The possible ages identified in the report are that he is 17 (based on his own account); or 19 (based on the assessment of his 'life narrative' in school and college); or 21 (the assessors' conclusion, which is not expressly explained, but appears to be based on his physical appearance, demeanour and interaction with them)".

(C) APPLICABLE PRINCIPLES

(1) Legislation

31. I have already quoted in part the relevant provisions of Schedule 2 to the Immigration Act 1971, but for ease of reference aim to set out all the relevant provisions below.

32. The SSHD may only detain individuals if she has lawful authority to do so. So far as relevant here, that authority is conferred by Schedule 2 to the 1971 Act. Paragraph 2 of Schedule 2 provides:

> "(1) An immigration officer may examine any persons who have arrived in the United Kingdom by ship .. for the purpose of determining –
>
> (a) whether any of them is or is not a British citizen; and
>
> (b) whether, if he is not, he may or may not enter the United Kingdom without leave;
>
> (c) whether, if he may not -
>
> (i) if he has been given leave which is still in force,
>
> (ii) he should be given leave and for what period or on what conditions (if any), or
>
> (iii) he should be refused leave; and
>
> (d) whether, if he has been given leave which is still in force, his leave should be curtailed."

33. Paragraph 16 of Schedule 2 provides that:

> "(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> …
>
> (2) If there are reasonable grounds for suspecting that a person is someone if respects of whom directions may be given under any of paragraphs 8 to 19A or 12 to 14, that person may be detained under the authority of an immigration officer pending -

(a) a decision as to whether or not to give such directions;

(b) his removal in pursuance of such directions.

(2A) But the detention of an unaccompanied child under sub-paragraph (2) is subject to paragraph 18B."

34. Paragraph 18 provides that where a person is detained under § 16, an immigration officer may take all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying him, including taking fingerprints.

35. Paragraph 18B provides:

"(1) Where a person detained under paragraph 16(2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where –

(a) the child is being transferred to or from a short-term holding facility, or

(b) sub-paragraph (3) of paragraph 18 applies.

(2) An unaccompanied child may be detained under paragraph 16(2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.

(3) The first condition is that –

(a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24 hour period, or

(b) a decision on whether or not to give directions is likely to result in such directions.

(4) The second condition is that the immigration officer whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the next 24 hour period in accordance with those directions.

…

(7) In this paragraph -

"relevant 24 hour period", in relation to the detention of a child in a short-term holding facility, means the period of 24 hours starting when the child was detained (or, in a case falling within sub-paragraph (5), first detained) in a short-term holding facility;

> "short-term holding facility" has the same meaning as in Part 8 of the Immigration and Asylum Act 1999;
>
> "unaccompanied child" means a person –
>
> (a) who is not under the age of 18, and
>
> (b) who is not accompanied (whilst in detention) by his or her parent or another individual who has care of him or her."

36. It should be noted, however, that §§ 16(2A) and 18B apply to detention pursuant to § 16(2), whereas the SSHD claims in the present context to be exercising only the § 16(1) power.

37. Section 55 of the Borders Citizenship and Immigration Act 2009 ("***BCIA 2009***") imposes a duty on SSHD to make arrangements for ensuring that, in the exercise of any of her functions, they are discharged *"having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom"* and that any service provided achieves the same.

(2) Case law: age assessment

38. Starting with an overview, Thornton J in *R (AB) v Kent County Council* [2020] EWHC 109 (Admin), [2020] PTSR 746 at § 21 set out the following list of the age assessment guidelines as they currently stood, being an amalgamation of the requirements in *Merton* and subsequent caselaw, summarised in *VS v The Home Office* [2014] EWHC 2483 (QB), and the summary in "Assessing Age":

> *"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."

39. However, it is helpful to focus more specifically on the parts of the case law of most direct relevance to the present case, including the topics of 'obvious cases', presence of an appropriate adult, and 'preliminary decisions' (adopting the terminology used by Thornton J in quoted § 18 above). I aim to do so in chronological order.

40. In *Merton* itself (where a local authority social worker had conducted an interview lasting somewhere between 25 and 45 minutes, concluding the claimant to be aged at least 18-20), Stanley Burnton J dealt with obvious cases as follows:

> "27. Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases."
>
> "36. The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.
>
> 37. It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years.

> Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.
>
> 38. I do not think it is helpful to apply concepts of onus of proof to the assessment of age by local authorities. Unlike cases under section 55 of the Nationality, Immigration and Asylum Act 2002 , there is in the present context no legislative provision placing an onus of proof on the applicant. The local authority must make its assessment on the material available to and obtained by it. There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child. Of course, if an applicant has previously stated that he was over 18, the decision maker will take that previous statement into account, and in the absence of an acceptable explanation it may, when considered with the other material available, be decisive. Similarly, the appearance and demeanour of the applicant may justify a provisional view that he is indeed a child or an adult. In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary."
>
> "50. In my judgment, the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. Judicialisation of what are relatively straightforward decisions is to be avoided. As I have stated, in such cases the subject matter of decision is not complex, although in marginal cases the decision may be a difficult one. Cases will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The Court should not be predisposed to assume that the decision maker has acted unreasonably or carelessly or unfairly: to the contrary, it is for a claimant to establish that the decision maker has so acted."

41. It is evident from § 27 that the judge regarded cases where the person concerned is only a few years over 18 as not being "*very obvious*" cases. There is no reason to believe he used the expressions "*clear cases*" and *"obvious case"* in §§ 37 and 38 in any different sense. It is a common theme in the age assessment case law that relatively modest differences of age cannot reliably be determined based only on appearance and demeanour, particularly in persons who have just endured difficult journeys or other experiences, and bearing in mind also differences in children's typical lifestyles (e.g. physical labour) between different countries.

42. Stanley Burnton J in *Merton* addressed provisional decisions thus:

> "55. So far as the requirements of fairness are concerned, there is no real distinction between cases such as the present and those considered in Q. It follows that the decision maker must explain to an applicant the purpose of the interview. It is not suggested that that did not happen in this case. If the decision maker forms the view, which must at that stage be a provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can. In other words, in the present case, the matters referred to in paragraph 15 above should have been put to him, to see if he had a credible response to them. The dangers of misunderstandings and mistranslations inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the Claimant an opportunity to explain."

43. The same topics were taken up in *R (FZ) v LB of Croydon* [2011] EWCA Civ 59, [2011] PTSR 748, which was an appeal from a decision refusing permission to apply for judicial review, but where the Court of Appeal gave a reserved and detailed judgment. As to 'obvious' cases, the court stated:

> "2. ... Some young people may be obviously and uncontroversially children. Others may accept that they are adult. It is for those whose age may objectively be borderline, between perhaps 16 and 20, that an appropriate and fair process of age determination may be necessary. A process has developed whereby an assessment is undertaken by two or more social workers, trained for that purpose, who conduct a formal interview with the young person at which he is asked questions whose answers may help them make the assessment. It is often necessary for there to be an interpreter. The young person may or may not be able to establish or indicate his age by producing documents, which themselves may require translation.
>
> 3. In *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280 Stanley Burnton J gave guidance in judicial review proceedings on appropriate processes to be adopted when a local authority is assessing a young person's age in borderline cases. The assessment does not require anything approaching a trial and judicialisation of the process is to be avoided. The matter can be determined informally provided that there are minimum standards of inquiry and fairness. Except in clear cases, age cannot be determined solely from appearance. ..."

44. As to provisional decisions, the court said:

> "If the decision-maker forms a view that the young person may be lying, he should be given the opportunity to address the matters that may lead to that view. Adverse provisional conclusions should be put to him, so that he may have the

> opportunity to deal with them and rectify misunderstandings." (§ 3, as part of a summary of *Merton*)
>
> "In our judgment, it is axiomatic 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. Obvious possible such points are the absence of supporting documents, inconsistencies, or a provisional conclusion that he is not telling the truth with summary reasons for that provisional view. In the absence of formal central government guidance, we would not be prescriptive of the way in which this might be done, and we stand aside from requiring in every case a formal "minded to" letter sent after the initial interview. It is accepted that these matters should not be over-judicialised. It is theoretically possible that a series of questions appropriately expressed during the course of the initial interview might fairly and successfully put the main adverse points which trouble the interviewing social workers. But that would be a haphazard way of doing it and one which would be intrinsically likely to lead to subsequent controversy in the absence of an expensive transcript of the interview. Mr Luba agreed that fairness could be achieved in this respect if the interviewing social workers were to withdraw from the interview room at the end of the initial interview to discuss their provisional conclusions. They could record these with brief reasons in writing on a form by means of which, upon returning to the interview, they could put the adverse points which trouble them to the person whose age they are assessing, thereby giving him the opportunity to deal with them. The young person may be able to deal points then and there or he may say he needs more time, for example to obtain more documents. Either way, the interviewers could then withdraw again to consider his answers and reach their decision. This would be a modification of the procedure adopted in this case. We emphasise that this suggested outline procedure is not the only way in which fairness might be achieved in this respect." (§ 21)

45. *FZ* also considered the need for an appropriate adult to be present at the assessment:

> "23. As to the second question it is generally accepted in a variety of contexts that, where children or other vulnerable people are to be interviewed, they should have the opportunity to have an appropriate adult present. Reference may be made in this respect to the Police and Criminal Evidence Act Code C at paragraph 11.17; *R (DPP) v Stratford Youth Court* [2001] EWHC 615 (Admin) at paragraph 11; and the Home Office Guidance for Appropriate Adults. Apparently Croydon do adopt this procedure in many of their cases, but they did not make the offer at the assessment on 4th September 2009. However, the

> appellant's key worker was present at the reviewing interview on 16th April 2010. The requirement does not feature in their written procedure, or in the attached form. In an age assessment case, the young person will at least claim to be a child. The present appellant did so and at the time it was agreed that he was. Additionally he was known to have mental health problems. In *R (NA)(Afghanistan) v London Borough of Croydon*, Blake J recognised at paragraph 50(1) the need in that case for the claimant to be asked whether he wanted to have an independent adult present.
>
> 24. The deputy judge concluded that the appellant should have had the opportunity of having an appropriate adult present, but that this failure did not undermine the proper process. This was because the appellant is recorded as having had a good relationship and interaction with the Azeri interpreter and that he was assertive and perfectly capable of dealing with matters where he was able to give credible evidence. The deputy judge did not consider that every departure from good practice should be seen as resulting in unfairness.
>
> 25. In our judgment, the appellant should have had the opportunity to have an appropriate adult present, and the fact that he was not given this opportunity contributes to our decision whether he should be given permission to proceed."

46. It is true that the claimant in *FZ* not only claimed to be a child (and had been accepted as such by the SSHD) but also had mental health difficulties. However, it is notable that the reasoning set out in quoted § 23 above preceding the sentence starting "*Additionally*" is not dependent on the existence of such difficulties. Moreover, the last sentence of that paragraph appears to endorse Blake J's statement at § 50(1) of *R (NA) v London Borough of Croydon* [2009] EWHC 2357 (Admin), where he said:

> "The claimant was not asked whether he wanted to have an independent adult present. That was considered to be one of the necessary aspects of fair procedure to be applied in *A v London Borough of Croydon No 2*, at [44]. Although not every departure from good practice results in a conclusion of unfairness, the context of the present case reveals the importance of that requirement in the overall assessment"

I do not read Blake J's statements in the first two sentences of § 50(1) as being premised on any particular circumstances over and above the claimant's claim to be a child.

47. Coulson J in *R. (on the application of J) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin), after citing *FZ*, said:

> "… In addition, the Court of Appeal also concluded that, in that case, an appropriate adult should have been present at the assessment, or at the very least the appellant should have been

> given the opportunity an opportunity to request the attendance of an appropriate adult." (§ 11)

and, in relation to the case before him:

> "…the claimant was not given the opportunity of having an appropriate adult present during the process. Given that the claimant had only just arrived in this country, illegally, and was being held at a police station, it seems to me axiomatic that he should have been offered such assistance. Indeed, given that it is now accepted that the claimant was 14½ at the time, I consider that the absence of an appropriate adult was a substantive failing" (§ 14)

The second sentence quoted above indicates in my view that Coulson J regarded the presence as an appropriate adult as necessary where the claimant had just arrived in the UK, illegally, and was being detained at a police station when the assessment took place.

48. The Supreme Court in *R (AA) (Afghanistan) v Secretary of State for the Home Department* [2013] UKSC 49 explained the relevance of the SSHD's *"Assessing age"* guidance in ensuring compliance with her obligations under BCIA 2009 section 55 to safeguard and promote the welfare of children who are in the United Kingdom, in the immigration and enforcement context:

> "46. Section 55 of the 2009 Act and section 20 of the Children Act 1989 contain the same definition of children, but their structure and language are very different. Under section 55 the Secretary of State has a direct and a vicarious responsibility. She has a direct responsibility under section 55(1) for making arrangements for a specified purpose. The purpose is to see that immigration functions are discharged in a way which has regard to the need to safeguard and promote the welfare of children ("the welfare principle"). She has a vicarious responsibility, by reason of section 55(3) , for any failure by an immigration officer (or other person exercising the Secretary of State's functions) to have regard to the guidance given by the Secretary of State or to the welfare principle.
>
> 47. In order to safeguard and promote the welfare of children the Secretary of State has to establish proper systems for arriving at a reliable assessment of a person's age. That is not an easy matter, as experience shows. The arrangements made by the Secretary of State under section 55 include the published policies referred to above: Every Child Matters, EIG 59.9.3.1 and Assessing Age.
>
> 48. The instructions in Assessing Age are detailed and careful. In my judgment the guidance complies with the Secretary of State's obligation under section 55(1), applying its natural and ordinary meaning. In this respect, the reasoning set out in the

> passage quoted at para 24 above is persuasive. Further, on the facts of this case there is no basis for finding that there was a failure by any official to follow that guidance. It follows that there was no breach of section 55 and therefore that the exercise of the detention power under paragraph 16 was not unlawful.
>
> 49. I have referred to the natural and ordinary meaning of section 55(1). Its wording and structure are very different from section 20(1) of the Children Act , as I have said, and I am not persuaded that section 55 should be interpreted in the way for which Mr Knafler contends in order to meet the UK's international obligations or to provide adequately for the welfare principle. In particular, I do not see that the section on its natural construction is inconsistent with article 5 of the European Convention or article 3 of the UNCRC. The risk of an erroneous assessment can never be entirely eliminated but it can be minimised by a careful process and there are appropriate safeguards. In addition to the process for making the initial assessment, which includes requiring the benefit of any doubt to be given to the claimant, the Secretary of State is under a continuing obligation to consider any fresh evidence. An age assessment by a local authority can be challenged on judicial review, and the Secretary of State would be bound to give proper respect to the outcome of such proceedings."

I refer later to the safeguards set out in "*Assessing age*", including in relation to the presence of appropriate adults other than in 'clear cases'.

49. The Court of Appeal returned to the topic of appropriate adults in *R (ZS) v Secretary of State for the Home Department* [2015] EWCA Civ 1137, which concerned a claimant who had arrived in the UK and been age assessed in 2009, before the decision in *FZ*. The court rejected the claimant's case that he had not been offered an appropriate adult and that the assessment was therefore unlawful, for these reasons:

> "48. Merton made no mention of an independent adult being present. Neither did the Hillingdon guidelines.
>
> 49. The first reference in the authorities before us to an independent adult in this context is in *R(A)*. Collins J noted at [42] that the practice at Croydon was to advise an applicant "*that he may have a person present to support him by observing the interview"*. That was part of his short summary of the evidence from Croydon of its procedures. He did not explicitly suggest that such a practice was necessary although he did, at [44], in general terms say that "*all the safeguards to ensure fairness*" should be in place. Four months later in *R (NA) v. London Borough of Croydon* [2009] EWHC 2357 (Admin) at [50] Blake J took that general reference in *R(A)* to include an invitation to have an independent adult present and regarded it as an aspect of "best practice". He concluded that not every departure from good

practice would result in unfairness, but that in the context of the facts in NA that aspect of the Croydon procedure was important.

50. Both these cases follow by some months the age assessment conducted by [Kent CC]. Although the evidence is silent on whether the appellant was made this offer (rather than that an independent adult was not in fact present) case law had not at the time identified it as necessary.

51. The case law developed. The issue was confronted in *R (Z)*. That case was in part concerned with the circumstances in which permission should be given to challenge an age assessment in judicial review proceedings and substantially with the question whether a proper opportunity had been given to the young person to meet the interviewers' concerns. However, one of the questions raised in the appeal was "*whether the local authority should in fairness offer the young person the opportunity to have an appropriate adult present at the age assessment interview*" [18]. This court's conclusions on that issue were,

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

52. Thus *Z* confirmed that an opportunity should be given to a young person to have an independent adult present at an age assessment interview. Judgment was given in *Z* in February 2011. The need to provide an opportunity for an independent

> adult to be present during an age assessment interview was by then a required part of the process.
>
> 53. I have indicated that the evidence does not support the proposition that the appellant was not offered the presence of an independent adult. Even if he was not, I do not accept that by February 2009 the term Merton-compliance in the EIG and Age Assessment policies was understood to include this requirement."

50. The court's statements in quoted § 52 above were strictly *obiter*, since the court rejected both the claimant's factual case that no appropriate adult was offered and his legal case that one was required for an assessment in 2009. However, these statements indicate that the Court of Appeal viewed its own decision in *FZ* as holding such a requirement to exist. I respectfully agree.

51. In *R (K) v Milton Keynes Council* [2019] EWHC 1723 (Admin), Pepperall J referred to the category of 'clear cases' in similar terms to those quoted above from *FZ* § 2:

> "In my judgment, there is an important point of distinction between this case and the one in Croydon. Here, Milton Keynes has already undertaken an age assessment. While it was not a full age assessment, it was, as Ms Rowlands submits, recognised in the Merton case that the law does not require a local authority to carry out a full assessment in clear and obvious cases. Arguably, therefore, the Council did not therefore act unlawfully in deciding that there was no need in this case for a full assessment. The full rigour of Merton assessments are reserved for cases of doubt where, the authorities suggest, the young person appears to be between 16 and 20 and where there is real scope for error when acting simply on physical appearance and demeanour. Milton Keynes submit simply that this is not such a case." (§ 14)

K plainly was a 'clear case': he was assessed as being *"clearly significantly over the age of 18"* (§ 2), having a receding hairline, some grey hairs, well-defined stubble, a pronounced Adam's apple and a deep voice; and the custody sergeant's view had been that the claimant appeared to be 24 to 25 years old.

52. Finally, returning to *AB*, Thornton J held Kent CC to have acted unlawfully in assessing the claimant's age using an 'abbreviated assessment' in circumstances where *inter alia* his assessed age of 20-25 years was, in all the circumstances, too close to 18 for Kent CC not to have given him the benefit of the doubt and conducted a *Merton* compliant assessment.

53. The claimant had arrived at the Port of Dover from Afghanistan after a journey of 9-12 months, and claimed asylum. After an immigration interview, he was sent to the 'Atrium', a designated area for unaccompanied asylum seeking children, and there delivered into the care of Mr Carter from the Refugee Council. Later the same morning, the claimant was interviewed in the Atrium for approximately 30 to 45 minutes by an experienced Kent CC social worker plus a colleague, and then for 10-20 minutes by a Chief Immigration Officer (Mr Nicholls) and a member of the Home Office asylum

support team (Ms Mead). After discussion with the social workers, with Mr Carter (who disagreed with their conclusion) and among themselves, Mr Nicholls and Ms Mead concluded that the claimant was over 18 years of age and notified him of this. The following passage of Thornton J's discussion are of relevance to the present case:

> "33. In *Merton*, Sir Stanley Burnton recognised that there may however be obvious cases where prolonged inquiry is unnecessary:
>
> > "[27] Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases."
>
> 34. In the course of his analysis Stanley Burnton J observed that cases will vary from those in which the answer is obvious to those in which it is far from being so and the level of inquiry unnecessary in one type of case will be necessary in another (§50). The court should be careful not to impose unrealistic and unnecessary burdens on those required to make age assessment decisions. Judicialisation of what are relatively straightforward decisions is to be avoided (§50). In *BF (Eritrea)* Lord Justice Underhill cited Sir Stanley Burton's reference to 'obvious' cases in *Merton* in his conclusion that it was not illegitimate for the Home Office to have a policy of initial assessments.
>
> 35. In this context, I accept the force of Ms Rowlands' submission that there may come a point when an experienced social worker considers they have conducted sufficient inquiries to be confident that the person in front of them is either an adult or a child. I accept her submission that it would be pointless to nonetheless require the continuation of the inquiry process to achieve full Merton compliance simply for the sake of form. In any event, Mr Rule's submissions before me did not seriously dispute the principle of an abbreviated assessment but focussed on the circumstances in which it would be permissible.
>
> 36. In his judgment Stanley Burnton J set out the limitations of an assessment based on physical appearance and/or demeanour. Age cannot be determined solely on the basis of appearance except in clear cases (§37). The appearance and demeanour of an applicant may justify a provisional view that he is indeed a child or adult (§38). The difficulties of assessing age are compounded when the young person is of a different ethnicity and culture (§24). Given the impossibility of any decision-maker

being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true (§28). His judgment refers to guidance from the Royal College of Paediatricians that the margin of error in age assessments can sometimes be a much as 5 years either side (§22).

…

43. In my judgment, recognition of the margin for error in an abbreviated assessment of age based on physical appearance and demeanour is of broader application than Ms Rowlands sought to suggest in her submissions. It stems from the well recognised difficulty in assessing the age of young people in the absence of documentary evidence, a difficulty that becomes ever greater the closer the person is to eighteen years. It is a reflection of the established understanding that physical attributes and demeanour are fragile material on which to base an assessment of age. In this respect it embodies the 'benefit of the doubt' being given to applicants, which Ms Rowlands did not dispute. It is consequent upon Sir Stanley's Burton's observation that *Merton* compliant assessments satisfy *minimum* standards of inquiry and fairness. It is moreover an aspect of the general principle of judicial review that a decision maker is under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person's age when deciding to treat a young person as an adult instead of a child in circumstances where the young person is claiming that he or she is a child (*Secretary of State for Education and Science v Tameside MBC* [1977] 1 AC 1014). In addition, it is necessary on grounds of fairness to reflect the determinative role of the assessment by the local authority, which is often then relied upon by the Home Office and the significance of the outcome of an assessment for an individual asylum seeker.

44. Accordingly, whilst it may be legitimate for a local authority to assess age based on an abbreviated assessment of physical appearance and demeanour, it is incumbent on the authority to ensure that any such decision takes into account the margin for error in the abbreviated nature of the assessment.

…

Application of the law to the facts

47. Kent Council assessed AB's age as between twenty – twenty five years based on his physical appearance and demeanour. It is common ground the assessment did not comply with the full panoply of procedural safeguards required for a 'full' Merton compliant assessment. In her statement, Ms Mead, one of the two

social workers assessing AB considered his age was 'around' twenty – twenty one years old.

…

53. A number of Mr Rule's criticisms about the conduct of the assessment amounted, in effect, to a complaint that it was not Merton compliant which cannot of themselves have force given I have concluded that it may be legitimate for an authority to conduct an abbreviated assessment. However, the social workers appear to have asked questions of AB designed to test his credibility but not then come to a view on the issue in the decision letter. Similarly, AB provided details of an uncle who might be able to verify his age and a phone number. I accept Ms Rowlands' submission that this could not feasibly be followed up in the abbreviated assessment because it would be difficult to verify who was at the end of the phone in the event that anyone answered a call. Nonetheless, the decision not to follow up on potential relevant evidence or to come to a view on AB's credibility ought, it seems to me, to be reflected in an acknowledgement of the margin for error in not doing so.

54. Further, Mr Carter was of the view that it was not possible to make a definitive assessment in the circumstances in which AB was assessed. In his statement he said he spent most of the day with AB on 26 July and described AB as following him around to the kitchen and his excitement on seeing an Xbox. The guidance on age assessment published by the Association of Directors of Children's Services (ADCS) (October 2015) written by specialist social workers and practitioners from local authorities and refugee and legal sectors sets out best practice for age assessments. It states as follows:

> "Information from other sources
>
> Foster carers, key workers, social care workers, advocates, teachers and college tutors may be involved in working with a child… and they are likely to have high levels of contact with the child or young person. Their observations of children and young people in different settings and interactions with peers and other adults can make a useful contribution to your assessments. It is good practice to gather the information available prior to conducting the age assessment interviews with the child or young person.
>
> You will need to consider the weight given to different sources of information. For example you may attach greater weight to the views of a professional who has worked with a number of asylum seeking children and young people from the same country of origin as a child or young person being assessed than you would to someone who has no previous

> experience of unaccompanied asylum seeking children and young people."
>
> 55. In her submissions, Ms Rowlands sought to justify the failure of the Council to take account of Mr Carter's views on the basis that the Refugee Council's role to support refugees meant Mr Carter had already decided that AB was to be believed. This does not seem to me to be a helpful way to characterise Mr Carter's views. He is a professional with relevant experience of Afghan boys. The Merton guidelines stipulate that the assessment process should not be based on any predisposition to assume an applicant is an adult and it is a process in which the applicant is entitled to the benefit of any doubt as to his age. In any event, the Defendant's decision letter makes no reference to Mr Carter's views or why they were not considered to be meritorious. I am not however persuaded by Mr Rule's criticisms of Mr Stringer's conduct or his submission that the location of the interview was inappropriate.
>
> 56. The Council's decision letter contains no express acknowledgement of the margin for error in its assessment. Nonetheless, Ms Rowlands pointed to the conclusion that AB presented as twenty – twenty five years and said this was consistent with any requirement to acknowledge the margin for error and appropriate in the circumstances of this case. However, given the potential margin for error identified above, I am of the view that Kent Council should have given AB the benefit of the doubt and conducted a Merton compliant assessment. Ms Mead assessed AB as 'around' twenty to twenty one years. The formal decision assessed him at twenty – twenty five years. In the circumstances of this abbreviated assessment, the assessed age is too close to the cut off of eighteen years for the Council not to give AB the benefit of the doubt."

(3) Pre-existing age assessment policies and guidelines

54. The SSHD has given guidance to immigration officers about how they should approach claims by asylum seekers that they are under 18, including the following:

i) *Assessing age*;

ii) Enforcement Instructions and Guidance ("***EIG***") Chapter 55 section 55.9.3.1, which deals with age disputes in the context of detention;

iii) Detention Services Order 02/2019 "*Care and management of Post-Detention Age claims*" ("***DSO 02/2019***"); and

iv) the Age Assessment Joint Working Guidance issued by the Home Office and the Association of Children's Services Directors ("***ACDS***").

(a) "Assessing age"

55. This policy guidance sets out the SSHD's approach to dealing with age dispute cases arising in respect of putative unaccompanied asylum seeking children ("***UASC***"). The current version is version 4.0, published on 31 December 2020. The previous version, in force as at the date of the Contested Decisions, was version 3, published on 23 May 2019. There are no material differences between version 3 and 4. Version 3 contained amendments to take into account the judgment of the Court of Appeal in *BF (Eritrea)*, referred to below, which remain in place in version 4. As explained below, the Supreme Court has now overturned the decision of the Court of Appeal and the Secretary of State is in the process of updating *Assessing age* (and related documents) to take this into account.

56. The section of *Assessing age* on "*Initial age assessment*" notes the *"very significant consequences"* if immigration officers fail to adhere to the legal powers and policy on detaining children, and that Home Office policy *"therefore is to apply the age assessment process in such a way as to guard against the detention of children generally, including accidental detention of someone who is believed to be an adult but subsequently found to be a child"*. Further:

> "Age assessments cannot always provide the same degree of confidence about treating an individual as an adult or a child as can be provided by reliable documents. To allow for this, the principle of "the benefit of the doubt" is applied. This means that where there is still uncertainty about whether the individual is an adult or a child, the individual should be treated as a child and referred to a local authority, with a request for a Merton compliant age assessment. This would include cases where their physical appearance and demeanour does not very strongly suggest that they are 25 years of age or over"

57. The policy goes on to explain that the initial age assessment stage for cases where the claimed age is not accepted is intended to lead to a decision on how an individual should be treated, and is divided into three possible outcomes with a number of reasons for arriving at them. Further guidance, on how a decision should be made as to which group an individual should fall, is provided later in this section. The three possible outcomes with reasons for arriving at them are as follows:

> **"Outcome 1: Decision made to treat the claimant as an adult**
>
> A decision should only be made to treat the claimant as an adult if either:
>
> • a local authority Merton compliant age assessment has been completed by a local authority finding the claimant to be 18 or over, which the Home Office has agreed with after:
>
> o giving significant weight to the assessment
>
> o taking all reliable evidence into account (Local authority age assessment already completed)

• two Home Office members of staff, one at least of Chief Immigration Officer or Higher Executive Officer grade, have independently assessed that the claimant is an adult because their physical appearance and demeanour very strongly suggests that they are 25 years of age or over (Physical appearance and demeanour very strongly suggests that they are 25 years of age or over)

• there is credible and clear documentary evidence that they are 18 years of age or over

Outcome 2: Decision made to treat the claimant as a child

A decision should be made to treat the claimant as a child if either:

• a local authority Merton compliant age assessment has been completed and found the claimant to be under 18, which the Home Office has agreed with after:

o giving significant weight to the assessment

o taking all reliable evidence into account (Local authority age assessment already completed)

• you doubt the claimant's claimed age but after a careful consideration of the specifics of the case they have been given the benefit of the doubt and their claimed age is accepted (Accepting the claimed age in cases where the claimed age is doubted)

• there is credible and clear documentary evidence that they are the age they claim to be

Outcome 3: Decision made to treat the claimant as a child until further assessment of their age has been completed

A decision should be made to give the benefit of the doubt and treat the claimant as a child until further assessment has been completed if you cannot be sure that the individual is an adult (as set out in outcome 1) and you have not accepted the claimed age (as set out in outcome 2). This further assessment includes obtaining the view of the local authority and considering this alongside other relevant evidence (Provisionally treating the claimant as a child).

Further to the above brief outcome descriptions, if an asylum seeker or migrants claimed age is doubted and there is no reliable evidence to support their claim, you must conduct an initial age assessment in accordance with the more detailed guidance in the remainder of the Initial age assessment section."

58. The subsequent section headed "*Physical appearance and demeanour very strongly suggests that they are 25 years of age*" includes, in the sub-section on "*Assessing physical appearance*", explanations of the limitations of assessing physical appearance and demeanour of a young person, including that:

    i) the claimant's journey to the UK, which may have been long and traumatic with limited opportunities to manage their basic physical health and self-care needs, and could have had an aging effect on their appearance; and that with good care and some recovery time, the claimant's physical appearance may appear younger within a short period of time;

    ii) children in some countries are more likely to have engaged in physical work from an early age than children in more industrialised nations – in these circumstances calloused hands are less likely to be evidence of maturity;

    iii) some young people take on responsibilities normally associated with adulthood at an earlier age, for example due to the culture in the country of origin or individual circumstances – in some instances this may result in a demeanour which appears older than their true chronological age;

    iv) the journey could also have left the claimant exhausted, emotional and malnourished;

    v) observations of demeanour made over a short period of time, such as during asylum registration, will limit the weight that can be applied to them; and

    vi) although levels of maturity can be assessed, maturity is "*not an accurate reflection of chronological age*" and maturity itself can be variable. "*You must also keep in mind that young people may deliberately attempt to present as younger or older than their age*."

59. For these reasons, the *Assessing age* policy:

> "is specifically designed to allow a large margin of error in favour of the claimant's claim to be a child. It achieves this by requiring Home Office staff to only treat them as an adult on the basis of their physical appearance and demeanour, where they conclude that these indicators very strongly suggest that they are 25 years of age or over. This takes account of the challenges in assessing a claimant's age in such circumstances."

60. The policy also contains a section on local authority age assessments, including a summary of basic requirements derived from *Merton* and further case law. This includes the following passages:

> "the individual must be offered the opportunity to have an independent appropriate adult present - as specified in:
>
> o A v London Borough of Croydon [2009] EWHC 939 (Admin)

o R (NA) v London Borough of Croydon [2009] EWHC 2357 (Admin), paragraph 50

o R (FZ) v London Borough of Croydon [2011] EWCA Civ 59, paragraph 25"

"except in clear cases (where it is obvious that a person is under or over 18 and there is normally no need for prolonged inquiry), those who are assessing age cannot determine age solely on the basis of the appearance of the claimant - as specified in:

o Merton, paragraphs 27, 37 and 38

o R (FZ) v London Borough of Croydon [2011] EWCA Civ 59, paragraph 3"

"Those who are assessing age must: … give the claimant the opportunity to explain any inconsistencies in their account or anything which is likely to result in adverse credibility findings - this is best done as soon as possible, when matters are "fresh in minds" – as specified in:

o Merton, paragraph 55

o R (FZ) v London Borough of Croydon [2011] EWCA Civ 59, paragraph 20

o R (NA) v London Borough of Croydon [2009] EWHC 2357 (Admin), paragraph 52

"remember that cases vary, and the level of inquiry required in one case may not be necessary in another – as specified in Merton, paragraph 50"

61. There is also a sub-section on "*Reduced local authority age assessments*", including these passages:

"There may be occasions where a local authority social worker considers that it is very clear from the claimant's physical appearance and demeanour that they are over the age of 18 and that prolonged inquiry (a comprehensive local authority age assessment) is not required. This is consistent with the Association of Directors of Children's Service practice guidance on conducting age assessments.

The case law on Merton age assessments allows for a less prolonged enquiry by a social worker where it is very clear from the physical appearance that a person is under or over 18 years of age in the absence of compelling evidence to the contrary. Furthermore, though adequate reasons must be given by an assessing social worker for a decision that a claimant claiming to be a child is not a child, these need not be long or elaborate,

particularly in cases where the social worker has assessed that they are very clearly an adult.

…

When considering the adherence of a reduced assessment against the Merton judgment and further case law, you should note that a reduced local authority assessment will not have been arrived at using a long interview or series of interviews which take place when a comprehensive Merton compliant assessment is conducted. It is, in fact, a statement from the local authority that in their view and for the reasons given, conducting such an assessment is not necessary. Because a comprehensive Merton assessment interview has not taken place, although these reduced assessments still have weight, they may not be supported by a second trained social worker, or have taken place in the presence of an independent adult. This does not necessarily affect the weight that can be applied to them, but they are additional reasons for checking that the assessment is reliable.

If an age assessment information sharing pro forma is submitted, as opposed to equivalent written evidence, you should note that the pro forma and its instructional text was drafted for comprehensive Merton compliant age assessments. Therefore, if a reduced local authority age assessment is conducted by a social worker, the following information can acceptably have been omitted from the pro forma:

• only the details and signature of one social worker are required in cases where the age assessment was conducted by one social worker

• the pro forma may not be endorsed by the social worker's manager or supervisor

• the claimant may not have been offered the opportunity for an independent adult to be present during the age assessment

If a decision is made by the Home Office to treat the claimant as an adult predominantly based on such an assessment, decision makers should record the Home Office's decision to be one that was based on a Merton compliant local authority age assessment, as would be the case for those predominantly based on a comprehensive Merton compliant age assessment. The minimum threshold that must be met for a local authority to assess that it is very clear from the claimant's physical appearance and demeanour that they are over the age of 18, is different and potentially lower than that required for the Home Office to assess that a claimant's physical appearance and demeanour very strongly suggests that they are 25 years of age

> or over. This difference reflects the particular expertise local authorities have through working with children on a daily basis."

(b) EIG Chapter 55

62. EIG § 55.9.3 states that *"as a general principle"*, even where one of the statutory powers to detain is available in a particular case, unaccompanied children (that is, persons under the age of 18) *"must not be detained other than in very exceptional circumstances"* and *"for the shortest possible time, with appropriate care."*

63. EIG § 55.9.3.1 states that the Home Office will accept an individual as under 18 *"unless"* one or more of four criteria (A, B, C, D) applies. For present purposes, A to C are materially the same as the criteria under *"Outcome 1"* in the *Assessing age* (and D is not relevant for present purposes).

(c) Detention Services Order 02/2019

64. DSO 02/2019 "*Care and Management of Post Detention Age Claims"* (August 2019) sets out further instructions and guidance for Home Office staff operating in immigration detention centres on the correct process for dealing with individuals claiming to be under 18.

65. The DSO defines

i) a "*child*" as someone who either has documentary evidence to demonstrate they are under 18, or has been subject to a *Merton* compliant age assessment by a local authority which concluded that they are under 18, and which the Home Office has accepted (§ 8);

ii) an "*adult*" as a person who has:

> "a) Credible and clear documentary evidence that they are 18 years of age or over;
>
> or
>
> b) Been subject to a Merton compliant age assessment by a local authority and been assessed to be 18 years of age or over (note that assessments completed by social services' emergency duty teams are not acceptable, with the potential exception of cases where the social worker considers that it is very clear from the individual's physical appearance and demeanour that they are over the age of 18 and that prolonged inquiry (a comprehensive local authority age assessment) is not required – see the Assessing age asylum instruction for further details on when shorter Merton compliant assessments are permissible);
>
> or
>
> c) A physical appearance and demeanour which very strongly suggests that they are 25 years of age or over and no other credible evidence exists to the contrary; or

> d) Prior to detention gave a date of birth that would make them an adult and/or stated they were an adult; and
>
> i. Only claimed to be a child after a decision had been taken on their asylum claim, entry to the UK or immigration status; and
>
> ii. Only claimed to be a child after they had been detained; and
>
> iii. Has not provided credible and clear documentary evidence proving their claimed age; and
>
> iv. Does not have a Merton compliant age assessment stating they are a child; and
>
> v. Does not have an unchallenged court finding indicating that they are a child; and
>
> vi. Physical appearance/demeanour very strongly suggests that they are 25 years of age or over." (§ 9); and

iii) an "*age dispute case*" as one where the individual claims to be a child, does not meet the criteria for being treated as an adult, but is unable to prove he/she is under 18 and *"is awaiting a Merton compliant age assessment to confirm their age*" (§ 11).

66. Paragraphs 4, 5 and 14 of the DSO state:

> "4. It is important that at the point of detention the immigration officer authorising detention is clear as to whether a child or an adult is involved. The detention of children is subject to strict restrictions set out in paragraph 18B of Schedule 2 to the Immigration Act 1971 as to the period for which they may be detained, and the type of detention facility which may be used. Therefore, in order to comply with these restrictions, the detaining officer must either be certain that he is dealing with an adult on the basis of documentary evidence, or having assessed that the individual's physical appearance and demeanour very strongly suggests that they are 25 years of age or over, be satisfied that it is reasonable to regard the individual as an adult."
>
> "5. An individual must be treated as an adult only if their physical appearance and demeanour very strongly suggests that they are 25 years of age or over. If an individual is treated as an adult and detained on that basis, they may bring a legal challenge against the decision to detain. If a court later finds, or the Home Office later accepts that an individual who has been treated as an adult was, in fact, a child at the time, then any period of detention not in line with the restrictions in paragraph 18B of Schedule 2 to the Immigration Act 1971 will have been unlawful and damages may result."

> "14. An individual who is defined as an age dispute case (see paragraph 11) must not remain in detention pending a Merton compliant age assessment. He/she will be released into the care of the local authority. Case workers should make referrals to the local authority as quickly as possible. In the event that the placement is delayed by the local authority, the IRC will make immediate arrangements to safeguard the individual within the centre whilst awaiting the local authority response. The Home Office has a safeguarding responsibility and therefore should not release children into the community until a place of safety has been found by the local authority."

(d) Joint Working Guidance

67. The Age Assessment Joint Working Guidance ("***JWG***") is a document setting out agreed arrangements between the Home Office and local authorities in England where either of them disputes the age of a person claiming to be a child. It does not replace local authorities' practice guidance or age assessment guidance issued by the Home Office (see para 1.1). It sets out the terms of joint working but does not purport to alter or amend the internal processes of either the Secretary of State or relevant local authorities.

68. The JWG provides for contact and referral points, information sharing, reviews of age in light of fresh evidence and actions to take when there are conflicting age assessments. It also provides at pp. 6-7 guidance for the location of local authority age assessments, providing that local authorities must attend places where people claiming to be children are held for their own safety, including ports. The JWG provides that where the local authority is called by the Home Office to conduct an age assessment, the local authority must take the claimed child into its care before conducting an age assessment. A glossary at pp. 14 - 15 of the JWG indicates that "*age assessment*" in this context refers to an age assessment carried out by a local authority.

69. The JWG includes the statements that *"An individual who is defined as an age dispute case will **not** remain in detention pending a local authority age assessment (with the exception of individuals previously sentenced by the criminal courts as an adult)."* (p.7) and:

> "LAs must attend premises, other than their own, where an individual who claims to be a child is being held for their own safety. For example:
>
> - police stations following lorry drops
> - Immigration Removal Centres
> - ports
> - screening environments

> The individual **should be released into the care of the LA** who then takes responsibility for the individual and for conducting the age assessment.
>
> LA age assessments should be conducted at suitable facilities by qualified social workers. They must not be rushed (for example, not be undertaken by out of hours or emergency duty teams), the young person must understand the purpose of the interview and the process must be in line with Merton and following case law... On this basis facilities such as police stations are not considered appropriate venues for conducting age assessments and an age assessment interview carried out here is not case law compliant." (p.6, emphasis in original)

70. The JWG also indicates that:

> "Where there is an age dispute and the Home Office has made a referral to the LA, the LA will aim to assess the age of the individual within 28 days and provide the Home Office with the outcome of the age assessment via the age assessment information sharing proforma (see LA Practice Guidance for informing the individual of the outcome). The LA must ensure age assessments are conducted in line with case law and guidance. Where more time is needed to complete the assessment, for example if the LA is waiting for relevant outstanding information or specialist assessments, the LA must let the Home Office know the reasons within 28 days." (p.5)

(4) Case law: lawfulness of policies

71. The approach to challenges to the lawfulness of policies has recently been considered by the Supreme Court in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37; [2020] 1 WLR 3931 and in *R (BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38; [2021] 1 WLR 3967.

72. In *A*, the claimant was a convicted child sex offender who brought a claim for judicial review of the Child Sex Offender Disclosure Scheme Guidance, which outlined a co-ordinated approach which police forces could adopt when members of the public requested information about whether persons who had contact with children had any convictions for sex offences involving children. The guidance had been made pursuant to common law powers, and had no statutory force. The claimant contended that the guidance did not go far enough in giving guidance about the circumstances in which a police force was obliged to seek such representations before disclosing information about him. Dismissing the claim, the court followed *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112, which concerned guidance issued by the Department of Health and Social Security to health authorities on family planning services including a section on contraceptive advice and treatment for young people. As highlighted in *A* (§ 33), Lord Scarman in *Gillick* stated that:

> "It is only if the guidance permits or encourages unlawful conduct in the provision of contraceptive services that it can be

> set aside as being the exercise of a statutory discretionary power in an unreasonable way." (p 181F)

The Supreme Court in *A* said:

> "Like Lord Fraser, Lord Scarman gave a far more detailed statement of the legal position at (pp 188H–189E) than that set out in the guidance. Despite the absence of detail in the guidance, he held it to be lawful. This was on the basis that "*the department's guidance can be followed without involving the doctor in any infringement of parental right*" (p 190B, emphasis added). The guidance did not lead doctors away from due compliance with their legal obligations, and this was sufficient for it to be lawful. The legal test applied was not that the guidance, if followed, must inevitably produce conduct on the part of doctors which would be lawful." (§ 35)

> "In our view, *Gillick* sets out the test to be applied. It is best encapsulated in the formulation by Lord Scarman at p 181F (reading the word "permits" in the proper way as "sanction" or "positively approve") and by adapting Lord Templeman's words: does the policy in question authorise or approve unlawful conduct by those to whom it is directed? So far as the basis for intervention by a court is concerned, we respectfully consider that Lord Bridge and Lord Templeman were correct in their analysis that it is not a matter of rationality, but rather that the court will intervene when a public authority has, by issuing a policy, positively authorised or approved unlawful conduct by others. In that sort of case, it can be said that the public authority has acted unlawfully by undermining the rule of law in a direct and unjustified way. In this limited but important sense, public authorities have a general duty not to induce violations of the law by others." (§ 38)

> "41. The test set out in Gillick is straightforward to apply. It calls for a comparison of what the relevant law requires and what a policy statement says regarding what a person should do. If the policy directs them to act in a way which contradicts the law it is unlawful. The courts are well placed to make a comparison of normative statements in the law and in the policy, as objectively construed. The test does not depend on a statistical analysis of the extent to which relevant actors might or might not fail to comply with their legal obligations: see also our judgment in BF (Eritrea) [2021] 1 WLR 3967." (§ 41)

> and

> "There will be cases where the application of the Gillick test for lawfulness of a policy may be less clear than it is here. The first claim brought by the appellant to challenge the Guidance is an example. In its original form, the Guidance did not tell decision-

> makers to consider seeking representations from a subject before a disclosure to the public, but nor did it tell them not to. However, reading the Guidance as a whole, it was clearly intended to set out for decision-makers a reasonably complete decision-making procedure to be followed, so in our view the Divisional Court was right to hold that, read objectively, it misdirected decision-makers as to how they should proceed, by implicitly indicating that they did not have to invite representations whereas in many cases they had a legal obligation to do so." (§ 43)

73. Pertinently to the case before it, the Supreme Court went on to explain that:

> "In broad terms, there are three types of case where a policy may be found to be unlawful by reason of what it says or omits to say about the law when giving guidance for others" (§ 46)

These categories were as follows:

> "46. … (i) where the policy includes a positive statement of law which is wrong and which will induce a person who follows the policy to breach their legal duty in some way (i e the type of case under consideration in Gillick [1986] AC 112); (ii) where the authority which promulgates the policy does so pursuant to a duty to provide accurate advice about the law but fails to do so, either because of a misstatement of law or because of an omission to explain the legal position; and (iii) where the authority, even though not under a duty to issue a policy, decides to promulgate one and in doing so purports in the policy to provide a full account of the legal position but fails to achieve that, either because of a specific misstatement of the law or because of an omission which has the effect that, read as a whole, the policy presents a misleading picture of the true legal position. In a case of the type described by Rose LJ, where a Secretary of State issues guidance to his or her own staff explaining the legal framework in which they perform their functions, the context is likely to be such as to bring it within category (iii). The audience for the policy would be expected to take direction about the performance of their functions on behalf of their department from the Secretary of State at the head of the department, rather than seeking independent advice of their own. So, read objectively, and depending on the content and form of the policy, it may more readily be interpreted as a comprehensive statement of the relevant legal position and its lawfulness will be assessed on that basis. In the present case, however, the police are independent of the Secretary of State and are well aware (and are reminded by the Guidance) that they have legal duties with which they must comply before making a disclosure and about which, if necessary, they should take legal advice.

> 47. In a category (iii) case, it will not usually be incumbent on the person promulgating the policy to go into full detail about how exactly a discretion should be exercised in every case. That would tend to make a policy unwieldy and difficult to follow, thereby undermining its utility as a reasonably clear working tool or set of signposts for caseworkers or officials. Much will depend on the particular context in which it is to be used. A policy may be sufficiently congruent with the law if it identifies broad categories of case which potentially call for more detailed consideration, without particularising precisely how that should be done. This was the approach adopted by Green J in *R (Letts) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2015] 1 WLR 4497 ("*Letts*")."

74. In a judgment handed down the same day in *BF (Eritrea)*, the same constitution of the Supreme Court applied the approach summarised in the passages quoted in § 72 above, when dismissing a challenge to criterion C of EIG § 55.9.3.1 and the corresponding passage in *Assessing age*. These provided that (in the context of initial assessment of age) the Home Office would not accept that an individual was under 18 if his physical appearance or demeanour very strongly suggested that he was 'significantly' over 18 years of age and no other credible evidence existed to the contrary. The Court of Appeal had held that passage to be unlawful because the word 'significantly' did not adequately reflect the width of the required margin of error, since it could be interpreted in different ways, creating a risk of misinterpretation: the guidance should instead attempt to quantify the extent of the required margin of error. Reversing that decision, the Supreme Court held the relevant passages not to be unlawful. The Supreme Court's judgment included the following passages, which it is necessary to set out at some length:

> "49. The principal obligation is that explained in *Gillick*, so in our opinion the parties were right to focus on this in their submissions in this court. The *Gillick* obligation is not to give policy direction to recipients to do something which is contrary to their legal duty: see the *A* case [2021] 1 WLR 3931, paras 29–47 .
>
> 50. In Mr Hermer's submission, criterion C in the context of both versions of the EIG and *Assessing Age* "permits or encourages unlawful conduct" by immigration officers (to use Lord Scarman's formulation in *Gillick* at p 181F), in the requisite sense. According to Mr Hermer, criterion C "permits" or "encourages" unlawful conduct because it does not sufficiently remove the risk that immigration officers might make a mistake when they assess the age of an asylum seeker who claims to be a child.
>
> 51. In our view, this submission involves a misinterpretation of what was said in *Gillick* and cannot be sustained. As we explain in our judgment in the A case, the meaning of the formula used by Lord Scarman is much narrower than suggested by Mr Hermer. It involves comparing two normative statements, one

being the underlying legal position and the other being the direction in the policy guidance, to see if the latter contradicts the former. Mr Hermer's submission as to the effect of *Gillick* distorts this test by comparing a normative statement with a factual prediction, i e comparing the underlying legal position with what might happen in fact if the persons to whom the policy guidance is directed are given no further information. If correct, this would involve imposing on the person promulgating the guidance a very different, and far more extensive, obligation than that discussed in *Gillick*. It would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee into an obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law.

52. Whenever a legal duty is imposed, there is always the possibility that it might be misunderstood or breached by the person subject to it. That is inherent in the nature of law, and the remedy is to have access to the courts to compel that person to act in accordance with their duty. …

…

54. The objective of the rule is to delineate two categories of person to be subject to different treatment at the initial stage of assessment by immigration officers. As was accepted on all sides in the Upper Tribunal and the Court of Appeal and was acknowledged by Underhill LJ (para 55), there are sound policy reasons why adults should be treated as such and not as children:

> "… It must be borne in mind that to treat an adult migrant as a child is itself not a problem-free course. It is a considerable burden on local authorities to have to find appropriate accommodation for [unaccompanied asylum-seeking children], and that resource should not be wasted on those who obviously do not qualify for it. 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."

Although a local authority, when deciding whether its obligations under the Children Act 1989 to provide child services are engaged, is not obliged to accept the assessment of immigration officers that a person is a child, it may be expected that under pressure of time before it is possible to arrange a Merton assessment for itself it is likely to do so on an interim

basis. Assessing Age contemplates that there will be co-operation between immigration officers and the local authority at the initial stage of dealing with an asylum seeker who may be a child.

55. In the *Merton* case Stanley Burnton J said this at para 27:

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

56. The last point adverted to by Underhill LJ in para 54 above is particularly significant in the present context. The policy guidance in criterion C falls to be applied at the initial stage when immigration officers first encounter immigrants, when the only evidence available from which to make an assessment of their age may be their appearance and demeanour. The position is that Parliament intends that they should be able to detain the immigrant with a view to possible removal if it turns out that their immigration status warrants this and they do not have a good claim to asylum. Detention may in practice be important to ensure the effective application of immigration controls if, upon investigation, it transpires the immigrant has no good claim to remain in the UK. Where the immigrant is an unaccompanied child, this policy is adjusted to take account of their greater vulnerability, and this means that it is incumbent on immigration officers to assess whether they are dealing with a child or an adult. However, this involves no derogation from the general object of the legislation that immigration controls should be effective and that to this end adults should be subject to immigration detention in appropriate cases.

57. The Secretary of State's policy (prior to 28 July 2014) and the legislative provision now in place require immigration officers to consider detention of an immigrant at that initial stage according to the different regimes applicable to adults and children, depending on whether they consider that they are dealing with an adult or a child. The officers are required to apply the statutory regime as Parliament intended it should be applied (as supplemented prior to 28 July 2014 by the approach set out in the Secretary of State's policy), and this means they must distinguish adults and children as best they can according to the evidence available to them. If immigration officers conclude that they are dealing with an adult, their duty is to apply the regime which is appropriate for an adult.

58. The policy set out in criterion C includes an allowance to give the benefit of the doubt to the immigrant who claims to be a child whose age is being assessed, in that it states that they should be assessed to be an adult only if their physical appearance and demeanour "very strongly suggests" that they are "significantly" over 18 years of age. The wider discussion in both versions of the EIG and *Assessing Age* stresses the same point, with the emphasis becoming stronger in the second version, as pointed out by Simon LJ. There is also an important safeguard built in, that two immigration officers of specified seniority should separately reach the same conclusion.

59. It is possible that these aspects of the policy, or something similar, were required by section 55(1)(a) of the 2009 Act, but it is not necessary to form any final view about that. It is sufficient to observe that the policy in criterion C has been formulated "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom", so that the Secretary of State has properly complied with her duty under section 55 : see *R (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] 1 WLR 2224, paras 47–49 per Lord Toulson JSC (" *AA (Afghanistan)*"). He held that by issuing the equivalent of version 1 of the EIG and of *Assessing Age*, including criterion C, the Secretary of State had complied with her duty under section 55 and that by acting in compliance with that policy guidance immigration officers also complied with that duty. Mr Hermer accepts that this is so and does not contend that section 55 imposes any obligation on the Secretary of State to go further than she has done in stating the policy to be applied. As Lord Toulson JSC observed (para 49), "The risk of an erroneous assessment can never be entirely eliminated but it can be minimised by a careful process and there are appropriate safeguards", as were provided for in the EIG and *Assessing Age*.

60. Therefore, in her policy the Secretary of State has set out in a lawful way, so far as section 55 is concerned, the relatively generous degree to which the benefit of the doubt should be allowed to an immigrant who claims to be a child. As Mr Strachan points out, the policy, in particular as set out in criterion C, instructs immigration officers how they should proceed if they are not in doubt according to that standard. Where, after making due allowance for doubt to the degree instructed by the Secretary of State, immigration officers believe they are dealing with an adult, their duty is to treat the person as an adult so as to comply with the rule set by the Secretary of State and then by Parliament and to achieve the objectives which that rule is supposed to promote.

…

> 62. Two additional points may be made here. First, it might be thought that the outcome proposed by the majority in the Court of Appeal—according to which, in effect, the Secretary of State was required to direct immigration officers to treat a person as a child aged less than 18 only if they believe them to be aged less than 23 (or 25, depending on how one sets the margin of error)—itself risked being unlawful according to the Gillick principle, in the sense that it would appear to contradict the rule laid down by Parliament for immigration officers to apply, namely that they should treat a person who according to their judgment is 18 or over under the adult immigration regime. We do not need to decide whether section 55 might provide a legal justification for the Secretary of State to go so far, since it is conceded that it certainly imposes no obligation on her to do so. We do not consider that there is any other warrant for the Secretary of State to seek to displace the rule laid down by Parliament in this manner.
>
> 63. Secondly, leaving aside the issue of whether section 55 requires the Secretary of State to say anything about the application of the statutory rule, we do not consider that there is any obligation under the common law for her to have any policy at all in place to supplement what is said in the relevant statutory provisions. Those provisions lay down a clear rule that persons aged less than 18 should be treated as children, while those aged 18 or over should be treated as adults for the purposes of the legislative regime. The provisions do not confer any discretion on immigration officers on this point, though obviously they have to make an evaluative judgment on the basis of such evidence as is available to them whether a person is aged under 18 or not.
>
> …
>
> 65. … The Secretary of State would have been entitled to have no policy at all as regards the application of paragraph 16(2A) of Schedule 2 to the 1971 Act, or a policy which simply directed attention to the rule in that provision. It would be odd to conclude that, although the Secretary of State was under no obligation to say anything at all about the statutory rule, if she did promulgate a policy in relation to it she suddenly came under an obligation to specify in her policy that the rule should only be applied if any margin of error had been eliminated, by using 23 (or 25) as the relevant cut-off age to identify a person as a child instead of 18."

75. The Supreme Court in *R (Lumba) v SSHD* [2011] UKSC 12, [2012] 1 AC 245 held that a detention may be rendered unlawful by a public law error which bears on and is relevant to the decision to detain; the decision must be one which was capable of affecting the outcome and did so; it is not a defence that a decision to detain free from error could and would have been made (see §§ 68, 69, 88 and 207).

(D) THE GUIDANCE

76. On 18 September 2020 the SSHD published version 1.0 of the KIU Social Worker Guidance, to provide "*guidance and information relevant to the delivery of social worker assistance by a team of social workers contracted to the Home Office who would support the delivery of KIU's functions in respect of children and those claiming to be children*." On 3 December 2020, an updated version 2.0 was published. Both Claimants were subject to version 2.0 of the Guidance. For present purposes, the two versions are materially the same.

77. The Guidance at page 4 defines the key aims of the policy as inter alia (a) "*strengthen the processes for ensuring children arriving in KIU are safeguarded […]"*, (b) "*to strengthen processes for assessing the ages of those whose claims to be children are doubted*" and (c) "*to reduce the pressure on local authority resources by decreasing the number of adults referred to them by the Home Office for age assessments […]*."

78. The Guidance states that it is subject to the BCIA 2009 section 55 statutory duty "*to safeguard and promote the welfare of children who are in the UK, including that the best interests of the child are a primary consideration at all times*" (p4) and "*must be read in conjunction with*" *Assessing age*, the JWG and the ACDS Age Assessment Guidance, the latter of which consolidated case law principles on age assessments in non-statutory guidance. The Claimants highlight the fact that the ACDS guidance includes the statement that *"[t]he appropriate adult plays an important role in supporting a child or young person through the age assessment process, and it is a legal requirement that a child or young person is offered this support"* (section I).

79. The Guidance lists age assessments as "*Primary objective 1*" (p8), safeguarding children where there are immediate welfare concerns as "*Primary objective 2*" (p,9) and general safeguarding assistance as a "*secondary objective*" which is "*subject to having spare capacity*" at the KIU (p.10). Neither Primary objective 2 nor the secondary objective would apply to or benefit those young people who have been assessed as adults under "*Primary objective 1*".

80. The section of the Guidance on age assessment is, so far as material, as follows (with numbering interpolated for ease of reference):

> "The social workers will help support the processes for assessing the ages of those seeking asylum who claim to be children, but whose claimed ages are doubted.
>
> The opinion of a social worker will be immediately obtained by KIU in the event they are minded to make a decision that:
>
> [1] • a claimant's physical appearance and demeanour very strongly suggests that they are 25 years of age or over
>
> [2] • there is reason to doubt the claimant's age, but their physical appearance and demeanour does not very strongly suggest that they are 25 years of age or over
>
> Upon receipt of the request, the social worker must immediately:

[a] • review the decision on age

[b] • provide their views in writing to KIU on why they agree or disagree with KIU's assessment – for example, that they are of a view that:

[i] o there is no doubt over the claimed age and therefore a Merton age assessment is not appropriate

[ii] o the person's claimed age is doubted, but the social worker still considers them to be a child

[iii] o that there is doubt over whether the person is an adult or a child, but their physical appearance and demeanour does not very strongly suggest that they are 25 years of age or over

[iv] o that they agree with the Home Office's assessment

[c] • undertake a short Merton compliant age assessment if either:

[i] o they are of a view that the Home Office decision to assess the claimant as age 25 or over, based on their physical appearance and demeanour, is incorrect, but they are still of a view that the claimant is potentially clearly an adult

[ii] o they are of a view that the claimant is potentially clearly an adult despite the fact that KIU did not assess that the claimant's physical appearance and demeanour to very strongly suggest that they are 25 years of age or over

A short Merton compliant age assessment must:

• only be conducted if assessed as appropriate in the professional opinion of the social worker and if in accordance with age assessment case law and the ADCS age assessment guidance

• be conducted in a manner which is in accordance with age assessment case law and the ADCS age assessment guidance

• take into account information obtained by the Home Office, whilst at the same time recognising that the decision is the responsibility of the social worker (even though legal accountability for that decision rests with the Home Office)

> • use the Kent Intake Unit initial age assessment report to set out the decision and provide evidence that it is case law compliant
>
> • ensure that in the event the person is assessed to be clearly an adult, the date of birth or age assigned to them within the report is consistent with this decision
>
> Upon receipt of the social worker's views or short Merton compliant age assessment, KIU must review its decision on age in accordance with the guidance in the assessing age guidance on Horizon or GOV.UK:
>
> • guidance on determining whether an age assessment is Merton compliant and assigning weight to the assessment, is located in the sections titled: 'Local authority age assessments' and 'Weighing up conflicting evidence of Age'
>
> • guidance on assigning weight to the views expressed by social workers on assessments made by the Home Office that a person's physical appearance and demeanour very strongly suggests that they are 25 years of age or over, is located in the section titled: 'Taking account of views expressed by a local authority'
>
> Where doubt remains over whether the claimant is an adult or a child, KIU will refer them to a local authority for a (potentially second) Merton compliant age assessment to be conducted and they will be treated as a child and their claimed age until further assessment of their age has been conducted. If a short Merton age assessment was conducted, a copy of the age assessment proforma must be sent to the local authority." (pp.8-9)

81. The "*Kent Intake Unit initial age assessment report*" form referred to in the text quoted above states at the top that it is:

> "For use in cases where it is very clear from the individual's physical appearance that they are over 18 years of age, with no compelling evidence to the contrary, and therefore a less prolonged Merton compliant age assessment is justified." (emphasis in original)

Towards the end of the report form, the section "*Decision on age*" asks whether the individual has been "*Assessed to be clearly an adult?*" (giving 'yes or 'no' tick boxes), and for the assessed age/date of birth. MA was assessed as 20 years old and HT as 21 years old. The report form includes boxes asking whether an appropriate adult was present during the age assessment, and whether an opportunity was provided for the assessed individual to check the information upon which the outcome was based.

82. *Assessing age* requires the Assessing Officer to complete form BP7 (ASL.3596), which provides the following options in section 1:

> "TREAT AS A CHILD
>
> His/her physical appearance/demeanour suggests he/she is a child but not the age claimed. A full decision on his/her age will be made when all available evidence is collected, including the opinion of the relevant local authority.
>
> PROVISIONALLY TREAT AS A CHILD
>
> His/her physical appearance/demeanour suggests he/she is 18 or over, but does not very strongly suggest that he/she is 25 years of age or over. Therefore it is appropriate for him/her to be given the benefit of the doubt pending receipt of further credible documentary evidence, a local authority Merton-compliant age assessment or a court finding.
>
> TREAT AS AN ADULT
>
> - Two officers (one of at least CIO/HEA grade) have separately determined that his/her physical appearance/demeanour very strongly suggest he/she is 25 years of age or over and no other credible evidence exists to the contrary.
>
> - There is credible and clear documentary evidence that he/she is 18 or over.
>
> - There is a "Merton-compliant" social services assessment available stating that he is 18 or over, which has been accepted by the Home Office."

Form BP7 also requires confirmation that any social services age assessment complied with *Merton* and further case law, including that:

> "The individual was offered the opportunity to have an independent responsible/appropriate adult present; Or, the opportunity to have an independent adult present was confirmed as unnecessary, as it was very clear from the claimant's physical appearance and demeanour that he/she was an adult over the age of 18 and therefore prolonger enquiry was not necessary."

83. The Guidance envisages that the assessment will be conducted while the young person is detained under immigration powers (p.14), and does not contemplate other venues.

84. The SSHD made the point that a person who is assessed to be an adult following a short form *Merton* compliant age assessment can still approach their local authority's Children's Services department with a view to that authority undertaking their own assessment of age if they believe the Secretary of State's decision as to their age to be incorrect (and, counsel told me, many do). Where doubt remains over whether the claimant is an adult or a child, they will be referred by KIU to a local authority for a (potentially second) *Merton*-compliant age assessment to be completed. They will be

treated as a child until further assessment of their age has been conducted. If a short *Merton* age assessment was conducted, a copy of the age assessment proforma must be sent to the local authority.

85. The KIU Guidance explains that "*the document will be kept under close review and will be amended as these arrangements are embedded*." Counsel for the SSHD explained that such a review is presently taking place (alongside a review of related aspects of the *Assessing age*). New versions of the updated Guidance and *Assessing age* will also take into account the judgment of the Supreme Court in *BF (Eritrea)*.

(E) LAWFULNESS OF DETENTION AND THE GUIDANCE

(1) Age assessment while in detention

86. In their written submissions, the Claimants began with the proposition that the power to detain derives from § 16(2) of Schedule 2 to the Immigration Act 1971; and that that power must be strictly and narrowly exercised, including in accordance with published policies: *Lumba* [2012] 1 AC 245, *Kambadzi v SSHD* [2011] 1 WLR 1299 at §§64, 69-72. In response to the SSHD's point that the relevant power is § 16(1), the Claimants submit that the same principles must apply.

87. The Claimants submit that it was not lawful to detain them for the purposes of an age assessment. They highlight, in particular:

i) the statement in in DSO 02/2019 that a person *"must not remain in detention pending a Merton compliant age assessment"*. The DSO is itself referred to in Assessing Age (at p62, referring to the predecessor to DSO 02/2019 which made the same statement). The DSO statement is also referred to in the JWG *("an individual who is defined as an age dispute case will **not** remain in detention pending a local authority age assessment (with the exception of individuals previously sentenced by the criminal courts as an adult)"* (p.7);

ii) the direction in DSO 02/2019 that immigration officers promptly make arrangements for the local authority to collect the age disputed child from immigration detention;

iii) the conclusion reached by the Court of Appeal in *AN and FA v Secretary of State for the Home Department* [2012] EWCA Civ 1636 that the point at which a local authority should be notified of the presence of an unaccompanied child for the purposes of taking them into local authority care is shortly after the initial welfare interview, albeit that was not an age assessment case (§§95-97);

iv) the statements in EIG § 55.9.3.1 that the threshold that must be met for individuals to enter or remain in detention following a claim to be a child "*is a high one*" and "*is only met if the benefit of doubt afforded to all individuals prior to any assessment of their age is made is then displaced*" by reason of documentary evidence, a decision that they are "*significantly over 18*" or a lawful age assessment; and

v) the statement in *Assessing age* that the policy rationale is, cogently, "*to guard against the detention of children generally, including accidental detention of*

> *someone who is believed to be an adult but subsequently found to be a child*." (p.10)

88. The Claimants point out that all of these policies form part of a system for arriving at a reliable assessment of a person's age in the immigration and enforcement context. They have been carefully formulated, having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom as required under section 55 BCIA 2009, as stated in *R (AA) (Afghanistan)* at §§47-49.

89. The SSHD responds that Schedule 2 § 16(1) confers a power to detain a person "*pending examination and pending a decision to give or refuse him leave to enter*", and the Court of Appeal in *AN & FN* recognised that:

> "immigration officers were entitled to establish whether there was a basis on which the appellants may enter the United Kingdom (see paragraph 2 of Schedule 2 of the Immigration Act 1971) and there is no dispute that they could be asked what language they spoke, their age, and whether they were accompanied. They could be detained for that purpose and because they were apparently illegal entrants and there were reasonable grounds to suspect that removal directions may be given in respect of them ..." (§ 92)

90. Further, Schedule 2 § 18 provides that where a person is detained under § 16, an immigration officer may take all such steps as may be reasonably necessary for photographing, measuring or otherwise identifying him, including taking fingerprints.

91. The SSHD points out that, whilst she seeks to process new arrivals as quickly as possible, there is no express time limit to the amount of time for which she may detain an individual pursuant to Schedule 2 § 16(1) – whether 24 hours or otherwise. This applies even in the case of a UASC, subject to the limits identified by the Court of Appeal in *AN & FA*. Nevertheless, the Secretary of State uses 24 hours as an operational benchmark for the maximum amount of time that a UASC may ordinarily remain in detention. Even in cases such as the present where a person's claim to be a child is disputed (i.e. he or she has not (yet) been accepted to be a UASC) and a referral is made to KIU social workers, the age assessment and subsequent decision as to age is still sought to be made within 24 hours of arrival at the facility.

92. The SSHD's core submission on this point is, thus, that:

> "Against this context, … consistently with [*Assessing age*], which sets out bases on which immigration officers can make "initial age assessments" …, the Secretary of State is entitled to reach an early decision as to an individual's age – including on the basis of a Merton compliant age assessment should one be available. And there is nothing to preclude the taking into account of a 'short' or reduced age assessment provided it complies with Merton principles."

93. The SSHD adds that:

i) The policies consistently provide for decisions regarding age to be made without the need for referral to local authorities for a full *Merton* assessment. EIG Chapter 55 and the *Assessing age* have consistently provided for summary assessments of age to be made by immigration officers, based on appearance and demeanour. The margin of error provided for in those policies has varied with changes to the relevant case law (and specifically with the progress through the appellate stages of *BF (Eritrea)*).

ii) There is a consistent pattern of assessments of this kind being found to be lawful; and they are routinely carried out when the subject is detained.

iii) The Supreme Court in *BF (Eritrea)* – beyond commenting (at § 62) that the "*25 years or over approach*" which was put in place following the judgment of the Court of Appeal risks being unlawful in the *Gillick* sense – goes further and leaves open the question as to whether even the "*very strongly suggests significantly over 18*" approach is in fact required by BCIA section (judgment § 59).

iv) Where short form assessments of age are not appropriate (whether summary assessment by immigration officers or short-form *Merton* assessments by KIU social workers) then the SSHD is obliged to refer the subject to a local authority for a full *Merton*-compliant assessment. It is these full *Merton* assessments that may not be carried out when the subject is detained.

v) In this respect, the SSHD's policies quite properly state that age disputed individuals (i.e. where their claim to be a child is given the benefit of the doubt) are not to be detained pending the carrying out of a (local authority) *Merton*-compliant assessment and, further, that immigration removal centres and port detention facilities are not suitable environments for (such) age assessments. This makes patent sense where what is in contemplation is a *Merton* compliant age assessment to be carried out by the relevant local authority and the fact that those whose claim to be a child is in doubt should not be detained pending that assessment (which may take several weeks to organise and carry out).

vi) However, the SSHD's policies do not preclude a decision being made (in the course of the individual being processed at a short-term detention facility) that their claim to be a child should not be given the benefit of the doubt - because either (a) immigration officials consider that they appear to be 25 years of age or over or because (b) trained social workers (located on site) consider – following a 'short' *Merton*-compliant age assessment – that they are "*very clearly*" over the age of 18 - and that assessment has been accepted by immigration officials. In such cases, the individual is no longer an age dispute case.

vii) The underlying rationale for the Guidance was the need to ensure, as far as possible, that individuals being referred to local authorities for age assessments (whether Kent CC or other local authorities) are children or likely to be children. Furthermore, it was considered that identifying adults as early as possible in the process would reduce the safeguarding risk of placing adults alongside children. The need for such a measure – given the increased caseload faced in particular by Kent CC, and therefore and in any event other local authorities, is confirmed

by Kent CC's explanation (going above and beyond the increase in the number of small boat arrivals) that the increase in the number of referrals to Kent CC "*since the adoption of the version of the assessing age policy following BF (Eritrea) in the Court of Appeal"* from 18% of arrivals (61 cases) in 2019 to 59% (178 cases) by the first half of 2021 (*per* Kent CC's Position Statement of 28 September 2021 in these proceedings, § 6(a)).

viii) The fact that the policies were otherwise drafted at a time when *Merton*-compliant assessments were routinely carried out only upon referral to and/or by local authority social workers cannot bear on the true meaning of those polices.

ix) Immigration officials are and should be entitled to rely on the outcome of a *Merton*-compliant assessment carried out by social workers under the KIU Guidance in the same way as they are able to rely on *Merton* compliant assessments carried out by social workers engaged by a local authority. There is no qualitative difference between a *Merton*-compliant age assessment carried out by social workers engaged by a local authority, and a *Merton*-compliant age assessment carried out by social workers engaged by the SSHD. Whilst they are contracted by the Home Office, they are required and expected to maintain independent professional judgment, in the same way as local authority social workers employed or contracted by local authorities are required and expected to act. *Assessing age* is not to be read as denoting a separate requirement (beyond the *Merton* compliance of the age assessment) that the assessment be carried out by a local authority.

x) The SSHD is presently updating the *Assessing age* (and Forms IS97M and BP7) in order to take into account the KIU Guidance and the possibility of reliance by immigration officers on *Merton* compliant age assessments (whether as carried out by local authority social workers or otherwise). This step will dispose of the Claimants' contention that KIU social workers are not local authority social workers and therefore cannot fall under the relevant outcome specified in the *Assessing age*. It will further dispose of the criticism that a local authority on referral (Coventry City Council, in this case) incorrectly assumes – on the basis of the documentation - that another local authority has carried out the age assessment.

94. In principle, I consider the SSHD's submission, as quoted in § 92 above (and including the important proviso of *Merton* compliance), to be correct. As recognised by, for example, the Supreme Court in *BF (Eritrea)* at §§ 54 and 56-57, it is necessary for the SSHD to decide, before the individual is transferred elsewhere (and, necessarily, while the individual remains in detention), whether they should at this initial stage be treated as an adult or a child. That requires some form of initial age assessment to be done. I see no objection in principle why the SSHD should not be entitled to enlist the assistance of social workers in that context. Further, I would be inclined to the view that detention for the purpose of a short formalised process, within the overall parameters of the duration of Schedule 2 § 16(1) detention referred to earlier, would not be unlawful provided (as the SSHD accepts) it complies with *Merton* principles. Conversely, detention – beyond the period for which an individual would otherwise need to be detained pursuant to Schedule 2 § 16(1) – for the purpose of an age

assessment that will or does not comply with applicable legal standards would in my view be unlawful.

95. The difficulty, as I perceive it, in the present cases lies in the extent to which such a short formalised process can in fact lead to an initial age assessment that complies with the existing legal standards and policies. This topic is the subject of sections (2) and (3) below.

(2) Compliance with *Merton* case law

96. The Claimants submit that the age assessments envisaged by the Guidance are inconsistent with *Merton* principles because:

i) they are carried out shortly after individuals arrive at the KIU, typically following a long and difficult journey (as in the cases of the Claimants), and the Guidance does not direct any consideration of the appropriateness of carrying out an age assessment in such circumstances: even though (as recognised in *Assessing age*) impressions about physical appearance and demeanour are even more fragile factors for determining age in relation to a newly arrived young person, and long and traumatic journeys can have an aging effect on a person's appearance and demeanour.

ii) The report form which the Guidance requires the social workers to use, referred to above, pre-empts any view that the social workers may take about the young person's physical appearance and demeanour and how that is to be factored into the assessment as a whole, by directing social workers to proceed on the basis that it is already "*very clear from the individuals' physical appearance and demeanour that they are over 18 years of age, with no compelling evidence to the contrary*."

iii) No appropriate adult is on offer to young people who are subject to KIU age assessments.

iv) No fair and proper opportunity is given to young people to know the adverse points to their age case which may weight against them and to have an opportunity to provide clarification, corrections or further information to deal with them.

97. The SSHD responds that whether an assessment is compliant with *Merton* principles does not depend on compliance with a given set of requirements, whether described as 'core safeguards' or otherwise. Ultimately, what matters is whether the individual decision as to age is rational and fair. What is required may vary from case to case. It was recognised in *B v Merton* that the level of inquiry that is appropriate cannot be generalised (§ 50, quoted earlier), and similarly, Thornton J in *AB v Kent* accepted that the "*margin of error*" required for a short-assessment "*may depend on the circumstances of the assessment*" (§ 46). As to the specific points itemised above, the SSHD submits that:

i) The purpose of the Guidance is not to establish a procedure that is comparable to a full *Merton* compliant assessment – which is necessarily carried out some time after the person's arrival in the UK. Rather it is to provide immigration

officers with an additional, but robust (i.e. social worker supported), basis on which to make an initial assessment of age. Further and in any event, the Guidance requires social workers to carry out their functions in accordance with the *Assessing age* such that they will be well aware of the risks it outlines in this respect.

ii) The Guidance does not direct social workers to assume that individuals referred to them are "*potentially clearly an adult*". In fact, they are directed to carry out a short *Merton* assessment only where "*they are of the view that the claimant is potentially clearly an adult*". Where that threshold is not met, the social worker is not entitled to carry out a short assessment at all.

iii) For a short age assessment of the kind contemplated in the Guidance to be *Merton*-compliant, an appropriate adult will not always be required, and the SSHD does not accept that there is any binding authority to that effect. The cases of *FZ* and *ZS* referred to earlier concerned full *Merton* assessments, and to the extent that they indicate that an appropriate adult should at least be offered to the individual, they cannot be taken as imposing the same requirement where social workers consider (on the basis of the Guidance) that a short assessment is appropriate. Both the 'threshold' test ("*potentially clearly an adult*") under the Guidance for the carrying out of a short assessment, and the conclusion ("*very clearly an adult*") that is to be reached for the individual to be assessed as an adult, operate to ensure that where there is any doubt in either of these respects, the individual will not be assessed to be an adult on the basis of a short assessment and instead will be referred to the local authority.

iv) The SSHD does not accept that there is any separate and independent requirement for a 'minded-to process' to be written into the Guidance. The underlying question will be whether the assessment was carried out in a way that was rational and fair. It is submitted that whether or not a failure to put adverse matters to the individual in any particular case was a material error is a matter for case-specific determination. Nothing in the Guidance precludes such a process being undertaken, and the prescribed form of report makes specific provision for the social workers to indicate whether or not such an opportunity was provided. (In the case of MA the authors ticked the box "*Yes*" and added "*Through clarification within the assessment*". In HT's case the authors simply ticked the "*Yes*" box, but HT's evidence is that no such process was carried out and the report itself sets out no details of any such process.)

98. To dispose of one point at the outset, I do not accept the Claimants' submission that the prescribed form of age assessment report pre-empts the outcome by asking the social workers to assume that it is "*very clear from the individual's physical appearance that they are over 18 years of age, with no compelling evidence to the contrary, and therefore a less prolonged Merton compliant age assessment is justified*". The form indicates that it is "*for use in cases*" where that is the situation, so it is expressed to as a pre-condition rather than an assumption.

99. The problem as I perceive it lies, rather, in the way in which the Guidance provides for short form age assessments to be done in cases where the individual is *not* so clearly over 18 as to constitute a clear or obvious case in the sense used in *B* and ensuing case law.

100. Looking at the criteria set out in the Guidance quoted in § 80 above, the first situation (which I have numbered "1" in the quotation) where the social workers may become involved is where the KIU are minded to make a decision that a claimant's physical appearance and demeanour very strongly suggest that they are 25 years of age or over.

101. The second situation where the social workers may become involved is ("2") where the KIU are minded to make a decision that *"there is reason to doubt the claimant's age, but their physical appearance and demeanour does not very strongly suggest that they are 25 years of age or over"*.

102. The following paragraph of the Guidance then requires the social workers to review that (provisional) decision and tell the KIU in writing why they agree or disagree with it. Examples are provided, including where they agree with the KIU assessment or where "*there is doubt over whether the person is an adult or a child, but their physical appearance and demeanour does not very strongly suggest that they are 25 years of age or over*". Most importantly, the Guidance goes on to require a "*short Merton compliant age assessment*" if either:

> "[c][i] they are of a view that the Home Office decision to assess the claimant as age 25 or over, based on their physical appearance and demeanour, is incorrect, but they are still of a view that the claimant is potentially clearly an adult;"
>
> or
>
> "[c][ii] they are of a view that the claimant is potentially clearly an adult despite the fact that KIU did not assess that the claimant's physical appearance and demeanour to very strongly suggest that they are 25 years of age or over."

103. Focussing to begin with on situation (2)/(c)(ii), the upshot will be a short form assessment conducted in circumstances where:

i) the KIU officer was minded to consider that the individual's physical appearance and demeanour does <u>not</u> very strongly suggest that they are 25 years of age or over, and

ii) the social workers have taken the view that the individual is only "*potentially"* clearly an adult.

(I note in passing that it is unclear how or when the social workers involved came to any such initial view in the present cases, or where that view or the reasons for it are recorded. That may be the, or a, reason why the Contested Decisions here have been withdrawn.)

104. It follows that in these circumstances, the short form assessment is embarked upon in circumstances where neither the KIU officer nor the social workers have concluded that the individual's appearance and demeanour show that he/she <u>is</u> obviously significantly more than 18, or even simply obviously more than 18. Thus a short form assessment will be done in cases which include those that are, at least at this stage, not 'clear' or

'obvious' cases in the sense referred to in *B v Merton, FZ v Croydon, K v Milton Keynes* or *Assessing age*.

105. It is possible that (as the SSHD submitted) an experienced social worker might be able to conclude that a person is clearly significantly over 18 based on physical appearance and demeanour even in circumstances where an immigration officer might not reliably be able to do so: making the 25-year threshold more apt for the immigration officer than for a social worker with extensive experience of dealing with children. That might be seen as consistent with the point made in the last paragraph quoted in § 61 above, from the *Assessing age* section on reduced local authority age assessments, about the particular expertise which local authority social workers have of working with children on a daily basis. However, the circumstances in which the Guidance provides for short form assessments are not limited to cases where the social workers can say, based on appearance or demeanour, that the individual is obviously over 18 (whether significantly or at all). Further, the unreliability of appearance/demeanour as a means of making fine judgments as to age (well recognised in the case law) would make it questionable whether a person regarded, even by an experienced social worker, as appearing to be slightly over 18 could be regarded as an obvious or clear case: especially when newly arrived after a long journey.

106. Moreover, such a case is unlikely to transform itself into a 'clear' or 'obvious' case – in that sense – during the course of the assessment. In the circumstances with which we are currently concerned, both the KIU officer and the social worker must have formed the view prior to the assessment that the individual's physical appearance and demeanour do not very strongly suggest that they are 25 or older. Their perceived appearance and demeanour are unlikely to change significantly as a result of the interview. Further, the "*Decision on age*" section of the report form itself does not ask the social worker to revisit the question of whether the individual's physical appearance and demeanour indicate that he/she is very clearly significantly over 18, nor even that his/her physical appearance and demeanour indicate that he/she is clearly over 18. Instead, the question is whether he/she has been *"[a]ssessed to be clearly an adult"*.

107. In substance, therefore, the process includes taking individuals who are not obviously over 18 based on physical appearance and demeanour, but seeking to assess whether they are clearly over 18 having regard to other factors, such as the nature and credibility of their accounts of their family history, education, journeys to the UK and life narratives generally. That is, indeed, the nature of the assessment purportedly made in relation to the present Claimants. However, such an assessment is in essence the very same type of analysis as a local authority sets out to make by conducting a 'full' *Merton*-compliant assessment: in relation to which the case law considered earlier has held it necessary for a number of safeguards to exist.

108. Against that, it may be said that the same types and levels of safeguards may not be required for an initial assessment of the kind with which we are presently concerned. I bear in mind also that the SSHD is seeking to address very difficult circumstances, with increasing numbers of arrivals, and the tension referred to in the case law between observing the welfare principle regarding children and the need to maintain effective immigration controls.

109. However – even leaving aside the point that the SSHD claims the short form assessment to be *Merton*-compliant and to have no qualitative difference from a local authority

assessment – I am unable to accept the SSHD's arguments in full. In particular, the requirements set out in the case law (and the SSHD's pre-existing policies) for an appropriate adult to be present, and for a 'minded to' (or 'provisional decision') opportunity, exist because they are necessary elements of a fair and appropriate process (containing appropriate safeguards) designed to assess a person's age in the absence of documentary records and given the fragility of reliance on appearance and demeanour save in obvious cases. In my view, those features are equally necessary in order to make a reliable assessment of age at the initial stage (and even applying a 'clearly an adult' standard) of an individual whose appearance and demeanour do not already indicate that he/she is obviously an adult. That is all the more so in circumstances where the individual in question has only in the last 24 hours reached the end of a usually long and arduous journey, which is bound to impact on his/her ability to respond cogently to questioning about details of his family history, education, journey to the UK and life narrative, at least without the assistance of an appropriate adult and a careful 'minded to' process. The risk of adverse inferences wrongly being drawn from incorrect or incomplete answers given due to fatigue and/or misunderstanding in such circumstances is obvious.

110. I also do not consider that the SSHD is assisted in this context by the statement at *AB* § 35 that there may come a point when an experienced social worker considers they have conducted sufficient inquiries to be confident that the person in front of them is either an adult or a child. Other than in clear or obvious appearance/demeanour cases, such a point can only properly be reached where the social workers' view (viz that sufficient enquiries have been made) has itself been based on a reliable process in the assessment interview so far. I do not consider that that can occur where the process has, from the outset, lacked features which are necessary in order to ensure the reliability of the views formed.

111. I do not rule out the possibility of conducting a lawful initial age assessment, in a non-obvious case – i.e. where individual's physical appearance and demeanour do not indicate that he/she is obviously over 18 – directly after the individual arrives in the UK. However, in my view it is inconsistent with the principles set out in the case law, including the need to conduct a fair and careful assessment, to seek to assess age in a non-obvious case (in the sense I have just indicated) in circumstances where an individual who has just arrived at the UK and been detained (i) does not have the support of an appropriate adult and (ii) is not given a 'minded to' opportunity.

112. The position in situation (2)/(c)(i) is in my view similar, even if arguably slightly less clear. Here, the KIU officer is minded to form the view that the claimant's physical appearance and demeanour very strongly suggests that they <u>are</u> 25 years of age or over, but the social workers (whilst considering the claimant still to be 'potentially' clearly an adult) disagree. That disagreement in my view has the result that the case can no longer necessarily be regarded as a clear one in the sense referred to in *B v Merton, FZ v Croydon, K v Milton Keynes* or *Assessing age*. As a result, the considerations set out in §§ 104-111 again apply, or (at least) they apply save in the subset of cases where the social worker does consider the individual to be obviously an adult even if not obviously over 25.

113. The SSHD makes the point that the Guidance does not mandate the absence of an appropriate adult, nor the lack of a 'minded to' process, even if both were absent in the present cases. Moreover, the Guidance requires the social workers to comply with the

applicable age assessment case law and policy guidance. However, the Guidance also makes express reference to the report form, which by the use of yes/no tick boxes would seem to direct the social workers that both are optional features of the process. Further, the 'short form' nature of the process virtually precludes any effective 'minded to' process. (By way of illustration, HT was told by the social workers that "*An appropriate adult is not present during this short age assessment interview. The interview is usually about an hour in length*".) On that basis, and to that extent, the Guidance in my view sanctions or approves a process which is not in accordance with the law.

114. Further, I consider that any prolongation of detention for the purpose of an assessment which is in practice not designed to comply with *Merton* principles (i.e. if the SSHD's general practice is not to provide for an appropriate adult or to direct social workers to provide a 'minded to' opportunity) is unlawful, even if such non-compliance is not positively mandated by the Guidance. I use the word '*if*' in the preceding sentence because (for the reasons indicated in section (E) below) I concluded that it was unfair for the Claimants at a late stage to advance evidence purporting to show a consistent practice in this regard, and it therefore seems to me that any conclusion I reach on this aspect of the matter can only be contingent.

115. For completeness, I should mention that the SSHD in oral submissions drew attention to the statements in *BF (Eritrea)* §§ 63 and 65 that:

> *"*leaving aside the issue of whether section 55 requires the Secretary of State to say anything about the application of the statutory rule, we do not consider that there is any obligation under the common law for her to have any policy at all in place to supplement what is said in the relevant statutory provisions. Those provisions lay down a clear rule that persons aged less than 18 should be treated as children, while those aged 18 or over should be treated as adults for the purposes of the legislative regime*"*
>
> and
>
> *"*The Secretary of State would have been entitled to have no policy at all as regards the application of paragraph 16(2A) of Schedule 2 to the 1971 Act, or a policy which simply directed attention to the rule in that provision*"*.

116. It is questionable, though, to what extent those statements would assist the SSHD in the present context. First, there is a policy in existence in the form of the Guidance, and the *Gillick* test must be applied in order to determine whether or not it is unlawful. Secondly, the Guidance purports to provide for a *Merton*-compliant assessment process, and it is necessary to decide whether or not that really is the case. Thirdly, even if there were no policy as to the correct approach to be taken at the SSHD's initial age assessment stage, it would not necessarily follow that the 'benefit of the doubt' approach would disappear in relation to that stage (so that, for example, an immigration officer could simply proceed based on his/her view that the individual in question looked 18 or older, taking the risk of a damages claim were his/her view later to be shown to be incorrect). In the context of local authority age assessments, the *Merton*

criteria are based on *"minimum standards of inquiry and of fairness"* (*Merton* § 36) and *"natural justice and fairness"* (*ZS* § 37). (See also Lang J's reference in *AAM v Secretary of State for the Home Department* [2012] EWHC 2567 (QB) to "*the minimum standards of fair procedure for carrying out of age assessments by local authorities, which have evolved out of child social work good practice and common law principles of fairness*" (§93)). I would be inclined to the view that those same broad principles must equally apply to an initial assessment, even if their content may differ in the light of the context. Further, the Supreme Court in *AA (Afghanistan)* held that relevant duties, including in relation to initial assessments, derived from section 55:

> "Under section 55 the Secretary of State has a direct and a vicarious responsibility. She has a direct responsibility under section 55(1) for making arrangements for a specified purpose. The purpose is to see that immigration functions are discharged in a way which has regard to the need to safeguard and promote the welfare of children ("*the welfare principle*"). She has a vicarious responsibility, by reason of section 55(3), for any failure by an immigration officer (or other person exercising the Secretary of State's functions) to have regard to the guidance given by the Secretary of State or to the welfare principle." (§ 46)
>
> "In order to safeguard and promote the welfare of children the Secretary of State has to establish proper systems for arriving at a reliable assessment of a person's age." (§ 47)
>
> "The risk of an erroneous assessment can never be entirely eliminated but it can be minimised by a careful process and there are appropriate safeguards. In addition to the process for making the initial assessment, which includes requiring the benefit of any doubt to be given to the claimant, the Secretary of State is under a continuing obligation to consider any fresh evidence." (§ 49)

I do not read the apparent reservation in the first sentence of *BF Eritrea* § 59 as seeking to overrule or disapprove the statements quoted above.

117. On that basis, both common law principles and section 55 require a fair and careful process involving appropriate safeguards (even if limited to giving the benefit of the doubt in non-obvious cases) even when making an initial assessment. The Supreme Court in *AA (Afghanistan)* held the instructions in *Assessing age* to provide for such a process. The decision in *BF (Eritrea)* held that it was not necessary to go further and require a specific age threshold in order to give effect to the 'benefit of the doubt' principle. However, that conclusion does not in my view entail the proposition that the SSHD can simply dispense with the need for a fair and careful process involving appropriate safeguards and/or to the benefit of the doubt. I mention these points for completeness, because I do not understand the SSHD to argue in the present case that she is entitled to dispense with the need for a fair and careful process involving appropriate safeguards. Rather, her case is that the Guidance provides for such a process. To the extent I have indicated above, I do not consider that the current arrangements do so.

(3) Compliance with existing policies

118. I have already addressed in section (1) above the Claimants' contention that it was unlawful *per se* to seek to conduct age assessments while they remained in detention.

119. Aside from that point, the issues arising under this heading largely reflect those considered under section (2) above, since the SSHD's pre-existing policies broadly reflect the position reached in the case law.

120. *Age assessment*, DSO 02/2019 and EIG § 55.9.3.1 provide, broadly speaking, for the SSHD to treat individuals as adults where:

i) there is credible and clear documentary evidence to that effect;

ii) the SSHD accepts a *Merton* compliant local authority age assessment;

iii) two officers of specified seniority separately assess the individual as an adult because their physical appearance and demeanour very strongly suggest that they are at least 25; or

iv) the individual has previously claimed to be an adult and other specified circumstances exist.

121. As noted earlier, these policies have been carefully calibrated in order to strike a balance between the need for immigration control and the welfare of children.

122. The Guidance can be reconciled with these policies only on the footing that the short form assessment which it envisages can be equated to a *Merton*-compliant local authority assessment. I would be inclined to accept the SSHD's point that there is no magic about the assessment being carried out by a local authority, if it otherwise had no qualitative difference from a local authority assessment. I also have seen no evidence on which to doubt the independence of the social workers whom the SSHD employs or may employ to conduct short form assessments. However, the features I have identified in §§ 104107-111 above mean that, in my view, the current form of short form assessment cannot be qualitatively equated to a *Merton*-compliant local authority assessment.

123. Further, I do not consider that the SSHD obtains assistance in this context from the section in *Age assessment* on reduced form local authority assessments, quoted in § 61 above. That section suggests that for local authority social workers with experience of working with children on a daily basis, a reduced assessment (i.e., as the quotation indicates, a statement that a full *Merton* assessment is not required) can be justified where the local authority assesses *"that it is very clear from the claimant's physical appearance and demeanour that they are over the age of 18"*. Even leaving aside any issue as to whether that stated threshold is consistent with the case law discussed earlier (as to which it is not necessary to express a view), and even assuming for present purposes that the SSHD's contracted social workers do have particular expertise gained from working with children on a daily basis, there remains the problem that the Guidance provides for short form assessments to be used in cases where the social workers have not concluded that it is "*very clear from the claimant's physical appearance and demeanour that they are over the age of 18"*: see §§ 100-107 above.

124. It follows that the Guidance is to that extent inconsistent with the pre-existing polices as currently framed; and it does not purport to override, or set out a reasoned basis for departure from, those policies (which, as noted earlier, reflect the carefully calibrated approach approved in *R (AA) Afghanistan)* as complying with the SSHD's duties under BCIA 2009 section 55).

(E) CLAIMANTS' APPLICATION TO ADMIT FURTHER EVIDENCE

125. The Claimants applied, by notice dated 6 October 2021, for permission to rely on additional evidence, namely:

    i) a report of Dr Mohammad Kahkhi on HT's identity documents, dated 23 June 2021;

    ii) a witness statement of Martin Bridger, dated 6 October 2021;

    iii) a witness statement of Edward Taylor, dated 6 October 2021;

    iv) a second witness statement of HT, dated 6 October 2021;

    v) a second witness statement of MA, dated 6 October 2021; and

    vi) a witness statement of Judith Dennis, dated 6 October 2021.

126. The orders of Mr Justice Foxton dated 11 May 2021 (granting permission to apply) directed the Defendants and Interested Party to file and serve their detailed grounds of defence within 35 days, i.e. by 15 June 2021. The order provided for any application from the Claimants to rely upon evidence in reply to be made within 21 days of the filing of the Defendants' detailed grounds.

127. The Defendants' detailed grounds were not filed in compliance with that direction, and the SSHD made four applications for extensions of time: on 14 June 2021, requesting an extension to 6 July 2021; on 6 July 2021 requesting an extension to 20 July 2021; on 20 July 2021 requesting an extension to 2 August 2021; and on 17 August 2021 requesting an extension until 31 August 2021. The SSHD's detailed grounds were filed and served on 31 August 2021, out of hours, along with an application to dismiss the claims. That was the application which Lang J dismissed on 4 October 2021. Neither the First Defendant nor the Interested Party filed detailed grounds.

128. The Claimants submit that:

    i) until the receipt of the SSHD's detailed grounds, the Claimants did not have a clear position from the SSHD on these claims, which hampered any ability to prepare for the substantive hearing;

    ii) the Claimants were unable to provide a reply until they received and considered the SSHD's detailed grounds of defence;

    iii) the draft order accompanying the SSHD's application of 17 August 2021 reflected the agreement between the parties on case management, which would require the Interested Party to file its detailed grounds and then for the Claimants

to follow with their reply evidence. However, the Interested Party never did file detailed grounds though in due course it filed a Position Note;

iv) the Defendants and Interested Party have been on notice of the Claimants' intention to seek to file reply evidence, most recently from the Claimants' Reply dated 28 September 2021, to the position statement of the Interested Party;

v) the statements from the Claimant's solicitor, Martin Bridger, and Edward Taylor of Osbornes Law, provide detailed information regarding their experiences of age assessments conducted at the KIU, in terms of whether the assessments are conducted lawfully and fairly and the impact on a significant number of putative children that both witnesses have represented. The evidence demonstrates that the experiences of MA and HT are far from anomalous but part of a pattern of putative children being unlawfully assessed and detained;

vi) the second statements from both Claimants are central to the court's assessment of the conduct of the KIU assessments and the detention of the Claimants. Mr. Bridger had previously already put forward evidence to this effect before the Court when the claims were issued; this updates the court as to the general picture on the ground. The Claimants' further statements address their experience of detention, including at the Kent Intake Unit, as the SSHD has not accepted liability for their detention at the KIU;

vii) the witness statement of Ms. Dennis speaks from the position of the Refugee Council, which has a presence at the Kent Intake Unit and is an organisation that was instrumental in policy formulation in respect of the Home Office's age dispute policies, including *Assessing age*, DSO 02/2019 (and its predecessor DSO 14/2012), and the JWG; and

viii) the report of Dr Mohammad Kahkhi confirms that the identify documents produced by HT in support of his age are genuine. The documents have been considered by the First Defendant in the course of their decision to accept HT's age and maintain Children Act 1989 services. The report also goes to the question of whether SSHD's KIU assessment came to a reliable decision on HT's age: and this is relevant because the Second Defendant has continued to maintain the KIU age assessment.

In light of the SSHD's subsequent decision to accept HT's age, the Claimants indicated that they no longer relied on Dr Kahkhi's report.

129. I have concluded that it would not be appropriate to grant permission for this evidence to be filed, apart from the second witness statements of each of the Claimants. Insofar as the evidence expands on the Claimants' account of their experiences of detention and the age assessment process, it is in substance not reply evidence but evidence which in principle could have formed part of their initial evidence. However, I accept the Claimants' points that their cases needed to be issued on an urgent basis, and also that relevant documents (including detention records and the report of HT's age assessment) were not disclosed until later in the process: it appears that the latter document was not disclosed until the permission stage, and the detention records only in response to a subject access request. As to the other evidence, in part it makes submissions and exhibits the relevant policies, but is not strictly necessary for either purpose. Otherwise,

the additional evidence from Mr Bridger, Mr Taylor and Ms Dennis addresses the wider impact of the Guidance and its effect on numerous other persons in similar positions to the Claimants. That is in evidence which, insofar as it might be relevant, would have needed to be put forward at the outset or, at least, at an earlier stage in the proceedings. Its service on or about 6 October, about three weeks before the substantial judicial review hearing, did not give the SSHD an adequate or fair opportunity to respond to it. In these circumstances it would not be just to admit this evidence.

(F) CONCLUSIONS

130. For the reasons set out above, I have concluded that the Guidance, and the age assessments carried out in relation to the Claimants, were not lawful in the particular respects I have identified; and that if and insofar as the Claimants' detention was lengthened for the purpose of carrying out those assessments, it was unlawful. I shall hear further from counsel as to the appropriate form of relief.

131. I am very grateful to both parties' counsel for their helpful written and oral submissions.