

Case No: CO/5465/2011

Neutral Citation Number: [2013] EWHC 284 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/02/2013

Before :

MR JUSTICE WALKER

Between :

PACHA KHAN DURANI

Claimant

- and -

**SECRETARY OF STATE FOR HOME
DEPARTMENT**

Defendant

- and -

NOTTINGHAMSHIRE COUNTY COUNCIL

**Interested
Party**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Ms Shu Shin Luh (instructed by **TV Edwards LLP**) for the **claimant**
Mr Sarabjit Singh (instructed by the **Treasury Solicitor**) for the **defendant**

Hearing dates: 20 December 2012, 11 February 2013

Judgment

Mr Justice Walker :

A. Introduction

1. The claimant was held in immigration detention from 25 May 2011 to 15 June 2011. The only remaining issues in this case are whether that detention was unlawful, and if so the quantum of damages.
2. The decision to detain was made in reliance on an age assessment carried out on 19 November 2009 (“the 2009 assessment”) by Nottinghamshire County Council (“NCC”). The 2009 assessment concluded that the claimant was born on approximately 1 November 1992. It is now common ground that:
 - (1) The claimant was born in or around November 1994;
 - (2) The claimant was thus aged 16 at the time of detention; and
 - (3) If those responsible for his detention had appreciated this, they would not have detained him.
3. Ms Shu Shin Luh appears for the claimant. She submits, among other things, that the 2009 assessment was not “*Merton-compliant*”. The expression “*Merton-compliant*” refers to the judgment of Stanley Burnton J in *R (B) v Merton LBC* [2003] EWHC 1689 (Admin), identifying general principles relevant in age assessment cases.
4. Mr Sarabjit Singh appears for the defendant. He acknowledges that under the defendant’s policy, detention would, in the circumstances of the present case, only have been permissible if those responsible were entitled to conclude that a *Merton-compliant* age assessment showed him to be of an age suitable for detention. On this basis the defendant accepts that if both of two criteria are met then the detention was unlawful. The first criterion is that the 2009 assessment was not in fact *Merton-compliant*. The second criterion is that those authorising detention in 2011 were not entitled to rely upon the 2009 assessment as meeting the need for a *Merton-compliant* age assessment.
5. I have concluded that both these criteria were met, with the result that the claim succeeds. In the next sections of this judgment I give an account of the history, the *Merton* principles, the 2009 assessment, and the relevant policy. I then turn to explain my reasons for concluding that the 2009 assessment was not *Merton-compliant* and that those responsible for detention were not entitled to proceed as if it were. In the concluding section of this judgment I mention some of the additional points raised by Ms Luh which, in the event, I do not need to address. I also note that damages will need to be assessed if they cannot be agreed.

B. History of events

B1. Events prior to the claimant's arrival in the UK

6. The claimant is a national of Afghanistan. He says that he left Afghanistan at a young age to live in Pakistan. He did not go to school but attended a Madrassa (religious school) in Pakistan, where he studied the Qu'ran. He studied there for about 3-4 years when he learnt from his uncle of the death of his father, a Taliban commander, apparently killed by American forces. His family were worried that he would be conscripted by the Taliban to be a fighter against the American forces in Afghanistan. They arranged for him to leave the region. His journey took about 18 months. He went through several different countries and was fingerprinted on at least two occasions, in Greece and subsequently in Calais, France.
7. As to the latter occasion, in May 2009 the claimant was arrested by UK Border Agency ('UKBA') officers when he was found in the back of a lorry in the UK Control Zone in Calais. The claimant was fingerprinted and asked for basic bio-data by immigration officers. He was recorded as a child, aged 14, with a nominal assigned date of birth of 1 January 1994.

B2. November 2009: arrival in the UK

8. The claimant says that he entered the UK mainland in the back of a lorry on or around 18 November 2009. He was arrested on that date and was interviewed by NCC children's services. He told them that he was a child about 14 or 15 years old. He did not know his date of birth.
9. The defendant has disclosed UKBA records which include an 11 page fax sent on 20 November 2009 by NCC to the UKBA Screening Team. The handwritten cover sheet said that the claimant's date of birth was:

Approx: 1st November (17 years).

10. The cover sheet gave details of dates on which a "worker" would be available. These were presumably dates upon which a social worker would be able to attend with the claimant for a screening interview. The remaining 10 pages of the fax comprised the 2009 assessment. It identified the assessing social workers as "TSW Julie Pinnock" and "SW Marykla Ranoszek." Other details of that assessment are given in section D below.
11. The electronic case record sheet maintained by the defendant includes an entry made on 24 November 2009 which recorded that the fax from NCC had been received. Under the heading "further action required" it identified a need to contact NCC to confirm that a screening interview was required and to ask for a formal faxed request from them in that regard. A handwritten note was then made on 25 November 2009 that the screening interview had been arranged for 10 December 2009. A fax confirming this was sent to NCC on 25 November 2009 by UKBA's local immigration team for the East Midlands. The fax was sent in relation to both the claimant and another individual, and referred to a request that had been made by NCC:

... for screening interviews of the above minors...

B3. From November 2009 to 24 May 2011

12. The role of NCC from November 2009 onwards can be summarised in this way. NCC did not accept what the claimant had said about his age. However, as it nevertheless accepted that he was a child, albeit older than claimed, it placed the claimant in supported accommodation provided by Horizon Social Care. The claimant remained there until his assessed 18th birthday in November 2010. He then moved to shared adult accommodation. NCC funded the shared adult accommodation under the “leaving care” provisions of the Children Act 1989, on the basis that the claimant had become a ‘former relevant child’ because he had been in care for more than 13 weeks.
13. Returning to the role of UKBA, the screening interview scheduled for 10 December 2009 was postponed. It eventually took place on 23 December 2009, with Ms Pinnock attending as an “appropriate adult.” A record was kept which numbered the questions and answers. Question 2.5 asked ‘how old are you?’ The claimant was recorded as answering ‘15 years old’. However in relation to the next question 2.6, ‘What is your date of birth’, the interviewing officer put down 01/11/1992 – a date of birth which would correspond to what had been said in the fax cover sheet of 20 November 2009.
14. The claimant was fingerprinted following this screening interview. On 26 January 2010, the claimant filed a witness statement in support of his claim to asylum. In it he stated:
 - (1) He was taken to Pakistan by his father to enroll in a Madrassa at the age of around 9½.
 - (2) He attended the Madrassa for about 3-4 years.
 - (3) His maternal uncle used to visit the Madarassa to see the claimant quite regularly. On one occasion, the claimant’s maternal uncle told him that his father, a Taliban commander, had been shot dead whilst fighting against the Americans in Afghanistan. His uncle told him that he was concerned that it would not be safe for the claimant to return to Afghanistan as he may be conscripted by the Taliban to fight against the Afghan government.
 - (4) The claimant’s uncle then arranged for the claimant to leave the Madrassa and subsequently leave Pakistan. This was the beginning of the claimant’s long journey to the UK.
15. It is said on his behalf that the chronological information given by the claimant to the UKBA in his witness statement suggested that he left Pakistan around the age of 12 ½ - 13 ½ years old, which would be consistent with the claimant arriving in the UK when 14 or 15 years old, on the basis of an estimated journey length of about 18 months.
16. Around the same time, on 25 January 2010, the UKBA’s own records show that they linked the claimant’s fingerprints to fingerprints taken from him in Calais in May 2009 and to the record taken of the claimant at the time of his arrest in Calais, including the record of his date of birth being 1 January 1994.

17. On 2 March 2010, the UKBA carried out a substantive asylum interview with the claimant. He was treated as a child for the purposes of the interview. No particular significance attaches to this: he was a child on either his claimed or assessed age.
18. At question 6 of the interview record, the claimant's date of birth was recorded in typed font as 1 November 1992. Next to the typed information, the UKBA interviewing officer noted this was the assessed date of birth and the claimant did not know his actual date of birth.
19. In the substantive interview, the claimant provided similar chronological information to that given previously:
 - (1) He was about 9 years old when he went to live in Pakistan and was enrolled in a Madrassa there.
 - (2) He stayed at the Madrassa for about 3 – 4 years.
 - (3) He left soon after his uncle took him from the Madrassa and told him he must leave Pakistan.
20. On 19 March 2010, the defendant refused the claimant's claim for asylum. The defendant rejected his asylum claim. Among other reasons for the rejection, the defendant disputed the claimant's credibility, and for that purpose relied on inconsistencies between what the claimant told NCC at the age assessment and what he told UKBA. However, on account of the claimant being a child, he was granted discretionary leave in line with the defendant's stated policy of granting unaccompanied asylum-seeking children leave up to the age of 17 ½ years old. Thus the defendant only granted the claimant a short period of discretionary leave of less than 2 months until Monday 3 May 2010 when, on the basis of a date of birth of 1 November, the claimant would have reached 17½. By operation of s 83 of the Nationality, Immigration and Asylum Act 2002, as the period of leave was less than 12 months, the claimant had no right of appeal against the refusal of his asylum claim.
21. On 29 April 2010, the claimant made an application to extend his leave to remain and repeated the grounds of his asylum claim. The claimant adopted the evidence in his previous witness statement and interviews with the UKBA, including the chronology of the age from which he started attending the Madrassa in Pakistan and how long he was there for before he left for the UK.
22. On 20 May 2010, the defendant refused the claimant's application for further leave to remain repeating the findings of inconsistency between the claimant's account told to NCC and to the UKBA as a basis for refusing him further leave.
23. On 7 June 2010 the claimant appealed against the defendant's refusal of further leave. In support of his appeal, the claimant produced a further witness statement dated 25 June 2010. In this statement, the claimant again repeated the chronology previously provided to the defendant. On 28 June 2010 he submitted two further witness statements. He stated that he had problems with the interpreter at the NCC age assessment. He could not make his concerns clear at the time because he could not read what was written in his age assessment. He also did not understand what was going on at the age assessment. Although the document was subsequently provided to

the claimant by his support worker, he could not review the document properly to raise his precise concerns because he could not review the document in English.

24. In advance of the claimant's appeal hearing before the First-Tier Tribunal, a chronology was submitted on his behalf. It noted that the date of birth 1/1/92 was an 'attributed dob' and added, 'appellant claiming age of about 15 on arrival in UK'. Before the immigration tribunal, however, there was no need for the immigration judge to determine the question of the claimant's age. This was because on either the claimant's assessed or claimed age, he was a child at the time of the appeal hearing and accordingly afforded the safeguards as a child. There was no need beyond accepting the claimant was a child for the tribunal judge to further consider the question of the claimant's age.
25. In a determination promulgated on 15 July 2010, the immigration judge dismissed the claimant's asylum claim on the basis that he had not shown that he was at risk of being conscripted by the Taliban had he remained at the Madrassa. On the main credibility issues relied on by the defendant, however, the immigration judge noted explanations by the claimant that there had been mistranslations by the interpreter. In that regard the immigration judge held in paragraph 19 that:

... bearing in mind the age of the appellant when it is said he first left Afghanistan and his present age, it seems to me that I ought properly to give him the benefit of the doubt, so far as his credibility is concerned ...
26. The claimant did not appeal against the findings of the immigration judge. Nor did the defendant. The claimant's appeal rights were exhausted on 27 July 2010. The claimant was still 17 years old at the time on his assessed age.
27. UKBA records indicate that on or around 1 December 2010 the defendant was preparing to remove the claimant. The claimant had by then turned 18 on his assessed age. An *'East Midlands NAM Referred 'Green' Sifting Proforma'* noted that the claimant was all appeal rights exhausted and stated that there were no barriers to removal. The form further noted that the claimant's full name, address, and 'DOB' were updated onto the CID record.
28. On 30 March 2011 the claimant failed to report.

B4. The claimant's detention: 25 May to 15 June 2011

29. On 25 May 2011 UKBA officers attended the claimant at his shared accommodation at around 5 a.m., woke him up and told him he was under arrest. The claimant was taken to Bridwell police station and detained there for about 5-6 hours before he was moved to Penine House, an immigration removal centre in Manchester. He remained there for three days before being moved to Tinsley House near Gatwick airport. Subsequently he was moved to Dover Immigration Removal Centre and from there to Brook House detention centre next to Heathrow airport.
30. The initial detention referral form dated 25 May 2011 gave the claimant's date of birth as "01-11-1992". It stated that the claimant had been "arrested for charter flight on 14/06/2011", and noted that the claimant was all appeal rights exhausted as of 27

July 2010. On the same day Form IS.91R was completed. This constituted a 'Notice to Detainee with Reasons for Detention'. It recorded a decision that the claimant "should remain in detention" because his removal from the UK was imminent. The form had tick boxes for up to 14 numbered factors on the basis of which the decision had been reached. Those ticked were numbers 6 ("You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries") and 7 ("You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in the UK"). Box number 9, stating 'You are a young person without the care of a parent or guardian,' was not ticked.

31. On 26 May 2011 removal directions were issued in respect of the claimant with a view to removing him to Afghanistan on 14 June 2011. An 'Immigration Factual Summary' ("IFS") produced on 26 May 2011 gave the claimant's date of birth as 1 November 1992. It noted that on 19 March 2010 he had been granted leave to remain because of his age until 3 May 2010. It did not mention the 2009 assessment, nor did it mention what the claimant had said about his age. Nor were either of these matters mentioned in the claimant's 24-hour detention review on 26 May 2011, 7-day review on 1 June 2011 and 14-day review on 8 June 2011.
32. In early June 2011 the claimant's present solicitors, TV Edwards LLP ("TVE"), were instructed on his behalf. On 8 June 2011 they sent an urgent letter before claim to the defendant. The letter maintained that the claimant was in fact a child, not an adult as mistakenly assumed by the defendant. In that regard it said that the 2009 assessment had been heavily reliant upon physical appearance and demeanour, and for that reason was not *Merton* compliant. Enclosed supporting evidence comprised: (i) the claimant's Taskera; (ii) the claimant's identity card from his Madrassa in Pakistan; and (iii) a detailed supporting letter from the claimant's key worker, Raj Chahal dated 7 June 2011. Mr. Chahal had by then known the claimant for over 2 years. He was the claimant's allocated key worker at Horizon Social Housing where the claimant was placed in November 2009 following the age assessment until November 2010 when the claimant was moved to shared accommodation. He kept in touch with the claimant thereafter. He stated in the letter that the claimant had stated to him on more than one occasion that he was younger than the age 'given' by his social worker. Mr. Chahal added that that when the claimant was with his peer group he had shown some traits which led Mr Chahal to believe he could be younger.
33. By a letter in response on 9 June 2011, the defendant rejected the claimant's submissions, stating that the documents had been provided belatedly and that Mr. Chahal's views should have been raised earlier and in any event did not provide sufficient detail to support a younger age. The letter noted TVE's assertion that the 2009 assessment had been heavily reliant upon physical appearance and demeanour, and for that reason was not *Merton* compliant. The defendant's letter did not dispute that the 2009 assessment had been heavily reliant upon physical appearance and demeanour. Instead it simply said:

You fail to explain why you consider that this would render the report ... not *Merton* compliant.
34. Also on 9 June 2011 TVE wrote to NCC inviting NCC to carry out a reassessment of the claimant's age. NCC replied on the same day:

Notwithstanding the fact that these documents only appear to have come to light at the eleventh hour, the Local Authority believes that they need to be properly examined. In the circumstances, the Local Authority agrees that it would be premature for [the claimant] to be removed from the United Kingdom until the documents have been properly considered.

35. TVE wrote again to the defendant on 10 June 2011, enclosing NCC's letter of 9 June 2011 and supporting evidence of the claimant's claimed age from three of his tutors at Castle College. TVE invited the defendant to cancel the removal directions and to release the claimant into the care of Nottinghamshire pending re-assessment.
36. In a response on 11 June 2011 the defendant again refused to release the claimant or cancel removal directions, stating:

The UK Border Agency does not have a blanket policy of suspending removal directions in all cases where an age assessment is being conducted. ... in some cases cancellation of removal directions would be appropriate, i.e. where an applicant's appearance and demeanour does not strongly suggest that they are significantly over 18, where there is a complete absence of any medical evidence relating to an applicant's age; or where an applicant has not had the opportunity of having his case reviewed before an Immigration Judge. That is not the case here. Your client was assessed by Social Services as being born on 1 November 1992 .. He did not dispute the findings made by Social Services at that time, nor did he dispute their findings at his appeal hearing on 5 July 2010. ...

37. The present proceedings were issued on 13 June 2011. The claim form was accompanied by a detailed statement of facts and grounds which contended, among other things, that the 2009 assessment was not *Merton* compliant and should not have been relied upon by the defendant to detain and seek to remove the claimant. By an order of Nicola Davies J dated 13 June 2011, the defendant was directed to stay removal directions against the claimant and release the claimant into the care of NCC pending an age re-assessment.
38. By a fax of 13 June 2011, the claimant's solicitors notified the defendant of the court order and received confirmation that the defendant would comply with the order. However delays ensued in arranging the claimant's release. It was only on 15 June 2011 that he was released into the care of NCC children's services.

B5: 16 June 2011 onwards

39. NCC initially took the view that the claimant's Taskera needed to be verified before it could proceed to a re-assessment. For this purpose the claimant's Taskera was eventually sent by the Afghan Embassy in London to Afghanistan for verification. However, no further news has been received from the Afghan Embassy.

40. On 19 October 2011 Elisabeth Laing Q.C. sitting as a deputy High Court judge granted permission for the claimant to proceed with his claim for judicial review.
41. In February 2012, concerned about the delays in the re-assessment process, TVE wrote to the defendant and NCC inviting the local authority to proceed with an age re-assessment, on the basis that this need not wait for verification of the claimant's Taskera. On 2 August 2012 the Treasury Solicitor on behalf of the defendant wrote to NCC endorsing that invitation. Eventually on 8 November 2012 NCC wrote to the defendant enclosing an addendum age assessment report. The addendum, dated 12 October 2012, had been inserted into the body of the 2009 assessment. It stated as follows:

Addendum

Information inputted on 12/10/2012

Khan Pacha was refused asylum, following his tribunal on the 23/07/10, due to this, he was requested to report at Loughborough on a monthly basis and became Appeal Rights Exhausted (ARE).

On the 25/05/11 Khan was picked up by Immigration and detained at several detention centres around the country with a view to return to Afghanistan on 14/06/11.

Whilst at the detention centre Khan obtained documentation x 2 which states that he is aged 16yrs. An Afghan ID document and a Madrassa student card both of which state his age and year of issue.

Khan was represented by his solicitor Jonathan Reeve from TV Edwards Solicitors and on 13/6/11 he sought a Judicial Review to prevent deportation.

Following new information presented by Khan (Madrassa birth certificate) identifies that Khan is a minor (current age 17 years and 7 months). The local authority has accepted Khan's age and will continue to support him as LAC until he reaches 18 on 01/11/2012.

42. On 10 December 2012 the defendant disclosed a letter from NCC dated 29 August 2012. It stated:

We write further to your letter dated 2nd August 2012.

We confirm that the Age Assessment completed in respect of PKD was not completed by an Emergency Duty Team. The referral came in and was conducted by social workers within the Reception and Assessment Team.

At the time of assessment it was the usual practice to complete an assessment in the presence of 2 social workers and an

interpreter. No specific appropriate adult was offered as in 2009 the social worker was deemed to be an appropriate adult.

43. The case came on for hearing before me on 20 December 2012. It was not possible to complete the oral submissions on that day. Those submissions were resumed and completed on 11 February 2013, when I reserved judgment.

C. The *Merton* principles

44. The claimant in *Merton* was referred to as “B”. He, like the claimant in the present case, presented to the UK authorities as an unaccompanied asylum-seeking child. However the *Merton* case did not involve a claim against the present defendant. It concerned the duty of Merton London Borough Council (“Merton LBC”) under Part III of the Children Act 1989 to make provision for those who are under 18 and in need. The decision under challenge was Merton LBC’s decision that B was at least 18 and that accordingly no duty was owed to him by Merton LBC under the 1989 Act.
45. Mr Latham, who appeared for B, advanced three principal contentions. These were that there had been inadequate inquiry, procedural unfairness, and a failure by Merton LBC to make its own decision. While he additionally contended that age determination fell within article 6 of the European Convention on Human Rights, he accepted that judicial review would render the process Convention compliant. Mr O’Brien, who appeared for Merton LBC, successfully resisted the first and third of Mr Latham’s principal contentions, but was unsuccessful as regards the second. Stanley Burnton J held that there had been procedural unfairness, and quashed Merton LBC’s decision on that ground.
46. The case was argued on the basis that Merton LBC’s decision could only be challenged on public law grounds. What was not then appreciated was that this was mistaken. It has now been established that the question whether an applicant is under 18 for the purposes of Part III of the Children Act 1989 is a question of jurisdictional fact: see the decision of the Supreme Court in *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557. An applicant whose claim is rejected is entitled to ask the court to decide the question one way or the other.
47. In his reserved judgment in *Merton*, under the heading “Discussion”, Stanley Burnton J made some initial observations:

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

37. It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years.

Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.

38. I do not think it is helpful to apply concepts of onus of proof to the assessment of age by local authorities. Unlike cases under section 55 of the Nationality, Immigration and Asylum Act 2002, there is in the present context no legislative provision placing an onus of proof on the applicant. The local authority must make its assessment on the material available to and obtained by it. There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child. Of course, if an applicant has previously stated that he was over 18, the decision maker will take that previous statement into account, and in the absence of an acceptable explanation it may, when considered with the other material available, be decisive. Similarly, the appearance and demeanour of the applicant may justify a provisional view that he is indeed a child or an adult. In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary.

39. However, the social services department of a local authority cannot simply adopt a decision made by the Home Office. It must itself decide whether an applicant is a child in need: i.e. whether the applicant is a child, and if so whether he or she is in need within the meaning of Part III of the Children Act 1989. A local authority may take into account information obtained by the Home Office; but it must make its own decision, and for that purpose must have available to it adequate information. It follows that if all the Defendant had done was, as stated by its letter of 13 February 2003, to have taken the stance of the Home Office, its decision would have been unlawful.

48. The need for reasons to be given, and their nature, was discussed at paragraphs 41 to 48. It suffices for present purposes to set out paragraphs 45 to 48:

45. ... I accept Mr Latham's submission that a local authority is obliged to give adequate reasons for its decision that an applicant claiming to be a child is not a child, and who is therefore refused support under Part III of the Children Act. The consequences of such a decision may be drastic for the applicant, and he is entitled to know the basis for it, and to consider, if he can, with legal assistance if it is available to him, whether the decision is a lawful one. In my judgment this is the position at common law, irrespective of the issue as to the

applicability of Article 6 of the European Convention on Human Rights, as to which I say nothing. It is noteworthy that in the analogous context of a decision by the Home Secretary to refuse support under section 55 of the Nationality, Immigration and Asylum Act 2002, in *(R) Q v Secretary of State for the Home Department* [2003] EWHC 195 Admin (Collins J) and [2003] EWCA Civ 364, [2003] 2 All ER 905 (Court of Appeal), the Home Secretary accepted that he was under a duty to give reasons for a decision adverse to an asylum seeker: see paragraph 21 of the judgment of Collins J, cited at paragraph 80 of the judgment of the Court of Appeal. I see no relevant distinction between those cases and the present. I bear in mind that the hypothesis is that the applicant is determined to be over 18, and therefore able to comprehend (if necessary in translation) the reasons given to him.

46. The availability of an internal review or complaints procedure, to which I refer below, does not obviate the need for reasons: reasons are required so that the applicant may make an informed decision whether to ask the local authority to review its decision or to make a complaint concerning the decision, quite apart from the need for him (or rather a legal adviser) to be able to ascertain whether the decision is lawful or amenable to judicial review.

47. Mr O'Brien told me that in practice reasons are given, but submitted that it is sufficient for a local authority to state that it refuses to provide the applicant with support under the Children Act because he is not a child. In my judgment, such a brief statement is a statement of the decision of the local authority, not of the reasons for its decision.

48. However, in general, the reasons need not be long or elaborate. On what is ultimately a simple if difficult issue, it should not be necessary to go to the lengths seen in, for example, adjudicators' determinations in asylum cases. In the present case, it would have been sufficient to have stated that the decision was based on the appearance and behaviour (or demeanour) of the claimant, and on the matters referred to in paragraph 23 of Ms Rodney's statement (referred to in paragraph 15 above), which led her to conclude that he was not truthful.

49. Under the heading "The adequacy of the information available to the Defendant" Stanley Burnton J said this:

49. Mr Latham submitted that the information available to the Defendant, and its procedure, were inadequate. If so, the decision reached by the Defendant would be liable to be set aside as being one that no reasonable authority could have arrived at in the circumstances. He submitted that the form used

by Ms Rodney was unsuited to the inquiry on which she was engaged: it was designed for an inquiry as to whether a child and his family were in need, not whether the person claiming to be a child is such. He suggested that the questions put to the Claimant, and his answers, should have been noted verbatim, by Ms Rodney or by someone else present during the interview, so that the Claimant's legal advisers and the court could be assured that the questions were open-ended, fair and appropriate. The procedure used, involving the use of an interpreter at the other end of the telephone, was replete with risk of confusion and misunderstanding. He suggested that medical evidence was required, and should have been obtained. He pressed the advantages of observation of the applicant over a period of time, preferably by a number of professionals, as mentioned in paragraph 33 above.

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

51. Ms Rodney did not make her decision on the basis of the appearance and demeanour of the Claimant alone. It is not suggested that the Claimant was unaware of the purpose of his interview. She took a full family and personal history, including the Claimant's educational history. It was not necessary to obtain a medical report, which for reasons stated above would not have been helpful and was unlikely to have been so. It was not necessary for the local authority to provide support for a period of some days or weeks to give the opportunity for others to observe the Claimant, and for him to be observed and assessed over that period, if the information available was sufficient for a decision to be made, which it was.

52. However, where an interpreter is required, it is obviously greatly preferable for him or her to be present during the interview. The procedure adopted in this case [involving questions and answers being communicated to an interpreter by telephone] carried with it the risk of misunderstandings, and great care was required of Ms Rodney and of the interpreter to ensure that no mistakes were made. As far as I am aware, the

interpreter made no note, in either English or French, of the questions asked by Ms Rodney or of the Claimant's answers, either in verbatim or rolled up form (i.e., with the questions and answers combined). Such a note by the interpreter would have been highly relevant to the Claimant's suggestions that what he said was not correctly noted, or was misunderstood, by Ms Rodney, who heard his answers at second hand. I am concerned at the contradiction between Ms Rodney's note that the Claimant "identifies with the Islamic faith and its culture" and her later note that "he is of Catholic faith". The contradiction is not referred to in her witness statement, and was not one of the reasons for her decision to reject the Claimant's credibility. If she correctly noted his statements, he made an obvious and unintelligent contradiction. In view of my decision in this case, I need say no more about it.

53. In cases such as the present, the social worker must of course bear in mind her unfamiliarity with the background of the applicant. There is no reason to believe that Ms Rodney did not do that. I should also mention that her sympathy with the Claimant's situation is apparent from her notes.

54. In my judgment, it is not necessary as a matter of law for there to be a verbatim note of the interview; but such a note would enable the court to be more confident of its accuracy and to address any suggestion that the interviewer put words into the mouth of the applicant by asking leading questions that led the young applicant to accept what was suggested to him. It is not necessary for the note to be countersigned by the applicant, although again that may be helpful for a local authority evidentially. The Claimant complains that he was not asked to counter-sign Ms Rodney's notes, but since he cannot speak English, there would have been no point in asking him to do so. Indeed, it would have been thoughtless to have asked him to counter-sign them.

50. The final section of Stanley Burnton J's judgment was headed, "Other requirements of fairness." Paragraphs 55 to 57 stated:

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

misunderstandings and mistranslations inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the Claimant an opportunity to explain.

56. The Claim Form clearly alleged that the Claimant should have been given an adequate opportunity to answer the points that the Defendant was minded to hold against him. Ms Rodney does not suggest that this was done. It follows that her decision should be set aside unless the Defendant has established that his responses to the matters on which she relied could not reasonably have affected her decision. The Claimant addresses these matters in paragraph 14 of his second witness statement. Not surprisingly, he gives no explanation of the implausibility referred to in paragraph 15(d) above. His explanations of the matters referred to at (b) and (c) are unsatisfactory, and in essence amount to an assertion that Ms Rodney must have misunderstood him. It is the risk that there was some misunderstanding of what he said, a risk that is accentuated by the inconsistency between her notes of the two statements as to his religion to which I have referred, and the possibility that he might have been able to rectify any misunderstanding if the matters relied upon had been put to him, that leads me to conclude, albeit with considerable hesitation, that the Defendant has not satisfied the onus of establishing that even if they had been put to the Claimant, the same decision would inevitably have been made.

57. Mr O'Brien submitted that this case is to be distinguished from Q because of the availability of the complaints and review procedure required by section 26 of the 1989 Act and regulations made under it, which provide a suitable alternative remedy to judicial review. Mr Latham countered that the complaints procedure is not a suitable remedy, because someone in the position of the Claimant requires immediate relief. Section 26(3)(a) requires a local authority to establish a procedure for investigating any complaint or representation made by "any child ... who is not being looked after by them but is in need". The Representations Procedure (Children) Regulations 1991 require a response to a representation or complaint within 28 days of its receipt, and this is indeed too long a period in the context of a child in need who has no available accommodation or support. The availability of internal review was not referred to by the Defendant in correspondence or in the Defendant's acknowledgment of service, and I have no evidence before me as to the complaints or review procedure operated by the Defendant, and in particular how it would have been operated if it had been implemented by the Claimant. In these circumstances, I am not satisfied that there was a suitable alternative procedure available to the Claimant to challenge the Defendant's decision.

D. The 2009 assessment

51. As noted in section B2 above, the 2009 assessment identified the assessing social workers as “TSW Julie Pinnock” and “SW Marykla Ranoszek.” Ms Luh submitted, and Mr Singh was not in a position to contest, that “TSW” denoted that Ms Pinnock was a trainee social worker rather than a fully qualified social worker.

52. The social workers used a standard form when setting out their assessment. The form had been produced by NCC in November 2005. It provided for information to be provided under a number of headings. For each of these headings there was what can conveniently be described as a “guidance box” on the left hand side of the page. The main box, to the right of this guidance box, set out the heading, and immediately under the heading set out an observation about it. The information recorded by the social workers was then set out in a different typeface.

53. The first heading was “physical appearance, demeanour.” Under this heading the form included the observation:

All assessments begin with initial impressions, made from visual presentation

54. The guidance box for this heading identified five points. The first four points were as follows:

An initial hypotheses if age range is formed based on height, facial features (facial hair, skin line folds, etc), voice tone and general impression.

It is important to consider racial differences here, e.g. it is normal in some cultures for boys to have facial hair at an early age and for girls to develop at different ages.

Life experiences and trauma may impact on the ageing process, bear this in mind.

Demeanour: it is essential to take account of how the person presents, style, attitude and authority and relate this to the culture of the country of origin and events of origin and events proceeding the interview, journey experiences etc.

55. The information recorded by the social workers in the main box for this heading included the following:

Khan is approximately 5’ 6” in height, slim build with a recently shaven face (he maintains he asked a friend he was travelling with, to cut his hair, he also shaved him). Khan stated he had not shaved prior to this. Khan has very strong defined facial features, with a pronounced jaw and thick neck line with evidence of an Adam’s apple. His voice tone is deep (he cannot remember when his voice changed). Khan’s clothes and appearance were reasonably clean.

Khan eats Halal food and did not state any particular favourite foods.

Khan is a practicing Sunni Muslim from the Helmand province of Afghanistan; he lived in a village called Manzoorabad. Khan lived with his father, mother and younger brother Syed Ulah. His father died initially he said 6 years ago, later he changed this to 3/6 years. Following his father's death Khan stated his mother sent him to a safe place with his uncle in Pakistan.

Khan presented as tired, initially he maintained he did not know how long he had been travelling, he stated he had stopped in several countries but could not name any of them, he did state he has been fingerprinted in some of these countries giving different names which they were told by the 'agent'.

Khan did not know his date of birth however before he left Pakistan his mother had told him he would be 15 years one month after the religious festival Eid. By the end of the interview it transpired during his journey, friends he was travelling with were phoning home and speaking to family who informed them when they were celebrating a festival (Eid). Eventually we established three Eid celebrations had occurred during their journey. Which we established there are two Eid festivals a year and although he could not be specific about which Eid festival he left the country, our calculations suggest he would have started travelling before the Eid in September 2008 which according to Khan would suggest his birthday is October when he states he would have been 15 years.

56. The last paragraph quoted above, and other parts of what was recorded in this box, did not specifically focus on either physical appearance or demeanour. So far as the last paragraph quoted above is concerned, it seems likely that it was included under this particular heading in response to what was said in the fifth point in the guidance box:

It is useful to establish the length of time that the person has taken to arrive in the UK from the time they left their country of origin and include this into the age calculation.

57. The second heading was "interaction of person during assessment." Under this heading the standard form included the following general observation:

The manner in which the person interacts with the assessing worker conducting the assessment will provide an indication of whether or not the person is responding in an age appropriate manner.

58. The guidance box for this heading stated:

It is important to note both the verbal and non-verbal (body language) behaviour of the person. ...

Take account of differing cultural terms, e.g. some people may believe it impolite to make direct eye contact.

But remember to be aware of cultural variations in attitudes to elders.

Does the person appear to be uncomfortable with speaking to an adult?

Keep in mind that your position will be seen as one of power, which may influence the way the person interacts with you, your role needs to be clarified and the differences in the roles of Social Services and the Home Office.

59. The information recorded by the social workers under this heading was:

Throughout the interview Khan sat looking down at the floor with his hands tucked between his legs and hunched shoulders only looking up when the interpreter asked him a question. There was a point when I observed him trembling this may have been attributable to stress/anxiety or hunger, as he had refused the food offered in the police station. Khan did drink some water when offered.

It was difficult to ascertain some of the information as Khan would give very little information when asked. He gave different accounts when asked, for such as; the clarification about his age, how long he had been travelling, when he started his journey, when his father died. Sometimes the interpreter was confused with his answers and commented that he was not answering the question asked. Some of the questions would have to be rephrased and we used religious festivals in an attempt to establish timescales. It was difficult to assess whether this was due to Khan having no education and limited understanding, or whether he has been told not to say anything.

It was not until the end of the interview that we examined the timescale around his birthday and leaving Pakistan (see physical appearance and demeanour), therefore we were basing our assessment that he was stating he was 14 years. After we suggested it was our opinion he was older than 14 years, Khan stated "this is not a good country I will go to another country, I did not choose to come here".

60. The third heading was "social history and family composition". The general observations on the standard form in this regard noted that the information gained on these matters may indicate discrepancies or impossibilities which need to be clarified. The social workers recorded three paragraphs of information. There was nothing, however, in that information to indicate any discrepancies or impossibilities.

61. The fourth heading was “developmental consideration”. Under this heading the standard heading made the observation that:

Questions about the types of activities and roles that the person was involved in prior to arriving in the UK can often give an indication of age.

62. What the social workers recorded under this heading was:

Khan maintains he did not do anything as a child he did not have friends and would stay in the house sometimes sitting with his father when he was at home. In Pakistan he prayed and read the Koran every day, this has been confirmed as practice in the religious schools, by colleagues from Pakistan.

63. The fifth heading was “education”. Under this heading the social workers recorded that the claimant said he had never been to school and “cannot read or write, but can read Arabic.”

64. The sixth heading was “independent/self-care skills”. Under this heading the standard form made a general observation that the level of ability, experience and confidence that a person has in being able to care for themselves can be an indicator of age. Under this heading the information recorded by the social workers included that the claimant said he could not cook. The social workers also recorded that he had used small amounts of money in Pakistan.

65. The seventh heading was “health and medical assessment”. Under this heading the social workers, after recording that the claimant said he had never been ill, had accidents or received any medical attention, added:

Khan was suffering from a headache and said it had started the previous night. Khan was seen by a police doctor, he was asked some health questions, his blood pressure and eyes were checked, the doctor gave Khan a paracetamol.

66. The eighth heading on the standard form was “information from documentation and other sources”. Under this heading the social workers noted that there was no documentation.

67. The ninth heading was “analysis of information gained”. Immediately under this heading the standard form stated:

Conclusion of the assessment.

68. The guidance box for this heading stated:

Key indicators of the conclusion

The assessing worker should draw together the information obtained and present his/her views and judgement on the age of the person being assessed, giving clear reasons for the

conclusion. If this differs from the stated age clear reasons for this should be given.

Please remember this process is not an exact science and that conclusion should always give the benefit of doubt.

69. In the main box for this heading the social workers wrote:

In our opinion Khan's physical appearance would suggest he is older than 14 years. In addition to this when we questioned Khan further the length of time he has been travelling using religious festivals and what his mother had said relating to his age (see physical and demeanour), this confirmed our decision.

It was difficult to ascertain some of the information as Khan would give very little information when asked questions. He gave different accounts when asked such as; the clarification about his age, how long he had been travelling, when he started his journey, when his father died. Sometimes the interpreter was confused with his answers and commented that he was not answering the question asked. It was difficult to assess whether this was due to Khan having no education and limited understanding, or whether he has been told not to say anything.

When it was put to Khan that we were of the view he was approximately 17 years, in our opinion his response 'this is not a good country I will go to another country', 'I did not choose to come here' could be considered as a mature response and not necessarily that of a child who is 14 years.

70. The next section of the form was headed "conclusion". This section dealt with two matters, which on the standard form were set out in block capitals. Those matters, and what the social workers said about them, were as follows:

CONCLUSION

BASED ON THE ASSESSMENT, THE CLIENT'S AGE IS:

17 years

DATE OF BIRTH ESTIMATED TO BE:

Approximately 1st Noveember

71. The last page of the standard form was headed, "form to be handed to the person assessed." I shall refer to this page as the "outcome form." It provided for details to be set out of the applicant, the local authority, the assessing social worker or workers, and the date of assessment. The final part of the standard outcome form was entitled "conclusion", and comprised three lines:

Person is assessed to be Over:

Person is assessed to be a child aged:

Assessment is inconclusive and further work is necessary
Please mark with an 'x'

72. When TVE requested a copy of the 2009 assessment from NCC in June 2011, the version provided to them by NCC was as follows:

Person is assessed to be Over:

Person is assessed to be a child aged: 17

Assessment is inconclusive and further work is necessary
Please mark with an 'x'

73. What emerged on disclosure in the present case was that this was not in fact what was set out in the document which NCC faxed to the UKBA on 20 November 2009. The version sent by fax to UKBA on that date was as follows:

Person is assessed to be Over: 18

Person is assessed to be a child aged: 17

Assessment is inconclusive and further work is necessary
Please mark with an 'x'

74. Thus the concluding section of the outcome form, comprising the final page of the 2009 assessment as faxed to UKBA on 20 November 2009, contained three statements by way of conclusion. The first was that the claimant was assessed to be over 18. The second was that the claimant was assessed to be a child aged 17. The third was that the assessment was inconclusive and further work was necessary.

E. The defendant's policy

75. The defendant's policy where an individual claims to be under 18 years of age is set out at paragraph 55.9.3.1 of Chapter 55 of her Enforcement Instructions and Guidance ("EIG"). That paragraph includes the following:

UK Border Agency will accept an individual as under 18 (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:

- ◆ there is credible and clear documentary evidence that they are 18 years of age or over;
- ◆ a full "Merton-compliant" age assessment by Social Services is available stating that they are 18 years of age or over. (Note that assessments completed by social services emergency duty teams are not acceptable evidence of age);
- ◆ their physical appearance/demeanour **very** strongly indicates that they are **significantly** over 18 years of age and no other

credible evidence exists to the contrary” [bold emphasis in original]

76. In addition UKBA produced what was described as an “instruction” entitled “Assessing Age.” Two versions of this document were provided at the hearing. The first was dated November 2009. The second was dated June 2011. Both explained that the purpose of the “instruction” was to set out the policy and procedures to follow when an asylum applicant claims to be a child. The 2011 version of the document went on to amplify this in more detail which I need not set out.
77. The instruction was intended to provide guidance for UKBA officials. It dealt with the practical approach which should be taken by those involved. In the circumstances of the present case I need refer only to section 3.1 of the instruction, which appeared under the heading “Local Authority Age Assessments.” This noted that unless the claimant is to be treated as an adult because his/her demeanour very strongly suggests they are significantly over 18, all unaccompanied children or claimants who say they are unaccompanied children should be referred to the relevant local authority. After summarising the *Merton* principles, the instruction continued, in a passage which is identical in both the 2009 and the 2011 versions:

Case owners should give considerable weight to the findings of age made by local authority social workers, recognising the particular expertise they have through working with children. In cases where the social worker’s assessment is the only source of information about the person’s age – their assessment will normally be accepted as the decisive evidence of the person’s age.

Nonetheless, case owners should carefully consider the findings of the local authority and discuss the matter with the social worker in appropriate circumstances – for example: when it appears that the findings are unclear; or do not seem to be supported by evidence; or it appears that the case is finely balanced and the person has not been given the benefit of the doubt; or that it appears that the general principles set out by the judge in the *Merton* case have not been adhered to.

F. Was the 2009 assessment *Merton*-compliant?

78. When considering whether the 2009 assessment was *Merton*-compliant I can dispose at the outset with two preliminary points made by Ms Luh and Mr Singh respectively:
- (1) Ms Luh noted that paragraph 55.9.3.1 referred to a *Merton*-compliant assessment stating that the applicant was 18 years of age or over. The 2009 assessment did not state this. Indeed in the months following the 2009 assessment all concerned proceeded on the basis that the claimant was not yet 18. It followed, submitted Ms Luh, that the 2009 assessment did not state what was required by paragraph 55.9.3.1. The answer, however, is that this is an artificial reading of the paragraph. An assessment identifying a particular birth date for an applicant will, if read at a time when at least 18 years has elapsed

since that date, be an assessment which effectively states that the applicant is 18 years of age or older.

- (2) Mr Singh submitted that there was an inconsistency in claimant's position in so far as he challenged the 2009 assessment: there were numerous criticisms of it, but the claimant was more than happy to accept it with the addendum. If the 2009 assessment failed to meet the *Merton* principles, so did the 2012 assessment, for nothing in the procedure had changed. The only difference, submitted Mr Singh, was that the claimant was unhappy with the conclusion of the 2009 assessment, but was happy with the conclusion once the addendum was slotted in. That, he said, was a mere disagreement with the conclusion and was not a basis for judicial review. The answer, however, is that a willingness to accept the addendum does not involve any acceptance of the 2009 assessment. The fact that the addendum was slotted in to the 2009 assessment is no more than happenstance.
79. Other general submissions by Mr Singh are undoubtedly right and I readily accept them. The court should not impose unrealistic and unnecessary burdens on the social workers. Judicialisation of the process must be avoided. Those submissions cannot, however, provide an answer to the obvious obstacles in the present case which lie in the path of any suggestion that the 2009 assessment constituted "a full *Merton*-compliant age assessment".
80. The first such obstacle was understandably put at the forefront of her submissions by Ms Luh. It is that prior to faxing the 2009 assessment on 20 November 2011, NCC had put a cross in the box next to the statement "Assessment is inconclusive and further work is necessary." On the face of it, there was a clear indication here by NCC that this was not a full assessment and that further work needed to be done.
81. Mr Singh submitted that NCC had not at any later stage said that the original assessment was inconclusive. That, however, does not meet the point: on 20 November 2009 NCC, by putting a cross in the box, plainly did say both that the assessment was inconclusive and that further work was necessary. Mr Singh then made a submission that one had to look at what the social workers did. To my mind, if after the assessment the social workers had said that they had changed their mind, or that the cross was a mistake, then there might be merit in such a submission. In the absence of anything of that kind, however, the assessment itself continued to be a document which was inconclusive and required further work. True it is that NCC after the assessment treated the claimant as having been born on the date suggested in the assessment. That, however, does not change the statement made in the assessment that it was inconclusive and further work was necessary.
82. Moreover there was material within the assessment to justify that statement. The claimant was interviewed shortly after his arrest which in turn had occurred shortly after a clandestine journey from Calais to Nottinghamshire. The assessment recorded that he "presented as tired". It recorded him saying that he had a headache. He had been given paracetamol, but the assessment does not say what, if any, effect that had had. In their analysis the social workers noted that the claimant had given answers which were confused. They said it was difficult to assess whether he did so because he had no education and limited understanding, or whether he has been told not to say anything.

83. For that reason alone I would hold that Ms Luh was right to say that the 2009 assessment was obviously not the sort of assessment which the *Merton* judgment had in mind.
84. Ms Luh identified a further obstacle which in my view was an obvious obstacle. It concerns the point on which Merton LBC lost. If the decision maker forms the view, which must at that stage be a provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view. Elementary fairness requires that the crucial points which are thought to be decisive against an applicant should be identified, in case the applicant has an explanation for them.
85. Mr Singh objected that this would have been pointless. What, he asked rhetorically, did Ms Luh expect the social workers to have done? They could have said, “We have considered these points and think you are 17.” Mr Singh submitted that all that the claimant could have said in answer would have been that they were wrong.
86. As to that, however, I fundamentally disagree. Standing back and looking at the 2009 assessment as a whole, the social workers do not seem to regard the confused answers as warranting a conclusion that the claimant was lying – as noted earlier, they found it difficult to assess the reason for the confused answers. At the start of what they said in the box headed “Analysis of information gained” the social workers relied on two matters:
- (1) They commented that the claimant’s physical appearance would suggest he is older than 14 years. Despite the guidance box stressing the need for clear reasons, no explanation was recorded as to what particular physical features were relied on. There was no statement that his physical features suggested an age of 17. If it was indeed the case that the social workers thought his physical features suggested an age of 17, there was no explanation why. Despite what was said in the guidance box for “physical appearance, demeanour”, nothing in the assessment indicated that the social workers had considered racial differences and whether the claimant came from a background where boys not uncommonly had certain features at an early age.
 - (2) They added that when they questioned the claimant about the length of time he had been travelling using religious festivals and what his mother had said relating to his age, “this confirmed our decision.” Here they were referring to the paragraph which concludes the quotation earlier in this judgment from what was said in the box headed “Physical appearance, demeanour.” What that paragraph suggests, however, is that the social workers had made calculations based on the claimant’s mother telling him he would be 15 years one month after the religious festival of Eid. If they had indeed identified the festival that the mother was referring to then he had turned 15 in October 2008, which would have made him 16, not 17, in November 2009. There is no suggestion that the claimant had an opportunity to point this out to them, nor any recognition that they might not have correctly identified the festival that the mother was referring to.
87. Mr Singh added that the 2009 assessment describes what the claimant had said when the social workers told him their conclusion. It was, submitted Mr Singh, “a bizarre

answer,” saying that he would go to another country. Whether or not it was bizarre, however, the account which the social workers give in this regard provides no reason whatever to think that they told the claimant what they thought were the decisive points against him, less still that they provided any opportunity for him to give an explanation for them.

G. The defendant’s approach to the 2009 assessment

88. Here, too, Mr Singh made a preliminary point. The terms of the defendant’s policy, he said, were such that officials could properly proceed on the basis of a local authority age assessment unless it were obviously not *Merton*-compliant.
89. It will be apparent from what I have said in section F above that even if Mr Singh’s preliminary point were right it would not assist the defendant in the present case. For the reasons given in that section, in the two respects there identified it was obvious that the 2009 assessment was not the type of assessment which the *Merton* judgment had in mind.
90. I add that I would not in any event accept Mr Singh’s preliminary point. As Ms Luh observed, the policy required officials to apply their mind to whether or not the assessment in question complied with the *Merton* principles. There is in this case a dearth of evidence as to whether this was done. If it had been done, then the conclusion could be challenged on public law principles. Those principles cannot be collapsed into an approach which requires that an assessment can be relied upon unless it obviously failed to comply with *Merton* principles.

H. Conclusion

91. For the reasons given above I conclude that, even adopting the legal tests contended for by the defendant, detention of the claimant during the period 25 May 2011 to 15 June 2011 was unlawful. Damages will need to be assessed if they cannot be agreed.
92. Additional points were raised by Ms Luh which, in the event, I do not need to address. Among other things Ms Luh contended that there ought to have been an appropriate adult at the 2009 assessment. NCC have explained in their letter to the Treasury Solicitor that this was not their policy at the time. In the absence of evidence from NCC about the reason for this I think it undesirable to express any view on the matter. Ms Luh on behalf of the claimant also took a fundamental point, relying on section 55 of the Borders Citizenship and Immigration Act 2009 to assert that detention was unlawful because the defendant detained the claimant as an adult when in fact he was a child. That approach, however, would run contrary to the decision of the Court of Appeal in *R (AA) v Secretary of State for the Home Department* [2012] EWCA Civ 138.