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Case No: CO/10061/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25 October 2011

Before

HH Judge Anthony Thornton QC
(Sitting as a Deputy Judge of the High Court)

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Between

	AS (by his litigation friend the Official Solicitor)	**Claimant**
	and	
	London Borough of Croydon	**Defendant**

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Christopher Buttler (instructed by **Steel & Shamash**) for the **Claimant**
Parishil Patel (instructed by **Croydon Legal Services**) for the **Defendant**

This decision was, by consent, determined on the basis of written submissions following the parties' agreement as to the claimant's date of birth.

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JUDGMENT

HH Judge Anthony Thornton QC:

A. Introduction

1. The claimant, a minor, brings this application for judicial review by the official solicitor who has been appointed his litigation friend. These proceedings seek an order quashing age assessments of the defendant and a declaration as to his age and date of birth. The principal proceedings were compromised by an agreed order that was sanctioned by the court that is dated 22 March 2011. That order left over three issues for determination. These are whether the court should quash the defendant's age assessments, whether the declaration of the claimant's date of birth is an order in rem and is therefore conclusive evidence of his age that it is binding for all purposes and on everyone unless and until it is set aside and as to the appropriate costs order that should be made. These three issues were, by consent, left over for my determination that would be made without a hearing and based on written submissions which the parties through their respective counsel have since exchanged. It is necessary, to resolve these three issues, to set out the factual background and the law in a little detail.

B. The background to the proceedings

(1) The claimant's background

2. The claimant was born in a village in Nangahar Province, Afghanistan and is of Pashtun origin. His native language is Pashtu and his religion is Muslim. On his account, which has not been

challenged in these proceedings, he is the second of seven siblings and attended regular school in his village from about the age of six or seven. The family were subjected to adversity of various kinds at the hands of the Taliban or the Hisb-I-Islami that included the kidnapping of the claimant's uncle and, subsequently, of his father. That second kidnapping was regarded by the claimant's surviving family as placing the claimant at particular risk as being the next in line and the oldest able-bodied member of the family and arrangements were made for him to leave Afghanistan for his own safety. He was placed on a commercial flight from Kabul to an unknown destination in Europe and, from that port of arrival, was smuggled into the United Kingdom on a lorry following a journey in the back of several successive lorries. He arrived in the United Kingdom on about 28April 2009 and immediately claimed asylum. He has since been granted, as is normal for an unaccompanied minor, leave to remain for an initial period of five years.

3. The claimant was placed in foster care and the Home Office referred him for an age assessment to the defendant. This assessment was summarised in a document dated 9 June 2009 which concluded that the claimant was then aged 15 with a date of birth of 18 March 1994. The claimant had claimed, and continued to claim, that his date of birth was 18 March 1996, a claim which he has always stated to have been based on what his mother told him when he was about to leave Afghanistan. The claimant, having been put in touch with his present solicitors by his foster carer, challenged the defendant's assessment in proceedings lodged in the Administrative Court on 8 September 2009. This led the defendant to undertake two further assessments, or reviews of the first assessment, which were summarised in documents dated 16 November 2009 and 11 February 2010.

4. These proceedings were prompted by the claimant being assessed as having a date of birth two years greater than his claimed age, so that he was considered at the time the proceedings were started as being fifteen years seven months whereas his claimed age was thirteen years seven months. The result of that assessment was that the claimant had been placed by the defendant in a Year 11 school placement, suitable for the age group 15 – 16 whereas it was claimed on his behalf that he should have been placed in a Year 9 school placement. The decision to challenge his assessed age was made because this was of particular importance to him because it would determine, as for any unaccompanied child granted leave to remain following an asylum application, the year group in any school that he attended, the accommodation and support that he would receive from the defendant until he reached the age of 18 and beyond and decisions as to his immigration status and the length of time that that status would remain before it is reviewed.

(2) The necessity for conducting age assessments

5. Age assessments are necessary for those who enter the United Kingdom without having obtained prior permission and who claim asylum or a right to remain and who also claim to be children, that is to be under the age of eighteen, without being able to establish a date of birth which supports such a claim. Such an assessment is necessary since education, accommodation, support and immigration benefits that a person resident in England is entitled to claim or receive are age dependent and, in particular, are more favourable for a child than for an adult. It is therefore necessary for an entrant who claims to be a child to establish his or her age since it is a condition precedent to obtaining

these benefits or for advancing a claim for them that the claimant has proved that he or she is a child at the time of the application.

6. A summary of the most significant of these benefits that are dependent on the claimant being a child is as follows:

(1) Section 23(3)(a) of the Children Act 1989 ("the CA") provides that it shall be the duty of a local authority looking after a child to safeguard and promote that child's welfare and to promote that child's educational achievement. Section 7 of the Education Act 1996 requires that local authority to ensure that he is educated effectively;

(2) Section 17 of the CA imposes a general duty upon a local authority to promote the welfare of a child within its area who is in need and section 20 requires it to provide accommodation for that child where there is no person having parental responsibility;

(3) The support provided to an adult asylum seeker, including accommodation and essential living needs, is provided under section 4 and Part 6 of the Immigration and Asylum Act 1999. Such support is "often … less than adequate"[1]. A child is entitled to the more extensive provision of accommodation and support required by the CA;

(4) A child in the care of a local authority is entitled to be "advised and befriended" and to be considered for "assistance" between the ages of 18 and 21 by virtue of section 24 of the CA and to be considered for further benefits if pursuing a planned educational course between the ages of 21 and 24 by virtue of the Children (Leaving Care) Act 2000;

(5) When the Secretary of State exercises any immigration power in relation to a child, that power must be exercised having regard to the need to promote and safeguard that child's welfare by virtue of section 55 of the Borders, Citizen and Immigration Act 2009; and

(6) The Secretary of State will not detain a child save in exceptional circumstances, and then only overnight, and will not remove a failed child asylum seeker for three years until that child reaches the age of 17½ years whichever is the sooner unless there are adequate arrangements to receive and look after that child in that child's country of origin on that child's return.

(3) The age assessment process

7. Challenges to age assessments have been a frequent occurrence since the influx of large numbers of child refugees from Afghanistan claiming asylum from the trauma and tragedies that have beset that country since the mid-2000s. This influx of child asylum seekers has placed particular strains on the defendant since it is the Local Authority within whose boundary is located the part of the UK Border Agency that processes such asylum claims. As a result, many of the unaccompanied minors claiming asylum have, in recent years, been referred to the defendant for their ages to be assessed. A number of other local authorities in the Greater London Area, particularly the London Boroughs of

[1] Macdonald's Immigration Law & Practice, 8th Edition (2011), paragraph [13.99].

Hillingdon, Lambeth, Lewisham and Merton, and others in various other parts of England[2] have been particularly busy in undertaking age assessments for, and providing statutory facilities to, child asylum and leave to remain applicants.

8. It is a matter of considerable difficulty to assess the age of a minor who speaks little or no English, who has few if any papers in his or her possession whose authenticity is accepted and who has had a traumatic, disturbed and interrupted childhood. There are no clear-cut methods of assessment and, indeed, The Royal College of Paediatrics and Child Health issued a Policy Statement in November 1999 which included these important statements:

> *"In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15 – 18, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as five years either side … Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical, family and social history.*
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> *We accept the need for some form of age assessment in some circumstances, but there is no single reliable method for making precise estimates. The most appropriate approach is to use a holistic evaluation, incorporating narrative accounts, physical assessment of puberty and growth, and cognitive and behavioural and emotional assessments. Such assessments will provide the most useful information on which to plan appropriate management."*

Such assessments are usually undertaken by social workers who have had training and experience in the assessment of an unaccompanied child who has recently arrived in England as an applicant for asylum or for leave to remain.

C. Law relating to age assessments

(1) Context of local authority age assessments

9. Many of the age assessments that are undertaken by a local authority are for the purpose of determining whether it has a duty to provide accommodation and other services required by the CA. The local authority becomes involved because the child whose age and status as a child is in doubt will have arrived in this country without authenticated and reliable documentation providing proof of age. That person's entitlement to asylum or to entry or leave to remain in the United Kingdom will depend on his or her age which must be determined. Moreover, that person, who will be vulnerable and without support, will need and will be entitled to support, shelter and education. Since local authority social workers have much more experience than others in undertaking age assessments, it rapidly became the

[2] Kent County Council, Manchester City Council and Hertfordshire County Council are three whose age assessments have been challenged in Administrative Court judicial review proceedings reported on BAILLI.

practice for immigration officers to refer the child or claimed child for a local authority age assessment as a prelude to determinations under the CA and other Acts of the support, accommodation and educational facilities that that person should receive from the local authority. Immigration officials will also invariably accept and rely on the same age assessment in making age-related decisions about the child's asylum, immigration and detention status.[3]

(2) Basis of challenge

10. The nature and purpose of a local authority age assessment undertaken under the Children Act 1989 where a local authority had concluded that the applicants were not children, that is were eighteen or over, and were not in consequence entitled to CA support has now been the subject of a decision of the Supreme Court in **A v London Borough of Croydon** [2009] 1 WLR 2557. This case is of ground-breaking significance in relation to age assessments and to the means whereby such assessments may be challenged. The leading judgment was delivered by Lady Hale and, given its importance to the issues that I must determine, it is worth setting out much of her judgment:

> "*So much depends upon how one frames the question. Put simply, when disputes arise about the age of some-one who is asking a local children's services authority to provide him with accommodation under section 20(1) of the Children Act 1989, who decides whether he is a child or not? Section 20(1) reads as follows:*
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> > *"(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –*
> > *(a) there being no person who has parental responsibility for him;*
> > *(b) his being lost or having been abandoned; or*
> > *(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."*
> > *(d) By section 105(1) of the Act, a "'child' means . . . a person under the age of eighteen".*
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> *2. The appellants, supported by the Children's Commissioner for England, say that, in cases of dispute, the court must decide whether a person is a child on the balance of probabilities. The respondent local authorities, supported by the Home Secretary, say that the authority must decide the matter, subject only to judicial review on the usual principles of fairness and rationality.*
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> *3. No doubt there have always been foundlings, abandoned or runaway children whose age was not immediately apparent to the authorities. But with many of these it will at least have been apparent that they were children. And sooner or later it will usually have been possible to establish their exact age by discovering their identity and obtaining a birth certificate. The problem of determining age has come to prominence with the recent increase in migration and particularly in unaccompanied young people coming to this country, some of them to claim asylum for their own benefit but some of them also having been trafficked here for the benefit of others. Although the focus of debate has been upon unaccompanied asylum seeking children, we must not lose sight of the other young people for whom the issue may also be important.*
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> *4. The importance comes from two directions. If a young person is a child, and otherwise meets the qualifying criteria, he must be provided with accommodation and maintenance under sections 20(1) and 23(1) of the 1989 Act. This brings with it a wider range of services than other forms of housing and benefit provision. These include the services for young people who leave*

[3] See further paragraph 14 below.

social services accommodation which were described in ***R (M) v Hammersmith and Fulham London Borough Council*** *[2008] UKHL 14, [2008] 1 WLR 535, paras. 20 – 24. While once upon a time young people may have resisted the quasi-parental services provided for children in need, many now recognise that they bring distinct advantages over the housing and welfare benefits available to "home" claimants (as in* ***R (M) v Hammersmith and Fulham London Borough Council****, above, and* ***R (G) v Lambeth London Borough Council*** *[2009] UKHL 26, [2009] 1 WLR 1299) and the National Asylum Support Service ("NASS") support available to asylum seekers, as in the cases before us.*

5. The Home Secretary also adopts different policies in relation to asylum seekers who are under eighteen. Legally, these may not be relevant to the issue which we have to determine, and in practice they are much more susceptible to change than is primary legislation such as the 1989 Act. But they are an important part of the factual background. Not only are unaccompanied asylum seeking children looked after by the local children's services authorities rather than by NASS while their claims are decided. Currently, if a claim is rejected when the child is under the age of seventeen and a half, the Home Secretary will not remove him for three years or until he reaches seventeen and a half, whichever is the earlier, unless there are adequate arrangements to look after him in his country of origin. Also, such children will not be detained under the Home Secretary's immigration powers, save in exceptional circumstances and then normally only overnight.

6. When a young person who says that he is a child arrives in this country or makes a claim for asylum, immigration officers make a preliminary determination based upon his physical appearance and demeanour. In a borderline case, the policy is to give him the benefit of the doubt and treat him as a child. Under the Secretary of State's 2007 Policy on Age Dispute cases, if his appearance or demeanour "very strongly" suggests that he is aged eighteen or over, the officer will dispute the age unless there is credible documentary or other evidence to show the age claimed. And if his appearance or demeanour "very strongly" suggest that he is "significantly" over eighteen then he will be treated as an adult. In the middle, age disputed, category, it is the policy to refer the case for assessment by the local social services authority and to accept that assessment if it is considered to have been properly carried out (in accordance with the procedural guidance given by Stanley Burnton J in ***R (B) v Merton London Borough Council*** *[2003] EWHC 1689 (Admin), [2003] 4 All ER 280).*

7. This was the policy adopted by the Home Secretary in August 2007. But in February 2007 the Home Office published a consultation paper, ***Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children****; and in January 2008, it published its conclusions and recommendations in* ***Better Outcomes: The Way Forward, Improving the Care of Unaccompanied Asylum Seeking Children****. Key Reform Number 4 was to put in place better procedures to assess age, in order to ensure that children and adults are not accommodated together. Both the Children's Commissioner and the Refugee Council have been critical of the present procedures, based partly upon their own experience and observations and partly upon research conducted by Professor Heaven Crawley for the Immigration Law Practitioners' Association.*

8. As Ms Nathalie Lieven QC for the Home Secretary points out, the issue before us is not whether the policy and procedures for assessing age in these cases could be improved, but whether the law requires that, in cases which cannot be resolved through those processes, the court shall make the final determination. However, the one thing which these proposals do show is that the assessment of age can be and is carried out quite separately from the assessment of need and the other criteria for accommodation under section 20.

...

13. ... The issues have been slightly reformulated for the purpose of the appeals before us, but the first two are closely inter-related:

> *(i) whether, as a matter of statutory construction, the duty imposed by section 20(1) is owed only to a person who appears to the local authority to be a child, so that the authority's decision can only be challenged on "Wednesbury" principles, or whether it is*

owed to any person who is in fact a child, so that the court may determine the issue on the balance of probabilities;

(ii) whether the issue "child or not" is a question of "precedent" or "jurisdictional" fact to be decided by a court on the balance of probabilities; and

(iii) whether section 20(1) gives rise to a "civil right" for the purpose of article 6(1) of the European Convention on Human Rights and if so whether the determination of age by social workers subject to judicial review on "Wednesbury" principles is sufficient to comply with the requirement that the matter be determined by a fair hearing before an independent and impartial tribunal.

The construction of section 20(1)

14. The argument on construction, advanced by Mr John Howell QC for A, is quite straightforward. The words of section 20(1) themselves distinguish between the statement of objective fact – "any child in need within their area" – and the descriptive judgment – "who appears to them to require accommodation as a result of" the three listed circumstances – which is clearly left to the local authority. The definition of "child" in section 105(1), which applies throughout the 1989 Act, is unqualified: "a person under the age of eighteen" – not "a person who appears to the local authority to be under the age of eighteen" or "a person whom the local authority or any other person making the initial decision reasonably believes to be under the age of eighteen". Reaching the conclusion that this is what it means in section 20(1) requires, as the Court of Appeal accepted, words to be read into section 20 which are not there.

15. This argument is bolstered by two others. One is derived from the legislative history. Section 20(1) of the 1989 Act is the successor to section 2 of the Child Care Act 1980 which consolidated (without amendment) what had been section 1 of the Children Act 1948 with later legislation. The 1948 Act was an important component of the establishment of the post-war welfare state, bringing together all the disparate powers and duties of the state to look after children who had no families or whose families were unable to look after them properly, and infusing those new duties with a commitment to the welfare of the individual child which had been so lacking before (see ***Report of the Care of Children Committee****, Chairman: Miss Myra Curtis, 1946, Cmd 6922).*

16. Section 1(1) of the 1948 Act, reproduced in section 2(1) of the 1980 Act, began "Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of seventeen . . .". Section 20(1) of the 1989 Act made various changes. These included raising the age of eligibility to cater for all children, not just those who appeared to be under seventeen. But they also included the change in wording, which no longer limited the duty to those who appeared to the local authority to be under the relevant age. There is nothing in the ***Review of Child Care Law: Report to Ministers of an Interdepartmental Working Party*** *(DHSS, 1985) or in the white paper,* ***The Law on Child Care and Family Services*** *(1987, Cm 62), which preceded the 1989 Act to cast light on the reasons for the change in wording. But when Parliamentary draftsmen make changes such as this they are normally presumed to have done so deliberately and not by mistake.*

17. The second point is that the same definition of "child" applies throughout the 1989 Act. The 1989 Act contains a variety of powers and duties relating to children, some of them voluntary, but many of them coercive as against the child or his parents. Most of the coercive powers, to make orders relating to the care and upbringing of children, depend upon court orders. Clearly, in those cases it is for the court to determine any disputes about the age of the child. But there are some coercive powers which are operated in the first instance by other authorities, subject to bringing the case to court within a relatively short time.

18. One of these is the power of the police, in section 46, "where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm" to remove a child to suitable accommodation and keep him there. This power is not infrequently used to pick up young people who are camping out in railway stations with no apparent place to go. If someone who was not a child was removed in this way, he could apply immediately for habeas

corpus and the court would have to inquire into whether or not he was indeed a child. The section does not refer to a "person whom the constable has reasonable cause to believe to be a child" and where liberty is at stake the court would be slow to read it in that way.

19. A similar case is perhaps more telling for our purposes because it is contained in section 25, which, like section 20, appears in Part III of the 1989 Act, entitled "Local Authority Support for Children and Families". Section 25, and the regulations made under it, place limits on the circumstances in which "a child who is being looked after by a local authority" may be placed in "accommodation provided for the purpose of restricting liberty". A child who is being "looked after" by a local authority means any child who is subject to a care order or a child who is provided with accommodation by a local authority under their social services functions, which include section 20(1) (see 1989 Act, section 22(1)). The regulations allow a child to be placed in secure accommodation – that is, to be locked up – for up to 72 hours without the authority of a court (Children (Secure Accommodation) Regulations 1991, SI 1991/1505, reg. 10(1)). Again, if a person who was not a child was locked up in this way, he could apply for habeas corpus and the court would have to enquire into whether or not he was a child. There is nothing to suggest that the power can be exercised in relation to someone whom the authority reasonably believes to be a child.

...

26. These days, Parliamentary draftsmen are more alive to this kind of debate. The 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments. What would be a reasonable standard of health or development for this particular child? How likely is he to achieve it? What services might bring that standard up to a reasonable level? What amounts to a significant impairment of health or development? How likely is that? What services might avoid it? Questions like this are sometimes decided by the courts in the course of care or other proceedings under the Act. Courts are quite used to deciding them upon the evidence for the purpose of deciding what order, if any, to make. But where the issue is not, what order should the court make, but what service should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "Wednesbury reasonableness" there are no clear cut right or wrong answers.

27. But the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision makers.

28. ... But in this case it appears to me that Parliament has done just that. In section 20(1) a clear distinction is drawn between the question whether there is a "child in need within their area" and the question whether it appears to the local authority that the child requires accommodation for one of the listed reasons. In section 17(10) a clear distinction is drawn between whether the person is a "child" and whether that child is to be "taken to be" in need within the meaning of the Act. "Taken to be" imports an element of judgment, even an element of deeming in the case of a disabled child, which Parliament may well have intended to be left to the local authority rather than the courts.

*29. I reach those conclusions on the wording of the 1989 Act and without recourse to the additional argument, advanced by Mr Timothy Straker QC for M, that "child" is a question of jurisdictional or precedent fact of which the ultimate arbiters are the courts rather than the public authorities involved. This doctrine does, as Ward LJ pointed out in the Court of Appeal [2008] EWCA Civ. 1445, [2009] PTSR 1011, para. 19, have "an ancient and respectable pedigree". Historically, like the remedy of certiorari itself, it was applied to inferior courts and other judicial or quasi-judicial bodies with limited jurisdiction. Thus a tithe commissioner could not give himself jurisdiction over land which had previously been discharged from tithe (**Bunbury v Fuller** (1853) 9 Ex 111), [1853] EngR 768; and a rent tribunal could not give itself*

jurisdiction over an unfurnished letting ***(R v Fulham, Hammersmith and Kensington Rent Tribunal, Ex p Zerek*** *[1951] 2 KB 1). Although of course such a body would have to inquire into the facts in order to decide whether or not to take the case, if it got the decision wrong, it could not give itself a jurisdiction which it did not have.*

30. In ***R v Secretary of State for the Home Department, Ex p Khawaja*** *[1984] AC 74, the same principle was applied to the power of the Home Office to remove an "illegal entrant". The existence of the power of removal depended upon that fact. It was not enough that an immigration officer had reasonable grounds for believing the person to be an illegal entrant. As Lord Scarman put it, ". . . where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied" (p 110).*

31. This doctrine is not of recent origin or limited to powers relating to the liberty of the subject. But of course it still requires us to decide which questions are to be regarded as setting the limits to the jurisdiction of the public authority and which questions simply relate to the exercise of that jurisdiction. This too must be a question of statutory construction, although ***Wade and Forsyth on Administrative Law*** *suggest that "As a general rule, limiting conditions stated in objective terms will be treated as jurisdictional" (9th ed (2004), p 257). It was for this reason that Ward LJ rejected the argument, for he regarded the threshold question in section 20 as the composite one of whether the person was a "child in need". This was not a limiting condition stated in wholly objective terms so as to satisfy the Wade and Forsyth test (para. 25).*

32. However, as already explained, the Act does draw a distinction between a "child" and a "child in need" and even does so in terms which suggest that they are two different kinds of question. The word "child" is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case). With a few limited extensions, it defines the outer boundaries of the jurisdiction of both courts and local authorities under the 1989 Act. This is an Act for and about children. If ever there were a jurisdictional fact, it might be thought, this is it.

33. ... the public authority, whether the children's services authority or the UK Border Agency, has to make its own determination in the first instance and it is only if this remains disputed that the court may have to intervene. But the better the quality of the initial decision-making, the less likely it is that the court will come to any different decision upon the evidence. If the other members of the Court agree with my approach to the determination of age, it does not mean that all the other judgments involved in the decision whether or not to provide services to children or to other client groups must be subject to determination by the courts. They remain governed by conventional principles."

11. Thus, the Supreme Court decided that an age assessment by a local authority under the CA to determine whether a claimant is a child is a decision of objective fact which, in disputed cases, can only be determined by the court. This is because the age assessment decision is one that determines the jurisdiction of the local authority to act under the CA and, therefore, of the court to direct a local authority to exercise its powers under that Act. In consequence, when there is a challenge to a local authority's decision relating to a claimant's entitlement to the benefits of that Act, the court must first determine whether or not that particular individual is a "child" for the purposes of the CA. That decision determines the status of that individual as being a child for the purpose of a consideration of that child's welfare and educational rights under that Act and is, in consequence, a decision which must be determined first and before there is any consideration of the child's substantive claims to the benefits of that Act.

12. The decision is a factual one that must be determined on evidence and on the balance of probabilities. Notwithstanding that evidential requirement, the claim is still one that arises in, and must be determined as part of, a judicial review of a local authority's exercise or non-exercise of its statutory

duties. However, the procedure that must be adopted in order to make that determination is not one that has, except on rare occasions, previously been adopted in judicial review since judicial review is normally concerned with a review of the reasonableness, rationality and legality of the decision-making process of other bodies and is one that does not ordinarily involve the resolution of factual disputes. When a jurisdictional dispute has previously had to be resolved, it has usually been determined as an issue of law on the basis of the evidence adduced in affidavits and witness statements that have been filed in the proceedings.

13. However, the jurisdictional challenge under the CA involves the age of an individual and his or her status as a child under that Act. The determination of a dispute as to whether a claimant is or is not a child will directly affect his or her civil rights and fairness requires the evidence that is adduced in relation to that issue to be subjected to a full adversarial procedure. In other words, the claimant must be permitted a trial in which the case as to his or her age can be fully and fairly advanced and in which the local authority's case can be fully tested. The usual judicial review procedure has therefore had to be adapted so as to permit disclosure and cross-examination to the extent permitted by the Civil Procedure Rules for any civil trial involving a determination of an individual's civil rights.

(3) Age assessment in Immigration cases

14. Blake J in **NA v London Borough of Croydon**[4], in a pre-**A** local authority age assessment challenge in a Children Act case, stated this:

> *"44. Other agencies of the state are unlikely to have the same experience of age assessment as social workers who are trained in the necessary techniques and have substantial experience in applying them. As a matter of practice, therefore, although not of law, a social worker assessment of the precise age of a child may well prove to be the decisive assessment on which other agencies of the state and private persons do, and are entitled to, rely in performing their duties. I observe that the following aspects of social life at least are engaged:*
>
> > *(1) Home Office practice: the Home Office under a protocol will apply the age assessment of the local authority for immigration purposes, that include vulnerability to detention and removal, as well as the issue of an identity document that it is the duty of the Home Office to provide whether under the Refugee Convention or otherwise, that will be taken as evidence of identity by other people in the United Kingdom in the absence of rectification or change of circumstance."*
>
> *(4) The assessment process*

15. The age assessments that are carried out by the defendant and other local authorities on asylum-seeking children are carried out using interview techniques undertaken by social workers who have been fully trained and who have usually acquired considerable experience in undertaking and evaluating these interviews. The questions are preceded by initial impressions that are made from visual presentation which are then tested by considering the manner in which the child interacts with

[4] [2009] EWHC 2357 (Admin).

the assessment. The questions cover a wide range of relevant issues including the social history and family composition of the child, his or her childhood before arrival in the United Kingdom, including the activities and roles that the child was involved in, the education already undertaken and the confidence that the child has in undertaking personal care and health and medical history. The answers are evaluated against any internal consistencies or inconsistencies, all available independent documentary materials and the assessors' experience and knowledge of age-appropriate responses.

16. Given that the assessment is being undertaken of a vulnerable and often traumatised child who often will have limited command of English and who has ended up in a friendless environment with no family support, and given that the assessment can have profound consequences for the child's future in terms of social and educational support, immigration status and all the other consequences flowing from the age and date of birth of the individual, it is essential that it is conducted in an objective, fair and sensitive manner in circumstances in which the interviewee is not placed under conditions of undue pressure or stress, is accompanied by a friend and is able to provide answers and comments to any potentially adverse findings that may be made by the assessors.

17. The relevant minimum standards to be expected of such assessment interviews were originally set out by Stanley Burnton J in **B v Merton LBC**[5]. The relevant standards are now commonly called "Merton compliant" standards and they are used as the starting point for any assessment of the fairness and reliability of a disputed local authority age assessment.

18. Beyond the very useful general guidance given in the **Merton** case, there is no formalised Central Government Guidance as to how local authorities should conduct age assessments. The UK Border Agency has issued a *Process Guidance* document for assessing age for the rather different purposes of section 55 of the Border, Citizenship and Immigration Act 2009, and another document for "*Processing Asylum Applications from a Child and for Conducting an Asylum Interview*". There is also a draft All Wales Protocol for *Safeguarding and Promoting the Welfare of Unaccompanied Asylum Seeking and Refugee Children*. The London Boroughs of Croydon and Hillingdon have produced their own *Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers*. This useful short document has attached to it an 8-page form divided into sections with detailed suggestions of the topics which an age assessment interview might address and spaces for recording the answers. The Guidelines suggest that practitioners should ask open, non-leading questions. The last page of the form is constructed to enable the interviewers to record their conclusions and reasons and provides for this form to be handed to the person assessed.

19. The minimum standards that are to be expected of an age assessment are not, therefore, clearly defined and the same standards are not universally adopted or applied. The current appropriate standards for application in age assessment cases were considered by the Court of Appeal in **FZ v Croydon LBC**[6]**.** Taking that decision and the **Merton** decision, which was approved in **FZ**, together, the relevant standards applicable to the defendant's assessments that were undertaken in this case may be summarised as follows:

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5 [2003] EWHC 1689 (Admin).

6 [2011] EWCA Civ 59, CA.

(1) An appropriate adult should accompany the child and should be present during the interview.

(2) A full and careful explanation should be given to the child of the nature of the assessment and its purpose and of the role of the assessing social worker. A careful check should be made to ensure that there is full understanding between the child and the interpreter and that the interpreter is skilled in both the language and dialect of the child and has experience of interpreting in the kind of situation created by the age assessment process.

(3) The interview should be conducted in a structured, fair, non-adverserial, non-stressful and informal manner and an informal but full note of the questions and answers should be taken by one of those present.

(4) The assessors should pay attention to the level of tiredness, trauma, bewilderment and anxiety of the child and his or her ethnicity, culture and customs should be a key focus throughout the assessment.

(5) The assessors must take a history from the child. All relevant factors should be taken into account including, but not limited to, physical appearance and behaviour. The objective is to undertake a holistic assessment.

(6) Each interview should, if practicable, be conducted by two assessors who should have received appropriate training and experience for conducting age assessment interviews on young and vulnerable children.

(7) The assessors should establish as much rapport as possible with the child (a process known as "joining"), should ask open-ended non-leading questions using, as appropriate, circular questioning methods. The assessors should be mindful of the child having been "coached" and that the child may have had to answer questions on relevant topics several times previously thereby unwittingly blurring the possible accuracy of the answers. Giving the child the benefit of the doubt should always be the standard practice.

(8) The assessors should give the child a fair and proper opportunity to answer any potentially adverse findings at a stage when an adverse decision is no more than provisional to so as to enable him or her to provide any appropriate explanation or additional facts which might counter or modify such findings.

(9) The conclusions reached by the assessors should be explained with reasons which, although they may be brief, should explain the basis of the assessment and any significant adverse credibility or factual finding.

(10) The reasons should be internally consistent and should not exhibit any obvious error or inadequate explanation for not accepting any apparently credible and consistent answers of the child.

(5) Challenging the local authority's assessment

20. An age assessment is not itself susceptible to judicial review. It is not itself a decision of the local authority but is the evidence that a local authority will use in determining whether it has jurisdiction to exercise its statutory powers and duties provided for by the CA in the welfare, accommodation and education fields. Furthermore, the UK Border Agency will usually refer any age assessment that it needs for its performance of its duties with regard to children of uncertain age to the relevant local authority and will, as a general rule, accept and adopt the age assessment that is provided by that local authority. If a child disputes the age assessment, it will do so by challenging a relevant decision which has been made on the basis of that decision or, as in this case, seek a declaration as to his or her date of birth.

21. This approach to a local authority age assessment challenge arises from the Supreme Court's decision in **A** that I have already referred to. A summary of the required approach is as follows:

> (1) When a local authority or the UK Border Agency is required to exercise its statutory powers or duties in connection with a child in the educational, welfare, accommodation or immigration fields in circumstances where such powers or duties may only be exercised where the person in question is a child, that is someone under eighteen years old, the statutory body must first decide, as a separate and precedent matter, whether that person is a child by deciding what his or her date of birth and age is as a matter of fact.
>
> (2) If that decision is challenged, the challenge must be brought by way of judicial review as part of a challenge to the statutory body for failing to undertake its statutory duties fully and correctly. The challenge as to the date of birth of the child must be determined separately and as a precedent fact.
>
> (3) The factual challenge, although one of pure fact, must be determined as part of the judicial review. Indeed, it is possible to seek, by way of judicial review, a declaration of the date of birth of the child as the sole matter to be determined.
>
> (4) The disputed age assessment is, unless shown to have been obtained in an unfair manner or following non-compliant procedures, the best evidence of the child's age which, unless challenged with reliable evidence, be accepted as determining the age of the child.
>
> (5) The Administrative Court's decision must be reached on the balance of probabilities and will, in the case of disputed evidence, be decided following appropriate discovery and cross-examination. The assessment or assessments being challenged are evidence which should be taken into account with all other evidence and age assessments adduced at the hearing.

22. Because the appropriate procedure arises in judicial review proceedings, permission must first be obtained. The appropriate test to be applied was set out by the Court of Appeal in **FZ v London Borough of Croydon**[7] as follows:

> *"9. There is an analogy between the court withdrawing a factual case or matter from the jury in defamation proceedings and the court refusing permission to bring judicial review proceedings upon a factual issue as to the claimant's age. We consider that at the permission*

[7] [2011] EWCA Civ 59, CA at paragraph 9.

stage in an age assessment case the court should ask whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so, permission should be refused. If not, permission should normally be granted, subject to other discretionary factors, such as delay. We decline to attach a quantitative adjective to the threshold which needs to be achieved here for permission to be given."

23. It follows that an age assessment dispute will come to the court, as in this case, following a local authority age assessment undertaken by social workers as a prelude to that authority's determination of whether or not the child in question is eligible for consideration for the various benefits and support that are age dependent. Once the case reaches the court, it is necessary for the court to determine the precise age of the claimant, it is not sufficient for it merely to determine that the claimant is currently a child. This is clear from Lady Hale's and Lord Hope's judgments in **A**[8] and Holman J's judgment in **F**[9]. As Holman J stated:

"Patently, as it seems to me, once the court is required to engage on determination of whether the person was on the relevant date a child, it must and should go on to make its own determination (binding as between the claimant and the local authority in point) as to actual age or date of birth. Further, that seems to me plainly to follow from the language of both Lady Hale and Lord Hope."

24. An age assessment dispute will arise when the child or the child's carers dispute the local authority's age assessment on the grounds that its assessors have erroneously assessed the child as being significantly older than the child actually is. In practice therefore, when an age dispute arises, the claimant will need to challenge the validity or accuracy of the local authority's age assessment. That challenge will usually, but not invariably, involve a challenge to the reliability of the local authority's age assessment. The claimant will seek to show that this process was non-compliant with the Merton guidelines or other accepted assessment standards so that the local authority's assessment of the child's assessed age is not to be relied upon or is one to which little weight should be attached. The claimant will then adduce all relevant available evidence, including expert age assessment evidence, and invite the court to reach its own conclusion by accepting the evidence adduced and placing little or no reliance on the local authority's age assessment that is being challenged. In infrequent cases, the challenge will seek to show that the age assessment has reached a factually erroneous conclusion even though there is no discernible error in the assessment process.

(6) The Administrative Court and the Upper Tribunal Immigration and Asylum Chamber

25. Following the **A** decision, age assessment disputes have been determined as matters of precedent fact in the Administrative Court. However, although such cases may continue to be started in the Administrative Court, if permission is granted, the case will now usually be transferred to the Upper Tribunal Immigration and Asylum Chamber for determination pursuant to section 31A(3) of the

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8 Ibid. at paragraphs 33 (Lady Hale) and 54 (Lord Hope).

8 [2009] EWHC 3542 (Admin) at paragraphs 9 – 10.

Senior Courts Act 1981[10] and article 11(c)(ii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order[11]. The test for determining whether to order a transfer is whether "it appears to the High Court to be just and convenient" to make the transfer. A transfer is normally appropriate because the Administrative Court does not habitually decide questions of fact on contested evidence and the Upper Tribunal is already experienced in age assessment of children from abroad in the context of disputed asylum claims[12]. The law and procedure that will be applied in the Upper Tribunal is the same as that applicable to age assessment cases that has been applied hitherto in the Administrative Court.

(7) Relevant procedure

26. The relevant procedure to be adopted was identified by Holman J in **F v London Borough of Lewisham[13].** It is worth setting out the passage in Holman J's judgment where he addresses this question:

> ***"The conduct of the hearings***
>
> *27. I turn, next, to a number of issues that have been raised as to the conduct of hearings. On behalf of the claimants it has been strongly submitted that if local authorities wish to rely upon the assessments already made by their social workers, then the social workers concerned must be available for cross-examination if required. On behalf of the local authorities it has been submitted that the assessments should, as it were, stand or fall within their own four corners and in written form, and that it is not appropriate to require social workers to attend. On that issue, I am firmly in agreement with counsel for the claimants. It is entirely a matter for local authorities how they wish to defend these cases, but if they wish to defend them by reliance upon assessments (which include matters of fact as well as opinion) of their social workers, then they simply must, in the ordinary way, produce those social workers for cross-examination if required. So as to reflect that, and the involvement generally of witnesses other than the claimant, I order, in all these cases, that "any witnesses must attend the final hearing if, not less than 4 weeks before the date fixed for final hearing, the other party gives written notice that the witness is required for cross-examination."*
>
> *28. Next, there has been much lively debate about the role and involvement of the claimants themselves in these hearings. The point has been made that in every case the claimant claims to be a child, or at any rate until recently to have been a child. In every case, the claimant claims to have had a difficult and often tragic life history and in general terms to be a vulnerable person.*
>
> *29. In all the cases it has been submitted on behalf of the claimants that special measures should accordingly be available for their participation at any hearing, for instance, that hearings should take place in chambers, or even that they should give any evidence even more informally and privately in a judge's private room. Additionally or alternatively, it has been submitted that video links should be made available for the giving of their evidence. More profoundly, Mr Christopher Buttler [counsel for F] in particular, on behalf of his two clients submitted that the claimants simply should not be involved in the forensic process at all, unless at any rate they positively wish to be.*

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9 Inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007.

10 SI 2010 No 2655.

12 See FZ v London Borough of Croydon [2011] EWCA Civ 59 at paragraph 31 where the relevant practice is set out by the Court of Appeal. The judgment pointed out that, a transfer ("cannot at present be made" – i.e. as at the date of the judgment of 1 February 2011) if the claim called into question a decision made under the Immigration Acts or the British Nationality Act 1981 (paragraph 32).

13 [2009] EWHC 3542 (Admin).

30. I have to say as a general observation that it does not seem to me that these fact- finding hearings can ordinarily take place without some involvement of the claimant and engagement of the claimant with the court. In most, if not all, cases there is some issue as to the credibility of the claimant and the account that he or she gives as to his or her earlier history. But I do accept that the extent to which, and manner in which, a claimant participates or gives evidence is quintessentially a matter for the judge at the hearing itself. Accordingly, in all these cases, I make a general direction in the following terms: "Conduct of the hearing: Any question whether the claimant shall give oral evidence or be cross-examined; and any question whether all or any part of the hearing will take place in chambers, or whether the judge will see the claimant in his private room, will be a matter for the sole discretion of the judge at the final hearing. If the claimant wishes to give by video link any evidence that he may be required to give, then his solicitors must so inform the court in good time and make necessary arrangements for the hearing to take place in a court room equipped with video link facilities and for reserving a video suite. The question whether the claimant actually gives evidence by video link will be decided by the judge at the final hearing."

31. Having thus made plain that all those matters are ultimately for the discretion of the judge at final hearing, it seems to me extremely important that ordinarily, at any rate, there should be a provision to ensure that the claimant is readily available if the judge considers that he should in some way give evidence. So in most of these cases I have also made an order as follows: "Without prejudice to his right to be in the courtroom throughout the hearing if he so wishes [which is axiomatic], the claimant must attend the vicinity of the court at the final hearing."

32. Mr Christopher Buttler, in particular, has strongly submitted that that is an order that I have no power to make, or if I do have such a power, that I should not make. I do not propose to engage in the detailed argument on that topic in this already over long judgment. At all events, I have accepted that there is something about the particular facts of the Lewisham case, in which the claimant claims to have been trafficked and very abusively treated, which may raise in acute form the question whether any involvement or questioning of the claimant at all would itself amount to a further abuse.

33. So in that particular case, I have been persuaded and have agreed (without opposition by Mr McGuire on behalf of Lewisham) to provide for a staged final hearing by a direction that: "The dates for the final hearing shall be fixed as follows: in each case before the same judge: (i) for one day in one week for consideration of [the above matters and issues as to the conduct of the hearing] and in particular whether the claimant personally must attend to give oral evidence or otherwise be seen by the judge; and (ii) for two days in the following week (with not less than five days intervening between the two dates fixed under (i) and (ii))." The purpose of that is so that the judge indentified for the final hearing itself can hear the fact specific submissions and make a ruling about whether or not the attendance of the claimant is required, and there will then be a reasonable and orderly period to prepare the claimant for attendance."

(8) Expert evidence

27. In a disputed case, there may be as many as six experts. The local authority assessors, who will invariably be social workers who are working in the field of child care, are experts within the meaning of the expert evidence Rule provided for in CPR 35.2(1). Their assessment involves an expression of opinion, albeit that that assessment will contain, and will rely heavily on, facts obtained during the assessment. Since there are often two assessments conducted by two different pairs of assessors, all of whom may be presented for cross-examination on their assessment reports, a local authority defendant may wish to tender four expert social workers for cross-examination. However, the need for all assessing social workers to give oral evidence will rarely arise and the court, or the parties by agreement, will usually limit or exclude oral cross-examination of these assessors. In addition, the

claimant and/or the local authority may have instructed an independent paediatrician, child psychologist, child psychotherapist or other related expert or experts. The provisions of CPR 35 also apply to such evidence so that leave will be required to call such evidence and the duties of independence, objectivity and candour owed to the court are all applicable. The Administrative Court or the Upper Tribunal should limit the number of expert witnesses that are permitted and should follow the practice provided for in the CPR 35, including the proposed changes in practice to be introduced by amendment in 2012, relating to defining the issues to be addressed, the number and disciplines of experts to be permitted and the use, wherever possible, of jointly instructed experts. However, experts' meetings and a joint statement prepared by experts of similar disciplines will not usually be ordered. The appropriate directions for expert evidence should be sought from the Administrative Court (or the Upper Tribunal in a case referred to or started in that tribunal) and issued by the court or tribunal prior to the hearing of the substantive dispute.

(9) Dr Birch's expert evidence

28. There is a serious shortage of qualified and experienced paediatric experts who are willing and available to give evidence for children in age assessment cases. This problem no doubt arises because of the very great difficulties associated with making a clear-cut age assessment, the lack of appropriate statistics and data bases, the poor levels of remuneration and the existing excessive professional demands made on the time of those with the necessary qualifications to undertake the work. The defendant's first expert in this case was Dr Diana Birch who is a well-known and highly qualified child and adolescent paediatrician and medical psychotherapist with over forty years experience of working with children and adolescents. Dr Birch has assessed and reported on approximately 300 cases and her reports have been used widely in many hearings involving age assessment cases and disputes. Dr Birch is also the director of Youth Support, a charity specialising in the assessment of single mothers, families, young people and children. Dr Birch undertook two separate assessments on reports about the claimant in March 2010 and March 2011.

29. Dr Birch has, in two separate cases, been the subject of considerable criticism in relation to her assessment methods. In **A v London Borough of Croydon**[14]**,** a pre-**A** case where the court applied a **Wednesbury** unreasonable test to determine that the local authority's assessment should not be quashed**,** Collins J did not accept or adopt Dr Birch's age assessments carried out on the two claimants in that judicial review whose cases were heard together. In **R v London Borough of Croydon**[15]**,** Kenneth Parker J also did not accept or adopt Dr Birch's age assessment having heard both Dr Birch and the local authority expert, Dr Stern, cross-examined at length. In many of the disputes in which Dr Birch has advised, the local authority has instructed Dr Stern although he was not instructed in this case. Dr Stern is a distinguished emeritus consultant paediatrician at St Thomas' Hospital, London. It is clear that in many of these cases, Dr Birch's conclusions as to age have been in conflict with those of Dr Stern and that these divergent views have arisen as a result of a conflict between them as to the use of the statistically-based analytical methods that Dr Birch has adopted in order to combine and merge

14 [2009] EWHC 939 (Admin), Collins J.
15 [2011] EWHC 1473 (Admin), Kenneth Parker J.

the various statistical strands that she has collected and then draw an overall conclusion as to age from the mass of data and assessments that she has obtained during the assessment process.

30. I can summarise the conclusions of Collins J and Kenneth Parker J's as to Dr Birch and Dr Stern's opinion evidence shortly since their findings coincide, albeit that Kenneth Parker J's reasoning based on the more extensive evidence that he heard are significantly more detailed than those of Collins J. In summary:

(1) Dr Birch undertook a series of psychometric tests and psycho-social development assessments and also a series of physical measurements on each child. Each test, assessment or measurement produced a separate "parameter". An average age calculation, separately weighted for each parameter was undertaken for each such parameter, each average age was weighted and an overall age calculation was then obtained by obtaining an overall average age. The resulting average age figure was taken to be the age of the child whose age she was assessing.

(2) Dr Stern considered that most of the clinically and psychologically derived estimations of age were in reality measurements of maturity with an unknown and, in many cases, unknowable timeframe of individual development. The tests themselves needed to be, but had not been, validated in a blinded manner on populations of known age. Dr Stern also had a series of criticisms of the individual parameter measurements relating to the various methodologies and statistical methods used to obtain an age for each parameter.

(3) Overall, the evidence of Dr Birch was rejected because of its considerable reliance on statistical methods that were shown to be based on serious errors and, hence, unreliable. It was concluded that, in each of the individual cases considered by Collins J and Kenneth Parker J, Dr Birch had had an erroneous confidence in the accuracy and reliability of her statistical methods which fatally undermined her age assessment evidence in those cases.

31. However, it has to be noted that both judgments acknowledged Dr Birch's very great experience of working with children and in assessing their ages that she has accumulated over many years that would bear upon her credibility as an assessor of the age of an individual child. In cases where the challenge related to an age assessment following a Merton compliant assessment, a successful challenge to that assessment can only rarely be possible. However, where the challenged local authority assessment has to be treated with caution or even to be disregarded due to the nature and extent of the errors and of the non-compliance with Merton compliant procedures, the assessment evidence of Dr Birch will be given appropriate weight so long as it was not dependent on the faulty statistical methods described and found to be unreliable in Collins J's and Kenneth Parker J's respective judgments in **A** and **R.**

D. These proceedings

(1) Procedural History

32. This case had a somewhat tortuous procedural history. It was started on 8 September 2009 when the claim form was filed in the Administrative Court. As initially started, the claim was confined to seeking a quashing order of the assessment made by the defendant's social workers dated 9 June

2009, albeit that that order was sought in the context of an assessment which would ensure that the claimant would receive educational and other CA services for two years less than he would do if his age was as he alleged it to be.

33. On 12 February 2010, the claimant issued an application seeking interim relief, namely a suitable educational placement based on his claimed age pending the final determination of his age by the Administrative Court. On 17 February 2010, Collins J directed that the defendant should disclose the claimant's full records and the reasons for the assessment dated 9 June 2009 and a later assessment dated 16 November 2009. He also directed that the claim form should be amended to take account of these further details, the defendant should then serve an acknowledgement of service and the permission application should then be considered. These steps should all be completed within 14 days of the service of the amended claim form. The claimant served an addendum note dated 23 February 2010 which grounded the claim for judicial review on an order for an appropriate educational placement. This was followed by the service of detailed grounds dated 18 March 2010 which set out in detail the claimant's criticisms of the allegedly non-compliant assessments carried out by the defendant. The defendant then served detailed grounds of defence dated 12 April 2010 which included allegations of misconduct and intimation that a wasted costs order would be sought from the claimant's solicitors.

34. On 30 April 2010, a series of directions were made including one requiring the defendant to provide appropriate discovery. The official solicitor was appointed as the claimant's litigation friend by an order dated 12 May 2010. King J, on 16 November 2010, granted the claimant permission to apply for judicial review and ordered the misconduct allegations to be struck out and the defendant's detailed grounds and evidence to be served by 7 December 2010. Discovery from the claimant was not provided as directed and a third order for discovery was made on 16 December 2010 requiring this to be provided by 20 December 2010. This order was also not complied with and a fourth order was made on 10 January for discovery to be provided by 21 January 2011. Finally, a fifth order for discovery was made on 25 January 2011 for discovery to be provided by 28 January 2011. The hearing of the judicial review application was listed for 22 March 2011 but, just before the hearing started, the parties reached agreement as to how the judicial review should be determined which was submitted in the form of a draft order to the court for the Court to approve. This proposed settlement agreement was accompanied by a joint signed statement and the proposed order was approved by the Court on 23 March 2011.

(2) Expert evidence in this case

35. The court was provided with the expert evidence of eight experts who between them produced seven age assessments. A summary of this evidence is as follows:

(1) The defendant's expert evidence: The first assessment report dated 9 June 2009 was brief and was undertaken by two social workers, Ms Okonkwer and Mr James. This report concluded that the claimant's date of birth was 18 March 1994, making the claimant some two years older than his claimed date of birth of 18 March 1996. The second assessment report, dated 16 November 2009, was undertaken by two different social workers, Ms Henry and Ms Betiku. This also concluded that the claimant's date of birth was 18 March 1994.

(2) The claimant then served an assessment report from Dr Birch which was based on an assessment undertaken on 17 March 2010. Dr Birch concluded that the claimant's date of birth was 15 years 2 months, giving him a date of birth of about January 1995.

(3) The defendant then served an addendum report dated 28 October 2010 prepared by Ms Gordon, the defendant's Team Leader of Unaccompanied Minors. This assessment was undertaken by a social worker who had not personally assessed the claimant and was, in effect, her personal commentary on the report of Dr Birch. Her opinion was that the two earlier assessment reports had correctly assessed the claimant's date of birth as being 18 March 1994.

(4) The claimant then served a second assessment report from Mr Ambat and Ms Palmer based on an assessment undertaken on 17 December 2010. This report assessed the claimant's date of birth as being 18 March 1995.

(5) Finally, the claimant served a second assessment report from Dr Birch based on a review assessment undertaken on 2 March 2011. This report considered that the claimant's date of birth was about 16 years old which would give his date of birth as being approximately March 1995.

(3) The terms of the proposed settlement

36. The judicial review involved two issues: firstly whether the two local authority assessments could be relied on notwithstanding the large number of complaints as to their non-compliance with accepted assessment standards and, secondly, what was the claimant's date of birth in the light of the evidence of the eight experts of whom five were to give oral evidence and the factual evidence of the claimant and three other witnesses. The first issue involved a series of alleged instances of non-compliance including there being (1) significant differences between the findings set out in the assessments and the contemporaneous notes made during the two interviews; (2) a finding unsupported by any evidence that the claimant had failed to produce his national ID card rather than, as the claimant contended, being unable to produce it because he had never been provided with one; (3) several failures to provide reasons for reaching factual conclusions which were at variance with the claimant's evidence and were not supported by any further evidence; and (4) a failure to permit the claimant to comment on the various proposed findings of fact adverse to his case. There were, or there appeared to be, several other significant procedural failings which taken together or separately were, if proved, capable of giving rise to significant prejudice to the claimant.

37. The three reports served on behalf of the claimant were detailed and clearly and fully reasoned. Dr Birch had provided her conclusions without relying on the statistical methods which had been invalidated in the two previous cases that I have already referred to. Furthermore, her conclusions and those of Mr Ambat and Mr Palmer were similar. All three reports were detailed, well reasoned and mutually supportive of each other.

(4) The need for court approval

38. When a judge is presented with a proposed settlement of an age assessment dispute, he or she must independently consider the terms of the settlement and satisfy himself or herself that the proposed settlement is one which can and should be approved. The need for that independent consideration arises

because the child claimant is a protected party and CPR 21.10 provides that no settlement, compromise or payment shall be valid without the approval of the court. This need is confirmed in the recent, unreported decision in the Administrative Court of **FN v London Borough of Croydon**[16] in which Mr Neil Garnham QC held that approval was required and that, in the event of a compromise being reached, the parties should submit an agreed statement of reasons and for the court to consider so as to enable it to conclude whether the agreed proposed settlement fairly represents the relative merits of the parties' respective cases as disclosed by the documents submitted to the court for the trial. I both accept that statement of practice as being correct and adopt it for this case.

(5) Reasons for approval of proposed settlement

39. The settlement sought a declaration that the two local authority assessments of the defendants should be quashed and that the claimant's date of birth was 18 March 1995. The supporting statement included the following:

> *"3. Upon further consideration, the parties agree with the conclusion of the independent social workers (Ken Ambat and Rose Palmer), which is set out in their report dated 8 January 2011, that the claimant's estimated age (at the time of assessment) was 15 (now16). Their conclusion is based inter alia on reasoning that:*
>
> > *a. Primary school generally starts at the age of 7 in Afghanistan. The claimant attended primary school for four years, left Afghanistan three years after finishing school and took two months to travel to this country. Given that he arrived in this country in 2009, the above matters would, in all reasonable likelihood, indicate that he was born in 1995.*
> >
> > *b. That is consistent with the likely reason for his mother sending him to Europe, namely the onset of puberty giving rise to a threat from the Taliban under the Layeha honour code.*
> >
> > *c. That is consistent with the claimant's account that he first fasted for Ramadan in September 2008, the trigger to fasting being linked to the onset of puberty.*
> >
> > *d. That is not inconsistent with his physical appearance and level of independence.*
>
> *4. The claimant was told by his mother that he was born on 18 March 1996. The parties agree that the year is more likely to be 1995 (for the reasons set out in paragraph 3) but have no reason to question the date.*

40. On reading the papers, I concluded that this statement provided cogent reasons for accepting the proposed settlement. In addition, I concluded:

(1) The alleged errors in the two local authority assessments were likely to be proved and these errors showed that the assessments were not Merton compliant since the errors were serious both individually and taken in the round. The third local authority assessment report was

[16] 16 March 2011.

not based on a separate assessment and it amounted to no more than a series of assertions and subjective beliefs to the effect that the first two assessment reports were correct and Dr Birch's first assessment was incorrect.

(2) Of the many apparent ways in which the assessments had been undertaken in a Merton non-compliant manner, the following stood out:

(i) The assessment interviews were not conducted with an appropriate adult present and the claimant was unaccompanied during the interviews;

(ii) No full explanation of the purpose of each interview was provided to the claimant and no check was apparently made to establish that he fully understood each question that was asked;

(iii) Inadequate notes were taken of the interviews and the necessary safeguards relating to the minimisation of the claimant's levels of tiredness, bewilderment and anxiety were not observed;

(iv) The assessors did not appear to join with the claimant or ask open-ended, non leading, circular questions[17];

(v) No, or insufficient reasons were given for disbelieving the claimant's core answers relating to his history;

(vi) The reasons that were given were internally inconsistent.

(3) Dr Birch's report did not appear to suffer from any of the statistical defects of her reports in **A** and **R**, were assessments that were made by an expert of renowned authority and experience in the field of the age assessment of children and reached a conclusion almost identical to that of Mr Ambat and Mr Palmer.

(4) The assessment of Mr Ambat and Mr Palmer appeared to have complied faithfully with the established guidelines, was well reasoned and was undertaken of two assessors with the necessary expertise and experience.

(5) The assessed age arrived at independently of each other of Dr Birch on the one hand and Mr Ambat and Mr Palmer on the other were almost identical and all three reports of these experts appeared to be reliable, Merton compliant and well-reasoned.

(6) The defendant's assessments were sufficiently flawed that they should not be relied on at all or only to a very limited extent. The expert evidence that remained comprised the two reports of Dr Birch and the one joint report of Mr Ambat and Mr Palmer. Their respective conclusions coincided even thought they had been independently arrived at.

(7) In consequence, the claimant's assessed age, as reflected in these three reliable assessments, should be adopted and approved by the Court.

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[17] See paragraph 19(7) above.

E. Declaration and judgment "in rem" or "in personam"

(1) Introduction

41. The claimant contended that my decision should be enshrined in a quashing order and a declaration as follows:

(1) The defendant's decisions as to the claimant's age should be quashed;

(2) It should be declared that the claimant was born on 18 March 1995 and that he was, both at the date of the issue of the proceedings and at the date of the announcement of the judgment in open court a child, namely a person who had not attained his eighteenth birthday, as defined by the CA.

42. The judicial review is of the claimant's decisions that the claimant should be treated for all purposes under the CA as if his date of birth was 18 March 1994. It is therefore appropriate to quash those decisions since they were findings of jurisdictional fact taken under the CA. The defendant questioned the need and desirability of quashing these age assessments since the claimant would be granted a declaration in any event and the age assessments were not decisions of the defendant. However, the age assessments were reached as the first part of the decision-making process required by the CA and they concerned the threshold or jurisdictional issue of whether, on the date of the claimant's original application to the defendant under that Act, he was eligible for assistance under that Act which only permitted assistance to be given to a child. The relevant assessments that had been made for that purpose were inherently flawed and, since they should not be referred to for any purpose, it is appropriate to quash them.

43. A declaration is appropriate since that is a remedy provided for in judicial review in a case where it is necessary to affirm and confirm a factual finding. This is confirmed by CPR 54.3(1) which states that the judicial review procedure may be used where the claimant is seeking a declaration. This mirrors section 31(2) of the Senior Courts Act 1981 which provides that a declaration may be made when the High Court considers that, having regard to:

"*(a) the nature in respect of which relief may be granted by mandatory, prohibiting and quashing orders;*

(b) the nature of the persons and bodies against whom relief may be granted by such orders; and

(c) all the circumstances of the case,

It would be just and convenient for the declaration to be made …."

(2) Declaration

44. It is clearly both just and convenient for a declaration of age to be made. There has been a finding of jurisdictional fact and all three matters that I must have regard to in section 31(2)(a) – (c) are present in this case. It follows that both the quashing order and the declaration sought should be granted.

F. Should the declaration state that the declaration is "in rem"?

(1) *When is a judgment "in rem"?*

45. A judgment in rem has been defined as follows:

> *"A judgment in rem is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for the purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as declared, it precludes all persons from saying that the status of a thing or person adjudicated upon was not such as declared by the adjudication...".*[18]

46. Judgments, or decrees, in rem have a long pedigree. They are appropriately made in cases[19] where there has been a determination as to status so that, after pronouncement of the judgment, no-one may question the existence of that state, irrespective of whether or not that person was a party to the earlier decision unless and until the judgment is set aside on such grounds as fraud or changes of status. The status may be an incident of personal status or of the "status" of property. An example of property status capable of giving rise to a judgment in rem is as to whether a stretch of road is a highway that is repairable at the expense of the inhabitants at large[20]. The type of case which has been characterised as one involving status or changes of status traditionally involved such personal matters as decrees of judicial separation or dissolution[21] or nullity of marriage. However, status has never been judicially defined nor confined to any specific category of case and a "status" determination has been recognised in a long series of cases to include situations beyond the purely personal or the marital state.

47. A helpful explanation of the concept of status in relation to judgments in rem in relation to individuals such is to be found in the speech of Viscount Dunedin in **Salvesen or Von Lorang v Administrator of Austrian Property**[22], a case in which the lower courts had held that a foreign decree of nullity was not a judgment in rem:

> *"The other point on which I want to say a few words is the question of what is a judgment in rem. All are agreed that a judgment of divorce is a judgment in rem, ... neither marriage nor the status of marriage is, in the strict sense of the word, a "res", as that word is used when we speak of a judgment in rem. A res is a tangible thing within the jurisdiction of the Court such as a ship or other chattel. A metaphysical idea, which is what the status of marriage is, is not strictly a res but it, to borrow a phrase, savours of a res and has all along been treated as such. Now the learned judges make this distinction. They say that in an action of divorce you have to do with a res, to wit, the status of marriage, but that in an action of nullity there is no status of marriage to be dealt with, and therefore no res. No it seems to me that celibacy is just as much a status as marriage. I notice that in the Oxford dictionary the word "status" is defined (inter alia) as "The legal standing or position of a person ... condition in respec , e.g., of liberty or servitude, marriage or celibacy, infancy or majority."*

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18 See Jowitt's Dictionary of English Law (3rd Edition, 2010) cited with approval in the opinion of Lord Mance in Pattni v Ali [2006] UKPC 51; [2007] 2 W.L.R. 102 at paragraph 21.

19 Other types of case in which such judgments may be pronounced include a judgment that determines ownership or other interest in real property, the sale of property in satisfaction of a claim against that property and a judgment by way of administration in bankruptcy or on death (see e.g. Dicey, Morris & Collins, The Conflict of Laws, 14th edition, 2006).

20 Wakefield Corporation v Cooke [1904] AC 31, HL.

21 Callaghan v Andrew-Hanson, [1992] 1 All ER, Fam D, Sir Stephen Brown P at page 56 at 63f: "the unimpeachable character of a decree absolute".

22 [1927] AC 641, HL at 663.

Another example of status is that of being an illegal immigrant, see **Khera v Secretary of State for the Home Department**[23]**.** In that case, involving a determination by the court of a jurisdictional fact that the claimant was an illegal immigrant, Lord Bridge stated:

> *"A person seeking leave to enter requires a decision in his favour which the immigration officer alone is empowered to give. The established resident who entered with express permission enjoys an existing status which, so far as the express language of the statute goes, the immigration officer has no power whatsoever to deprive him."*[24]

48. Since the decision in **Wakefield Corporation v Cooke**, if not earlier, a court has approached the question of whether a particular judgment is a judgment in rem as one of statutory construction. In that case, the House of Lords construed the Wakefield Corporation Act 1887 and concluded that the earlier determination by magistrates that a particular street ("Sludge Lane") was "repairable at the expense of inhabitants at large" was a judgment in rem.

49. The statute in issue in **Wakefield** was found to give the court jurisdiction to make an in rem determination because the primary determination that the court had to make was as to the status of the street in question. That determination was a substantive one and not "merely a *medium concludendi"*[25]. That decision is to be contrasted with the decision in **The Queen v Hutchins**[26] where the relevant statute gave the Magistrates' Court the jurisdiction to decide whether a sum of money was due from frontagers to a particular street. That determination was not in rem since the issued to be determined was as to whether or not a sum of money was due, any conclusion as to whether the street was maintainable at public expense was incidental to that question.

50. In the personal field, declarations in rem are made as to parentage, legitimacy legitimation, adoption and the validity of marriage by virtue of sections 55 – 60 of the Family Law Act 1986. These statutory provisions provide expressly, or are construed as providing, that the relevant judgment that they provide for is one in rem. However, the statute in question may be taken to impliedly provide that a relevant judgment it provides for is one in rem and such an implication can certainly arise if the subject-matter of the statute is one falling within the extended concept of status. In this case, the relevant concept that is alleged to arise is that of being "a child" and the relevant statute is the CA.

(2) The necessary ingredients of a judgment in rem

51. The appropriate starting point for determining the necessary ingredients of a judgment in rem is the decision of Hickinbottom J in **PM v Hertfordshire County Council**[27]**.** In that case, the claimant on arrival in the United Kingdom from Afghanistan claimed to be 14 years of age. The Council's Children's Asylum and Refugee Team formally assessed him as being in the range 16 – 19 years and he was given a date of birth of 15 November 1991, making him just 17. In his asylum interview, the claimant continued to assert that he was 14. A date of birth of 15 November 1994 was consequently recorded, but not accepted, by the UKBA. The claimant's asylum claim was refused on 24 July 2009,

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23 [1984] 1 AC 74, HL.
24 Ibid., at page 122D – E.
25 Per Lord Robertson at page 38.
26 (1881) 6 QBD 300.
27 [2010] EWHC 2056 (Admn).

the decision letter indicating that the Secretary of State considered that the claimant had fabricated his age in order to strengthen his claim for asylum and that his date of birth was 15 November 1989 which would make him an adult. The decision therefore accepted the local authority's assessment even though the local authority had found that he was 17. However, and of considerable significance, the Secretary of State found that the claimant was not credible and his core account was disbelieved. He was, therefore, not eligible for asylum and that his removal would be appropriate. His appeal to the FTT (Immigration) was refused, the Immigration Judge finding that he was not eligible for asylum and that he was over 18. The defendant then refused the claimant section 20 accommodation because he was an adult and when this was challenged in judicial review proceedings, contended that the Immigration Judge had made a finding in rem that the claimant was over 18 and also that, in any event, he was in fact over 18.

52. Hickinbottom J concluded that the finding or decision of the FTT was not one that was in rem but that, nonetheless, on the evidence available to it, the local authority was entitled to conclude that the appellant was an adult. In his judgment, Hickinbottom J set out the essential ingredients of a judgment in rem in contrast to the more limited judgment in personam in these terms:

> *"38. Where a judgment of a court of competent jurisdiction is made on a particular cause of action, to promote finality and prevent wasteful duplication, the law provides that, in any future proceedings, that judgment is conclusive in relation to that cause of action. The law prevents re-litigation of that cause of action by imposing an estoppel, which "merely means that a party is not allowed in certain circumstances to prove in litigation facts and matters which, if proved, would assist him as [a party] in an action" (Thoday v Thoday [1964] P 181 at page 187, per Diplock J). This doctrine applies to tribunals as well as courts (see, e.g., Munir v Jang Publications Ltd [1989] ICR 1 at [16]). It also extends, not just to whole causes of action ("cause of action estoppel"), but to any decision on an issue forming a necessary ingredient in that cause of action ("issue estoppel"); although issue estoppel may give way where there is further relevant material in relation to that issue is available (Phipson, paragraph 43-15). "Cause of action estoppels" and "issue estoppels" are collectively sometimes referred to as "estoppels per rem judicatam" or "estoppels by judgment", recognising that they derive from the judgment of a court or tribunal. However, marking the well-recognised difference between a judgment and the facts upon which a judgment is based, the doctrine does not apply to mere incidental findings of fact made en route to that judgment.*
>
> *39. Generally judgments to which this doctrine applies are in personam, i.e. they only affect and bind those privy to the original proceedings. Indeed, subject to exceptions not relevant to this claim, a judgment in personam is not even evidence of the truth of either the determination or any findings leading to that determination for or against strangers to the original proceedings (The Duchess of Kingston's Case (1776) 2 Sm LC 13th Edition 644; and Hollington v F Hewthorn & Co Ltd [1943] KB 587).*
>
> *40. However, just as a statute conferring jurisdiction may exclude estoppels by judgment (see examples cited in Phipson, paragraph 43-24), in certain circumstances, jurisdiction is granted to a court or tribunal to enable it to make a judgment that is binding, not only on the parties to the proceedings, but the whole world, i.e. a judgment in rem. As, Phipson indicates (in paragraph 43-10) estoppels to which judgments in personam and judgments in rem give rise are similar in kind. In respect of a judgment in rem, they provide conclusive evidence of the matters determined, for or against all persons.*
>
> *41. Other than the High Court (which has inherent powers, specifically retained by the section 19(2) of the Senior Courts Act 1981), every court and tribunal is dependent upon Parliament for its powers, including its jurisdiction to make judgments in rem. For obvious reasons, the grant of such jurisdiction is rare: it is a potentially severe jurisdiction, binding everyone without those who might be interested in the issue necessarily being given notice or an opportunity to be heard. Other than in exceptional cases, it would have the clear hallmark of*

injustice. However, there are exceptional cases in respect of which Parliament recognises that certainty of the status of a person or property overrides the natural repugnance of the law to considering rights and obligations without giving all those affected the chance to be heard. In those cases, it may grant a court or tribunal jurisdiction specifically to make determination of, and effectively declare, that status against all persons in all future proceedings.

42. Given the overriding nature of judgments in rem, the circumstances in which a court or tribunal is given such a power or jurisdiction are understandably rare, and usually granted in the clearest of terms. For example, by Part 3 of the Family Law Act 1986 specified courts are given clear specific jurisdiction to make declarations in relation to marriage, divorce, parentage, legitimacy, legitimation and adoption; but even that is reinforced, in section 58(2), by an express provision that any declaration made under that part is "binding on Her Majesty and all other persons.

51. As I have already suggested, the distinction drawn in the Wakefield case and recognised ever since - between cases in which the court or tribunal has jurisdiction to adjudicate upon a matter such that its determination will bind the world, and those where it has jurisdiction only to make incidental findings en route to a determination that will bind just the parties - has sound foundations. Claims before the courts generally involve the rights and obligations of those - and only those - privy to the proceedings. It is usually contrary to the interests of justice to determine rights and obligations of those who are not parties, and who may not have been given any notice or opportunity to make submission on the issue. It is for that reason that Parliament is only likely to have granted jurisdiction to a court or tribunal to make judgments in rem rarely, and in clear and unequivocal terms.

52. Ms Stout's [counsel for the local authority] submissions were based on the premise that any finding by a court or tribunal on any matter that would fall into the broad category of "status", including age, is binding on the world at large. As can be seen from the above analysis, that premise is false. A judgment is only in rem if it is made by a court or tribunal with the jurisdiction to determine proceedings where the function of those proceedings is to determine status or rights as against the world. Findings, even as to matters such as age, which are merely incidental to a determination that the court or tribunal is required to make in personam are not binding on the world at large."

53. Hickinbottom J concluded that the FTT was not granted jurisdiction to make a declaration in rem since its jurisdiction was confined to deciding appeals against immigration decisions so that it had no jurisdiction to make an age determination. Moreover, Hickinbottom J concluded that the Immigration Judge sitting in the FTT neither purported to exercise a primary jurisdiction in concluding that the claimant was not an adult nor was he making a determination to that effect. Instead, the Immigration Judge's conclusion that the claimant was an adult was a credibility finding which assisted him in disbelieving the appellant's evidence and in concluding that his article 8 claim to a private and family life in the United Kingdom failed.

54. Two other authorities relevant to this case were cited and should be mentioned. In **A & M**[28]**,** Ward LJ in the Court of Appeal stated obiter that the age determination in question was not a judgment in rem declaring to the world at large that the appellants were adults. In **NA v London Borough of Croydon**[29], Blake J stated that determination of age as a part of an assessment of whether a housing duty is owed is not, as a matter of law, an in rem adjudication on the status for all purposes. However, these cases were decided and these statements made prior to the decision in **A** at a time when it was not considered that a determination that the individual was a child for the purposes of section 20 of the

[28] [2008] EWCA Civ 1445, CA at paragraph 88.
[29] [2009] EWHC 2357 (Admin), Blake J at paragraph 43.

Children Act was one of jurisdictional fact and a condition precedent to the activation of the duties imposed by the act. The dicta in both cases must therefore be considered in the light of **A**.

55. In the light of these authorities, the following conclusions may be drawn as to what the claimant must establish to show that the declaration that I am making is one that is in rem:

(1) The relevant determination, in this case the determination that the claimant is a child whose date of birth is 18 March 1995, must be one which gives rise to a decision and is not merely an incidental finding en route to a determination[30]. In other words, the determination must be in the form of a judgment and is not simply a finding of facts upon which a judgment is based;[31]

(2) The relevant determination must be one that the tribunal had jurisdiction to make[32];

(3) The relevant statute must, expressly or by necessary implication, confer on that tribunal the jurisdiction to make a determination in rem[33]. An indication that a statute confers that jurisdiction is that the statute confers on the tribunal exclusive jurisdiction to make a final determination and that that determination is as to the status of the claimant[34];

(4) The judgment must be final, on the merits and not by consent[35]; and

(5) There must be a public interest in the judgment being one which binds everyone rather than only binding the parties to the case in question[36].

(4) Discussion

56. I will consider each of the necessary ingredients that must be present for this judgment to be one that is in rem and binding everyone rather than merely than one that is in personam and binding only on the parties.

57. **General.** **A** is an essential starting point for the decision in this case as to the nature of the declaration as to the claimant's age. This is for three essential reasons: namely that childhood and age have not hitherto been expressly recognised in the authorities as being ingredients of the status of an individual, that the CA has not hitherto been considered in the context of a statute conferring jurisdiction on the court to make an in rem determination as to that status and that the Administrative Court has not hitherto been a court and judicial review a procedure that has given rise to an in rem determination. A further feature of this case that must be considered is that the court made a consent order, albeit having itself considered the merits of the case. There was no full oral hearing on the merits.

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30 Wakefield Corporation v Cooke, ibid. at page 38 per Lord Robertson; PM, ibid. at paragraph 51.
31 PM, ibid, at paragraph 45.
32 PM, ibid. at paragraphs 58 and 61.
33 Pattni, ibid. at paragraph 22.
34 Wakefield Corporation v Cooke, ibid. at page 36; Salvesen, ibid. at page 663; A, ibid. at paragraphs 14 – 19. See also Phipson on Evidence, 17th edition, 2010 at paragraph 43-11.
35 Pattni, ibid. at paragraph
36 Phipson, ibid. at paragraph 43-11.

58. **Nature of the determination.** The determination was to the effect that the claimant was a child whose date of birth was 18 March 1995 and who was, therefore, at the critical date, the date of the judgment, 30 September 2011, a child since, on that date he was under eighteen. There was no discussion as to what the critical date should be, or should be taken to be, on which the determination of "child or no" was made. This is because the claimant was under eighteen on all of the possible relevant dates: the date of his arrival in the United Kingdom, the date of his being referred to the defendant under the CA, the dates of the various age assessments, the date of the pronouncement of the result of this case in open court or the date of the order giving effect to that pronouncement. As a matter of principle, the date by reference to which the question should be answered is the date of the application for CA services since that is the date on which the claimant engaged with the defendant in its capacity as the relevant local authority with CA jurisdiction over the claimant. The declaration that was made in this case did not refer to the fact that he was a child but, since his date of birth was determined, the determination that he was a child followed automatically from the determination of his date of birth.

59. **Jurisdiction of the Administrative Court to make a determination in rem.** In the light of **A**, the Administrative Court had, by virtue of section 20 of the Children Act, both the jurisdiction and the obligation to determine as a finding of precedent or primary fact, the claimant's date of birth and whether he was a child.

60. **In rem jurisdiction of the Administrative Court.** The Administrative Court determined that the claimant was, for all purposes under the CA, a child. Since the claimant might well be subject to the attentions of more than one authority or to more than one department or outsourced body of the defendant, this age determination was clearly intended to govern all future considerations of the claimant's eligibility for assistance under that Act and under the UK Border Agency protocol. Since the Administrative Court is given exclusive jurisdiction to determine whether the claimant is or is not eligible for such assistance and that issue of fact determines an incidence of the claimant's status and must be determined first and as a separate issue, the determination is an in rem determination biding on the world at large. These conclusions arise from the nature of the determination of the status of the claimant and from the structure of the CA as interpreted by the Supreme Court in **A.** It follows that section 20 of the CA provides the Administrative Court by necessary implication with the jurisdiction to determine as a judgment in rem the claimant's age and his status as a child.

61. **Final and conclusive nature of the determination.** Although the judgment was made without their being an oral hearing, there was a full trial on the merits in the sense required. In other words, there was a formal age assessment, a clear crystallisation of a dispute as to the age and date of birth of the claimant; a claim in the form of an application for judicial review made against the defendant who fully defended that claim; the preparation of pleadings, disclosure, expert evidence and the listing of a hearing before the court; a reasoned joint agreement to settle and an independent assessment of the claim by a judge which was embodied in a formal and final order. For the purposes of a judgment in rem, that determination was, therefore, final and conclusive.

62. **Public interest in the judgment being in rem.** There is a clear public interest in the judgment being an in rem judgment and not merely an in personam judgment. It would be contrary to the best interests of this child defendant, whose best interests the state and the courts are by law required to take account of and promote, to be subject to further and possibly different age assessments. The fact that the UK Border Agency has entered into a protocol with the various local authority agencies to the effect that it will accept and apply a local authority age assessment, and hence a court determination following that age assessment, under section 20 of the CA, shows that it is in the public interest for the claimant's date of birth to be expressed as a judgment that binds everybody and is not merely one that binds the defendant.

(6) Conclusion – Declaration in rem

63. The declaration made in this case, being one as to the claimant's date of birth and status as a child, is a declaration in rem. Since it is a declaration in rem, the declaration should itself state that it is such a declaration.

F. Costs

64. **Issues**. The claimant, having succeeded in obtaining a quashing order and a declaration, seeks the entirety of his costs of this action to be assessed if not agreed. In seeking a costs order, the claimant relied on his having to seek and obtain an order which was not by consent albeit it was obtained without the need for a hearing. He also relied on the defendant's unnecessarily obstructive method of conducting its defence, particularly in its failure to give full discovery promptly, thereby necessitating five successive orders for discovery, the last being an unless order which is very unusual in a case in which the best interests of a child are being considered. The defendant, relying on **Boxall v London Borough of Waltham Forest**, contended that the appropriate order should be costs in the cause since, in reality, neither party had won and the defendant's reasonable attitude had enabled the parties to settle before the hearing of the claim had taken place.

65. **Discussion and conclusion**. I do not think that **Boxall's** case is relevant to this case. That case involved a conventional judicial review and it decided that parties to a judicial review should seek at all times, and particularly so as to avoid an oral hearing, to reach an out of court settlement which would lead to the review claim being withdrawn. However, in this age assessment case, being a kind of case which was unknown to judicial review until March 2011 when **A** was decided, the court is concerned with disputed issues of fact in relation to someone who is, or is claiming to be, a child and who needs a court approved settlement and a declaration of age. Therefore, a pre-hearing settlement cannot end the case since that requires the independent input of a judge's declaratory order. Moreover, the claimant clearly won since he obtained a declaration of age which showed him to be significantly younger than the defendant had assessed him to be. Finally, the conduct of the defendant's discovery exercise left much to be desired, a particularly unfortunate turn of events given that the subject-matter of the claim was a vulnerable child whose best interests cried out for speed and prompt disclosure.

66. Thus, the claimant is entitled to the entirety of his costs which must be assessed if not agreed. Since, inevitably, he is publicly funded, there must tbe a detailed assessment of the claimant's publicly funded costs.

G. Summary of judgment

67. In summary:

(1) The Court, having independently considered and approved the terms of the proposed declaration, should adopt the parties' proposed basis for concluding this age assessment case.

(2) The court should quash the defendant's age assessments since they were non-compliant with the Merton guidelines and should grant a declaration of the claimant's date of birth in reliance on the age assessments provided by Dr Birch and the joint assessment provided by Mr Ambat and Ms Palmer.

(3) The declaration, being as to the claimant's date of birth and his status as a child, and also being one of jurisdictional fact under the Children Act 1989, is a declaration in rem and should be declared to be such.