



**Upper Tribunal  
(Immigration and Asylum Chamber)**

R (on the application of ES) v London Borough of Hounslow (AAJR) [2012] UKUT 00138  
(IAC)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW**

**Heard at Field House  
On 22, 23, 24 November 2011**

**Determination Promulgated**

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**Before**

**UPPER TRIBUNAL JUDGE LATTER  
UPPER TRIBUNAL JUDGE COKER**

**Between**

**THE QUEEN (ON THE APPLICATION OF ES)**

Claimant

**and**

**LONDON BOROUGH OF HOUNSLOW**

Defendant

**Representation:**

For the Claimant: *Ms Shu Shin Luh*, instructed by Pierce Glynn, Solicitors  
For the Defendant: *Mr J Swirsky*, instructed by London Borough of Hounslow

## DETERMINATION AND REASONS

### Introduction

1. This is an application for judicial review by the claimant, a citizen of Afghanistan, of decisions by the defendant, the London Borough of Hounslow, assessing his date of birth as 1 June 1993 as opposed to his claim that it is 1 June 1996. Permission was granted by the High Court to challenge the defendant's decisions on 11 April 2011 and the application has been transferred to the Upper Tribunal. In the light of the judgment of the Supreme Court in R (A) v London Borough of Croydon [2009] UKSC 8, the task of the Tribunal is to assess the claimant's age.

### The Evidence before the Tribunal

2. We heard oral evidence from the claimant and Balbona Mejzini from the Refugee Council and on behalf of the defendant from Jacinta Kayne, Hannington Nuwamanya and Cyril Leroy, all social workers in its employment, Gwyneth Austin, a tutor at West Thames College and Celina Dennis, an education support mentor at the Institute of Education Centre (IEC) at Brentwood Football Club.
3. We had written evidence from Elaine Fehrman, an independent social worker instructed on behalf of the claimant. There was a witness statement from Lizette Villaverde on behalf of the defendant. She was unable to attend the hearing as she was abroad. The defendant instructed Dr Philip Marsden to carry out a dental age assessment. His report was considered by Professor Graham Roberts on behalf of the claimant. A joint report was submitted dated 4 November 2011.
4. The documentary evidence is in the trial bundle which is divided into nine sections indexed and paginated 1.1 - 9.19. A notice of hearsay evidence dated 18 November 2011 in respect of the evidence of Lizette Villaverde was produced by the defendant. On the day of the hearing the claimant sought to adduce a response by Professor Roberts to a series of questions submitted by his solicitor, the defendant subsequently producing a response from Dr Marsden to that further evidence on 23 November 2011. Both counsel produced full and helpful skeleton arguments and following the hearing Ms Luh produced a further supplementary note on the burden of proof dated 21 December 2011 drawing our attention to the judgment of the Court of Appeal in R (C) v Cardiff CC [2011] EWCA Civ 1590, Mr Swirsky filing a response on 13 January 2012. We were also provided with a bundle of authorities.

### Background

5. The claimant is a citizen of Afghanistan who arrived in the UK on 2 September 2009 making a clandestine entry by lorry. He was arrested and then claimed asylum. In

his screening interview on 3 September 2009 when asked his age, he said that he was 13 years and 6 months (7.3). He explained that he had left Afghanistan two and a half months previously for Iran where he stayed for a week before going to Turkey. He was in Istanbul for six days and then travelled to Greece by lorry and ferry where he stayed for about 45 days. Whilst he was there he was arrested and fingerprinted. He then travelled to France by train where he stayed for about a month, leaving on 2 September 2009 by lorry for the UK.

6. He submitted a Statement of Evidence Form dated 12 October 2009 again claiming to be 13 years 6 months old. In answer to the question (A21) on which date he left his home country, he replied that he was not sure, may be it was about three and a half months ago. He supported his claim by a written statement also dated 12 October 2009 repeating his claim that he was 13 years 6 months old and saying that when he had left Afghanistan, his mother had told him that this was his age but he did not know his calendar date of birth (7-44A).
7. The claimant's application for asylum was refused. He based his claim on a fear of the Taliban. He said that his father had been working for the Taliban but had disappeared about four years before he left Afghanistan. He and his family moved in to live with his maternal uncle and about four years later, his uncle went missing. He claimed that about three months after his uncle's disappearance the Taliban came to his uncle's house and bombed the yard. An aunt and cousin were killed. Later they returned asking him to become a suicide bomber saying they would come back the following week to take both him and his brother.
8. Arrangements were made through the village leader "the Malik" to arrange the sale of their house and for him to leave Afghanistan. The Secretary of State did not accept that the claimant had given an accurate account of his reasons for leaving Afghanistan or of his fears on return and his application was refused. His age was also disputed. The defendant carried out an age assessment in September 2009. It was accepted that the claimant was under 18 but his age was assessed as 16 and a few months, his date of birth being treated as 1 June 1993. That finding was disputed and the claimant's then representatives instructed Elaine Fehrman, an independent social worker, to undertake a further assessment and in her report of 26 March 2010 she set out her view that the defendant's social workers had not given adequate reasons for their decision and concluded that the claimant's age was as he claimed.
9. The claimant appealed against the decision to refuse his asylum claim and his appeal was heard by IJ Williams on 29 March 2010. In his determination issued on 7 April 2010 the judge said that he preferred the evidence of Ms Fehrman to the evidence of the local authority. He commented that, although it would be impossible to come to any definite conclusion that the claimant at the date of hearing was only 13, he was satisfied, at least on the lower standard of proof, that he was under the age of 16 and accepted for the purposes of his determination that the claimant was the age which he had always asserted consistently and vehemently. He concluded that he had been

told the truth by the claimant and that he would be at risk in his home area. As internal relocation was not an option, the appeal was allowed on asylum grounds.

10. The claimant was duly granted refugee status, and the Secretary of State issued a status document giving a date of birth of 1 June 1996. However, the defendant carried out a further age assessment in November 2010 and maintained its view that he was in fact three years older than he claimed and was born in June 1993 not 1996.

#### The Evidence of the Claimant

11. The claimant gave his evidence through a Pashtu interpreter. He adopted his witness statement at 2.1-20 dated 16 August 2011. He said that he was 13 years and 3 months old when he left Afghanistan in 2009. The journey took about 2½ or 3 months and he arrived in the UK in early September 2009. The birth date of 1 June was given to him by the Home Office after his first interview. He had told them that he was 13 years and 6 months in September 2009. He believed that it was possible that he might actually have been born in March. Calendars were not used in Afghanistan in the way they were in the UK but in Afghanistan the New Year, "Nawroz", usually fell in March. It was a big event and in his village and home he had the nickname of Nawroz. He had never asked his mother about this but he thought it might be because he was born on or around New Year's Day.
12. He then gave details about his family. He has one older brother who is severely disabled and after him he is the oldest in the family. He has two younger brothers and sisters. His father disappeared when he was about 8½ or 9 years old and he then stopped attending school. He had started attending when he was a little older than 5 but younger than 6. He had been very eager to start school early. When he first went he was not accepted because he was told that he was too young although other boys in the village were accepted. This was how he knew they were a little older than him. The head teacher had spoken to his mother about attending school and he remembered her being asked how old he was but he did not know what she had said in reply. It was suggested that he should wait a year to start but he was keen to attend school, often turning up with the other boys and eventually the head teacher accepted and registered him in the school. He went to school for three full years and was in his fourth year when he stopped attending.
13. He confirmed that he was now living with his foster carer in Brentford and he got on well with her. He attended the IEC Centre three days a week, describing it as a mixed school for children who had been kicked out of normal schools. He attended maths and English lessons. He was not happy there as he wanted to attend a normal school like other children of his age. He also attended a place in Hounslow called "The Spot" for two hours each day where he was taught English, IT and maths. He remembered seeing one of the teachers although he did not know that her name was Ms Dennis. There was an occasion when a boy asked him his age and he said that it was no concern of his. Normally he would not indicate his age but he said it was 15

when the other boy mentioned 17. He did not know whether he was talking about him or not but he had not said that he was 17. He repeated it was not possible that he would have said that he was 17.

14. He was asked about the age assessment carried out by the defendant in 2009. He said he was not asked if he wanted to have an adult with him. His social worker, Hannington was there as was another person, Lizette. There was another person whose age was also being assessed, Kushal, whom he had met in France. The claimant was asked about whether he had said that he had met him in Greece. He explained that Kushal had been put under pressure and was confused. He later told the claimant that he had said that they had met in Greece. For this reason the claimant confirmed that was the case but he later told the social worker that this was a mistake. He was trying to cover up for Kushal. He had not said they had met in England but in France. So far as his second age assessment was concerned, he said that he had not been asked whether he wanted an adult to be present.
15. In cross-examination the claimant explained that in Afghanistan they did not use a calendar but he was aware of the passing of time because of events such as the New Year ceremonies. He knew when Ramadan would come because there would be an announcement in the mosque. At the age of 15 people were expected to start fasting but some children did fast when they were under 15. He said that when he left Afghanistan he did not understand about months. It was only after he arrived in the UK that he learned what a month was. He was asked about his evidence that his mother had told him how old he was just before he was due to leave. The elder of the village was a man called Kazan also known by his title of Malik. The Malik told his mother that he needed to know his age before embarking on such an important journey. She told him how old he was, 13 years 3 months.
16. The claimant confirmed that he did not know what a month was when he was in Afghanistan but by the time he came to the UK, he could calculate his age in months. He said his companions told him about months saying that there were four weeks in a month, and 30 days in a month. Before he arrived he had spent time in France and had been calculating time in weeks. He had said that he was in Greece for four to five days when interviewed not 45 days. He was asked why when first interviewed, he had said that he was 13 years 6 months. He explained that he had been told he was 13 years 3 months when he left Afghanistan and he had been travelling for about two and a half to three months and so he mentioned 13 years 6 months. He accepted that when he reached 15 he would fast during Ramadan. He had only fasted for a few days. In his household in Afghanistan no one talked about age although his mother would have known how old he was. The Malik had said that he must be told his age as he might need it on his journey and it was then she had said 13 years 3 months. He had not been surprised but he was pleased to know that this was his age.
17. He said that he had not known where he was going when he left Afghanistan. His mother had said goodbye but he had not been given anything to take with him: no money, no mobile phone or clothes. It had been his mother's decision. She had

asked the Malik to make arrangements so that he could be taken away from Afghanistan. He had been frightened of the Taliban. His was a small village of about 30 households. The question of him leaving was raised and then it had been about a week before he went. After six days the Malik said that next day he was due to leave. Land belonging to his uncle had been sold to pay the agent but he did not know for how much or how his family were going to live. He had wanted to leave because he was frightened. He had not been curious about where he was going. He had no idea how long the journey would take and he was not surprised by its length. He had not thought at all about how he was going to live or find food. The journey had taken some two and a half months. Once he was out of Afghanistan he had no reason to feel frightened of the Taliban. He had come into the UK hidden in a box in a lorry. He had been fingerprinted when the driver called the police and later he had been handed over to social services. No one had told him what to do. He confirmed that all the arrangements for him leaving Afghanistan had been organised in a week.

18. He explained that he had been to school in Sanki District School. Initially he had been told by the teacher that he was too young. He thought he was about 5½ when he enrolled, that he had told the social workers that he was 8½ when he had left and that he had been at school for three years. When he was first taken to school he had not heard what his mother had said to the head teacher about his age. He had been told he could go to school when he was 6. The people he had travelled with across Europe were all Afghan boys older than him but this had not bothered him. He had been stopped in Greece, arrested and fingerprinted and had spent two nights in a police station. They had only asked his name and not where he came from. He was also arrested in France and his fingerprints were taken. He was asked his name but not where he was from or his age. At the age assessment he said he had met Kushal in Greece but later said that he had made a mistake. He had travelled with him from Calais. He accepted that he had been suspended from college and there had been some problems involving the police but generally his studies had been going well. He confirmed that there had been an incident in which the police were involved and that he was being taken to court.

#### The Evidence of Balbona Mejzini

19. Ms Mejzini is an advisor at the children's section of the Refugee Council. Her statement is at 2.15-20. She confirmed that she was the claimant's allocated children's panel advisor from 17 September 2009 but first met him on 10 May 2010. During this period she had had no concerns that he was not a child of his claimed age. Her first impression, based on his appearance and behaviour, was that he was clearly a child. He was very shy and kept smiling a lot. She had worked with age-disputed children especially from Afghanistan. The most significant indicator of immaturity and youth was his limited ability to communicate. At the end of her first meeting she felt that he was an immature, young person because of his non-communicative manner, his lack of confidence and self-care skills. She had met him and felt he had not been coping very well. By way of example his diet was very bad. She also accompanied him to his appointments with his legal representatives. There had been one occasion

when she had arranged to meet him at Borough Tube Station so that they could both go to see his solicitor. He was supposed to be brought by his key worker but on the day he had not been available and had told the claimant how to get to the station but he had not arrived. She was in a panic as she could not reach him by mobile. She finally got in touch with him after 8 pm. She described him as terrified and could hear him crying over the phone. She calmed him down and explained how he could get home.

20. In cross-examination she explained that the role of the Refugee Council was to give advice to children on asylum procedures and to ensure that their welfare was met so far as accommodation, support and education were concerned. She was very experienced in dealing with age dispute cases. She had concerns about the way local authorities carried out age assessments and did not think they were carried out the right way: there should only be an age assessment if a claimant really did not look the claimed age. She said that she would support a client only if she believed them to be the age they claimed. She had seen the claimant about eight to nine times. She had not obtained a second opinion: her manager had accepted her view. She had not thought that the accommodation provided was the proper place for him and was confident that the claimant was the age he claimed. She said that he had very low self-esteem and there had been some very immature behaviour. She thought that at first he had been suspicious of her and even when he trusted her, he still showed the same behaviour. She had been with him to solicitor's appointments and to see accommodation. She believed what he said about his age and accepted that she could be regarded as part of his team.

Written Assessment Prepared by Elaine Fehrman

21. Ms Fehrman has prepared two reports on behalf of the claimant dated 26 March 2010 and 6 August 2011. Her first report was specifically requested to comment on the accuracy and reliability of the defendant's age assessment, to consider whether the instructions as given by the claimant to his representatives were reflected during her observations and enquiries, whether the age assessment paid appropriate regard to these issues and whether the conclusions reached were consequently affected or undermined by them. Her qualifications are set out in para 2.1.5 of her report. She interviewed the claimant and has set out his account of his background in Afghanistan and his reasons for leaving. In the interview he was consistent in his responses, confirming that he was 13 years old and would be 14 some time in June 2010. He said that he did not know the day, month or year of his birth but clarified that he knew his age because his mother had provided him with this information prior to his departure for the UK. He denied having any proof in identity documentation or papers, saying that he had none in Afghanistan. She noted that the claimant told her that he prayed regularly and did this in his room. He did not fully observe Ramadan this past year through fasting. She was aware from previous work with Afghani young people that fasting in Ramadan was generally expected after the age of puberty but commented that it could not clearly be defined as a set age of 15 but would vary between individuals and populations.

22. She commented adversely on the lack of details in the report prepared by the defendant about the interpreter and the interaction between him or her and the claimant, on the fact that the report did not elaborate on or consider the myriad issues about diversity and discrimination, that the interview duration was unclear in both the handwritten and finalised reports and on the lack of clarity of whether they were paraphrasing what the claimant had said or whether their statements were sourced from third party information. She made the point that it was essential for age assessors not to rely upon socially constructed ideas of appropriate behaviour in making a formulation of age and commented on a number of errors in recording information given by the claimant. It was her opinion that the defendant did not give adequate reasons for its decision and she referred to the conflict of interest between the provisions of social care and the maintenance of immigration control and to research by ILPA that social work managers placed pressure on assessing social workers to gauge children as older than they are. She concluded that there was no credible evidence to indicate that the claimant's assertion that he was aged 13 was untrue and she concluded that he would be 14 in June 2010 and was under the age of 16 given by the defendant.
23. In her report of 6 August 2011 she recorded that she was further instructed to give her opinion as to the claimant's age. She interviewed him on 6 August 2011 through an interpreter. She set out again his background and history, his journey to the UK and his current situation. She recorded that the claimant was consistent in his responses that he was 15 and that his mother informed him he was 13 years old before his departure for the UK. She covered again many of the issues set out in her first report and undertook a critique of the further report from the defendants of November 2010. She referred to the policy of giving the benefit of the doubt in cases of an age dispute unless an asylum seeker's physical appearance strongly suggests that he is older. It was her opinion that the claimant's appearance did not give rise to any credible suggestion that he was older than his stated age and expressed the view that on the balance of probabilities there is no credible evidence to indicate that the claimant's assertion that he was aged 15 was untrue and she concluded that his age was as he claimed (16.7).

#### Oral Evidence called by the Defendant

##### Celina Dennis

24. Her statement is at 3.74. She is an education support mentor at IEC. She records that the claimant is a student currently attending the IEC for tuition. He began attending on 4 April 2011 for three days a week and has continued to date. There are two adjoining teaching rooms separated by a plaster wall with a door. During the lunch break on 9 June 2011 the door between the two rooms was open. Some staff were in

one room and four pupils and an attendant were eating lunch in the adjoining room. She was sitting in the room with the pupils eating lunch. She, the claimant and another student were together around a rectangular table on one side of the room. The claimant was standing by the nearside opposite corner of the table shuffling cards. The other student asked the claimant how old he was and he replied "I am 17". The other student then told him that he should not bother to attend as he was over the age of compulsory education. The claimant made no reply but looked up to see if anyone else was listening and motioned to the other student he did not want to talk about it any further. She said that during his time at the IEC students had periodically asked the claimant about his age but he usually refused to answer or told them he was 15. She did not indicate that she had overheard the conversation but reported the matter to her manager at the end of the day.

25. In cross-examination she confirmed that she was not a teacher but she tutored groups, not taking the class herself. Those attending were mainly students excluded from school but the claimant did not fall into that category. She knew that he was in foster care and was being looked after by the defendant. She did not know that his age was in dispute. Sometimes students talked about why they were at the IEC. She did not know if anyone knew that the claimant was being age disputed. He was not the only child there from abroad but probably the only unaccompanied minor. She had never asked him about his age; she had no reason to. The other students there often felt he looked older and would say to him that he did not look as though he should be there but he would say he was 15 or just not answer. She confirmed that she had heard the claimant say that he was 17 and she had told the manager about this afterwards. It had been just a casual conversation. Matters such as this were reported as they needed to know what was going on. Anything like this that was heard was mentioned later. She did not tell the claimant that she had reported the matter. She felt it was an odd thing to say and was out of the ordinary. In re-examination she confirmed that the other student involved was now 16. He was from Somalia and she could recognise the difference in their voices; he was living with his family and had been excluded from school.

#### Hannington Nuwamanya

26. Mr Nuwamanya is a social worker employed by the defendant. He confirmed his witness statement at 3.36-39. He has been the allocated social worker for the claimant since he came into the care of Hounslow on 8 September 2009. He had completed the initial care assessment on 9/10 September 2009 based on his observations of the claimant and the assessment of Lizette Villaverde. He had assessed and supported numerous young people from Afghanistan and was confident that the claimant was older than his stated age. His physical features are well defined, his skin texture well weathered and he appeared confident in relating to adults. He did not believe that the claimant's physical appearance and demeanour was consistent with a 13 year old adolescent. He had progressed well through the different levels of ESOL without any problems and did well at college just like many other 16 year olds he had looked after before. He had provided emotional support

for the claimant and made sure that he settled well in his environment in a foreign country.

27. From his observations the claimant had not shown signs of struggling to cope with life but he had been living just like any other teenager of 16 or 17 rather than as a 13 year old. He had had no problem with living with other young people in semi-independent accommodation with 16 and 17 year olds. He had spoken to the claimant's foster carer with whom he had been since March 2011. She had said that she did not want to give a formal opinion on his age as she feared it might cause animosity. She said that the claimant got on well with her 14 year old adopted son and her 22 year old grandson and described him as courteous and helpful. Mr Nuwamanya said that he had been involved with 37 age assessments since January 2010. Twenty-one had not been disputed, eight were disputed and eight had absconded.
28. In cross-examination he confirmed that he had carried out many age assessments and was familiar with the Merton guidelines. He accepted that physical appearance on its own was not reliable: everything had to be considered and a claimant's life experience could have an impact on the assessment. He also accepted that behaviour alone would not be determinative and that no one single factor would tip the balance. During the assessment on 8/9 September 2009 Ms Villaverde had not been present all the time. On 8 September he had been there by himself but on 9 September she was there. On that day he had repeated what they had done the day before so that the claimant's response could be assessed. He had said that he had been fasting because of Ramadan on both days of the assessment. He was asked what age people started fasting and he replied that this was when they were 15. He was asked why he was fasting as he was 13. He replied that he felt ashamed because everyone in the bed and breakfast where he was living was fasting but later said that it was because his mother was not there to tell him to stop doing so.
29. He accepted that the information given by the claimant about his schooling was mathematically consistent (4.10). He had not given the name of the school. After he was told the outcome of the assessment, both he and another young person interviewed at the same time had said that they had met in Greece but the following day the claimant said he wanted to change some of the information and that in fact they had met in England and had not seen each other on the way at all. Mr Nuwamanya was aware that the age assessment had not been accepted by the immigration judge and that the defendant had decided to carry out a re-assessment. He accepted that the age assessment had been discussed at a meeting of the managers. He stood by his assessment and never had any real doubts about it. The claimant was a good learner and was quite bright. In re-examination he confirmed that there had been criticisms that an appropriate adult had not been provided. He found the claimant to be sociable and polite. He was not someone who was monosyllabic or had difficulty in communicating but he had needed to speak through an interpreter. He understood that the claimant had at one point been suspended from college for fighting and was then taken to the IEC.

### Gwyneth Austin

30. Ms Austin is a student learning advisor at West Thames College and adopted her witness statement dated 5 July 2011 at 3.68. She had been the claimant's tutor from September 2010 until February 2011. She said that he had not been a problem in class although there had been incidents outside class, mostly minor but one serious involving his suspension from the college in February 2011. She described his attitude to work as fairly good, working well in class but not doing very much out of class. He was sociable and got on well with his classmates and had other friends he saw at break times and when he was not in class. She confirmed that the review at 3-65 related to the claimant unlike the tutor report at 3-66 which had been included in the documents in error.
31. In cross-examination she confirmed that she was both a teacher and personal tutor and offered pastoral support to students. She remembered the claimant as a polite and friendly student. She had not been aware that his age was in dispute when she first met him. She remembered a brief telephone conversation with someone from the defendants and being told that it was about an age assessment. She had spoken on the phone and felt that she had been put on the spot but said that the record at 3-28 accurately reflected what she said. She had described the claimant as fitting into a class of 16 to 19 year olds as well as anyone else, looking the same and not standing out in any way and having no problems socialising. In re-examination she said that although she had felt on the spot, she would probably not say anything different. The class was for 16 to 19 year olds and last year there had been no one under 16 in the class. The claimant appeared to be at the right level and had fitted in although they did not group students by age. The answers set out at 3-28 were in response to specific questions such as whether the claimant stood out in any way and whether he had any problems socialising.

### Jacinta Kayne

32. Her witness statement is at 3.2-7. She is a social worker employed by the defendant. She carried out the second age assessment on the claimant on 11 and 15 November with her colleague Cyril Leroy. The claimant was given the opportunity of having an appropriate independent adult present but he declined. She confirmed that she had made the note at 3.28 when speaking to the claimant's college. She regarded him presenting as an image conscious young man who confidently wore bright coloured clothing to both interviews. He presented as a friendly, polite and confident young person. He only became uncomfortable when inconsistencies in his account were pointed out to him and he was given the opportunity of explaining them. He did not become aggressive or challenge staff but maintained respect for them because he perceived that they were older than him and he demonstrated respect for people

both older and in a position of authority. She believed that he was aged about 17 at the date of her assessment and had given him the benefit of the doubt by not assessing him as over 18.

33. In cross-examination she said that she had done about five or six age assessments and had been trained in the Merton guidelines. She was aware of the need to take into account ethnic issues and to evaluate the matter holistically when assessing chronological age. The evidence in the dental report was part of the puzzle and she accepted that teenagers varied in their growth and development and that if a claimant was from Afghanistan, he would have a different view of elders from someone born in this country. He might also be expected to work earlier and this may have had a role in his physical ageing. There had been enough concerns to tell the claimant that they did not believe that he was the age he was claiming to be. These arose mostly out of contradictions in his statements and the information he had given to the Secretary of State. She did the assessment with Cyril Leroy. A student was present but there was no independent adult. She accepted that this had not been recorded in the report and that it would have been good practice to do so.
34. She was asked about the inconsistencies she had set out at 4.46/7 of her report. She accepted that the Malik and Khazan were the same person and that the information given about whether he helped out or worked on the family's farm was not necessarily an inconsistency. So far as his account of the journey was concerned, the claimant had given very little information to the independent social worker (4.37) and she commented that if short and less specific information was given, a person was less likely to contradict himself. She had misgivings about Ms Fehrman's social report because either the claimant was not giving sufficient information or he was not being asked enough questions. She thought that it was possible that he had been withholding information. She explained that if she thought the matter was borderline, she would give a claimant the benefit of the doubt. She accepted that on the issues of whether the Malik had arranged the journey it was possible that she had not sought to clarify this with the claimant. She regarded the information he gave about his school as an under-estimate to support his claimed date of birth. She accepted that he had always maintained that he was 13 when he arrived. She dealt with his physical appearance and so far as his demeanour was concerned, she described him as friendly and polite and a pleasure to work with. She could not assume that he would necessarily be comfortable with her because she was a social worker. She had spoken to Mr Nuwamanya and gained his view of the claimant. She described him as such a nice young man that many professionals did not want to be involved in a decision which might adversely affect him. She believed that she had given him the benefit of the doubt in assessing him as a late adolescent rather than as an adult.

Cyril Leroy

35. Mr Leroy is a social worker employed by the defendant. He confirmed his witness statement at 3.30-4. He took part in the age assessment in November 2010. He was aware of the Merton and general practice guidelines and that age assessment was a child centred process. He accepted that there was a need to ask questions to establish the milestones in a child's life and that different children would answer questions differently. He was aware of the need to take into account ethnic sensitivities and that it was quite common for someone from Afghanistan to work on a farm and not to go to school. He was asked about the impact of traumatic events on physical appearance and said that there was no evidence to support a finding that it would have an impact on appearance. He accepted that life experiences did need to be taken into account and would impact on demeanour. He agreed that people developed differently and reached puberty at different ages. The claimant had been asked whether he wanted an independent adult to attend. This had not been recorded but should have been. It was one of the main things he asked when starting an age assessment.
36. So far as the claimant's physical appearance was concerned, in particular his hair, he said that teenagers liked to follow the fashion and the clothes he wore were also indicative of being a teenager. He would not say that any one factor was more important than another; all had to be put into the balance. He accepted that Khazan and Malik were one person but there was nothing in his notes to show that he had raised this discrepancy with the claimant. It was possible that he had not asked because there was a need to be child sensitive and not to ask too many questions. So far as the account the claimant had given about his journey and what was seen as a contradiction between the account given to them and the independent social worker, he commented that it depended on whether the claimant had given them more information. He did not believe that the independent social worker had asked enough questions. He also accepted that there was nothing in his notes to show that there had been any attempt to clarify what the claimant had been saying about when he had started school. He accepted that it was possible that he had got the age assessment wrong but it had been a genuine re-assessment.

#### Written Evidence of Lizette Villaverde

37. The evidence of Lizette Villaverde who was unable to give oral evidence as she is presently abroad is set out in her statement at 3.70-2. She confirmed that she is a qualified social worker and has conducted over 35 age assessments. She was involved in the age assessment which took place on 8 and 10 September 2009 and says in her statement that her first impressions of the claimant were suggestive of an individual older than 13 years, this being reinforced by his mature demeanour and adolescent style of dress. She said that he was unable to provide a consistent time frame for dates of significant events and he had said that he did not use a calendar and did not know the dates of his travel or education but was able to provide various lengths of times for events such as his education, the disappearance of his father and his journey from Afghanistan to the UK. She confirmed that it was her joint conclusion with Mr Nuwamanya that the claimant was older than his claimed age and he was assessed to be about 16 years old in 2009.

## Dental Assessment

38. The evidence relating to the dental assessments is at 6.1-374. Dr Marsden was requested by the defendant to complete a dental age assessment for the claimant who gave his consent. His report was completed on 1 July 2011. He carried out a clinical dental inspection on 14 June 2010 and made a chart of the teeth present. The claimant had 28 adult teeth in the mouth; none of the four wisdom teeth were clinically visible. He said that at the age stated by the claimant (14 years 0 months at the date of the examination) only the third molars would certainly still be developing. The wisdom teeth were the last teeth to develop and erupt into the mouth and he would not expect the wisdom teeth to be emerged into the mouth at this stated age. It would be possible but unlikely that the second molars would be at a late stage of root development. The assessment of root development is carried out by using a radiograph (x-ray) of the tooth. The claimant's lower right wisdom tooth was at an angle that made an assessment of the roots compromised so he took a radiograph of the lower left wisdom tooth. He was able to visualise the mesial root and the estimated stage of development in the widely used Demirjian system was at stage F, representing a stage of development where the root length is at least equal to the length of the crown and the roots have funnel-shaped endings. On both sides the second molar roots were completed.
39. The average age for this stage of root development in Caucasoid males is 16.88 years and in one paper there is a note that the youngest individual at this stage of root development was 15.13 years. Dr Marsden's conclusion was that on purely dental evidence the claimant was likely to be about 17 years of age or just under and it was unlikely that the stated age of 14 was correct as this fell outside the age range for this stage of root development. If it was accepted that the day and month of birth were correct, then the most likely year of birth was 1993 giving a likely date of birth as 1 June 1993. Dr Marsden commented that age assessment at this stage would not be precise and given the scarcity of age indicators there would always be exceptions from the norm.
40. Dr Marsden's report was subjected to a critique by Professor Roberts of King's College London at 6.113-132. Following his report and in accordance with the court's directions, Dr Marsden and Professor Roberts prepared a joint statement which appears at 6.372-4. There is substantial if not almost complete agreement in this joint report. It is accepted by them that dental age assessment is an accepted method of ageing and is considered one of the most reliable methods for the 14+ age group. There has been a large amount of research and the results are reliable when assessed on the civil standard of the balance of probabilities where research consistently gives results for more than 50% of the sample. Both agreed that the

radiograph of the claimant's lower left wisdom tooth taken on 14 June 2010 could be used to assess the stage of dental development of the tooth and that the Demirjain tooth development stages were widely used in dental age assessment. These depend upon the use of databases and the one at King's College Hospital is the largest in the world. Although there is no database specifically for Afghans, its results are statistically broadly in agreement regardless of Caucasian origin. Using the King's database the mean age of a Caucasian male at stage F would be 16.57 years. The probability that a Caucasian male at stage F would be less than 14 years and 14 days old is 1.19% whereas the probability that he would be more than a 16 year old would be 69.46%. It was agreed that the conclusion in Dr Marsden's report was valid in that, although there were differences in methodologies used in dental age assessment, they were on an academic level relating to the detail of the supporting references only and these did not adversely affect the age assessment reached in Dr Marsden's report.

41. On the day of the hearing the claimant's representatives sought permission to adduce further evidence in the form of a response by Professor Roberts to a series of questions submitted by the claimant's solicitors. The admission of this document was opposed by Mr Swirsky. We can well understand why but we felt, in the light of the need to consider the welfare of a minor that this evidence should be admitted subject to Dr Marsden having a proper opportunity of providing any further comments. The questions to Professor Roberts ask why he had carried out an age assessment referring to the King's College database when he had been instructed that he was not expected to carry out an age assessment and that he should have restricted his discussions to the parameters of his report. His comment on this was that it did not make any sense to restrict himself to his instructions. He could not have a joint meeting with Dr Marsden to discuss a dental age assessment and not put forward his own database. He therefore felt obliged in the interests of providing the court with the maximum amount of information that would be of use to go outside the parameters of his instructions.
42. Dr Marsden later submitted further comments confirming the opinion given in his report as discussed at the joint meeting. Suffice to say at this stage that the reports and in particular answers given by Professor Roberts set out in the letter of 18 November 2011 confirm to us that both experts have done their best to provide the Tribunal with the benefit of their obvious expertise in this area.

### Submissions

43. Mr Swirsky submitted that the burden of proof was on the claimant to show on a balance of probabilities that his age was as claimed but made the point that to resort to the burden of proof should be a last resort. The benefit of the doubt meant that when dealing with children, due allowance should be made for the fact that a child might have a different way of recounting narratives and that proper regard should be paid to the fact that it was a child who was the subject of the age assessment process. The issue for the Tribunal was not whether the defendant's age assessment

should be quashed as not being Merton compliant but to determine age as a factual dispute taking due account of all the evidence. He argued that no reliance could be placed on the claimant's own evidence as his sole point of reference for his age was the fact that he had been told a matter of days before he left Afghanistan that he was aged 13 years 3 months. The rest of his evidence was factored in to try and make sense of that date.

44. He submitted that the claimant's evidence had not been credible. He had said that he knew what a year was and his nickname arose from the fact that he was born in the New Year. He said he went once a week to the mosque but had no understanding of the concept of a month until he came to this country and yet his mother had told him that he was 13 years 3 months old. In his first age assessment he had given a number of time periods in months as well as in days. He had said that the minimum school age was 6 and he had given extraordinary evidence about when he first went to school and discovered that he had to be 6 but nonetheless was still able to start school because he persisted in attending. If his account was correct his departure from Afghanistan was organised in a matter of six or seven days. He was leaving home, so he claimed, as a 13 year old and being sent to another country but he was not provided with food, clothes, money or a phone. The only piece of information he was given was his age. It was incredible that a 13 year old would leave Afghanistan in such circumstances.
45. He argued that Ms Mejjini's evidence could not be regarded as reliable or independent as in effect she was a member of his team and had simply made an informal age assessment after taking up the claimant's case. He submitted that little if any weight should be given to the reports from Ms Fehrman. Although permission had been given to rely on her reports the witness had not attended to give oral evidence and so could not be cross-examined. He submitted that her reports were unusual documents. In substance they were a critique of the reports prepared by the defendant's social workers and were further tarnished by the generalised inferences in para 16.4 that local authorities were not objective in their age assessments. He submitted that the evidence from Ms Dennis was clear and had not been shaken in cross-examination. It could hardly be possible that the claimant could have been confused with a Somali boy. Weight should also be given to Ms Austin's evidence that the claimant fitted in well with 16 to 19 year olds. Four social workers had been involved in assessing the claimant's age and no one had taken the view that he was the age he claimed. He submitted that they had carried out careful assessments which should be given due weight. They had accepted that some things could have been done differently and conceded that other things could have been better done. He relied on the dental evidence and the joint statement from both experts. The tooth x-ray was taken in June 2010 and the probabilities were that the claimant was over the age of 16 at that time. He submitted when all these factors were taken into account the likelihood was that the claimant's age was as assessed by the defendant.
46. Ms Luh confirmed that the Tribunal's task was to establish chronological age as an objective fact. It was necessary to establish the chronology of the claimant's life

taking into account ethnic and cultural information and where there were elements of doubt, they should be resolved in his favour. She submitted that he had given a credible chronology. His account had been accepted by the immigration judge. She conceded that the judge's finding was not binding but submitted that there would need to be clear reasoning before a decision maker could depart from it. She argued that the claimant had been remarkably consistent in his chronological account of his life in Afghanistan and how he came to know what his age was. He had said that he did not start fasting for the full month of Ramadan when he was in Afghanistan because he was too young but as customary, he had tried to fast for a few days. He believed that he might have been born in March instead of June because he had been known as his nickname Nawroz by family members.

47. He had explained when he started school and why it was that he was able to start before he was 6. Just before he left he was told that he was 13 years and 3 months. It was argued that he had said that he did not know the answer to a number of questions and that this meant that he was being evasive but it was to the claimant's credit that when he did not know, he did not try to say that he did. She argued that the points taken by the defendant and regarded as undermining the claimant's credibility had a little substance. When asked about Ramadan he knew that some people could fast for less than a month but none of the concerns had in any event been explored with him. What had been regarded as a discrepancy when he referred to Khazan and Malik had been explained. She submitted that this had indicated a lack of understanding of the claimant's evidence and a lack of fairness on the defendant's part. There were no inconsistencies in the account he gave about helping on the farm. This left no inconsistencies of any consequence.
48. The claimant was, she submitted, a bright young man who had given a reasonably consistent chronology with only a very few minor inconsistencies. She argued that it would be wrong to draw any adverse inference from the evidence of Ms Austin who had given her evidence with great care. She had not been asked whether the claimant stood out because of his young age but whether he was someone at the right level academically. It was clear that all those who came into contact with the claimant regarded him as a polite, sociable young man. There had been no appropriate adult at the first age assessment and it was the claimant's case that none was offered for the second one. This was a glaring omission which undermined the age assessment. So far as the medical evidence was concerned, this could not be regarded as determinative and it was clear that there would be cases falling outside the average. In summary, the claimant had given a credible and consistent account which confirmed that his age was as he claimed.

### The Law

49. In R (A) v London Borough of Croydon [2009] UKSC 8 the Supreme Court held that in cases involving the exercise of a local authority's statutory obligations in respect of a child, age was a matter subject to determination by the courts as a precedent fact. In R (KN) v London Borough of Barnet [2011] EWHC 2019 His Honour Judge Pearl

having heard arguments about the burden of proof and the proper approach to age assessment said:

“17. I do not believe that there is a really any difference in approach as between Langstaff J and Neil Garnam QC on the one hand and Ouseley J on the other hand. It is my view in age assessment cases, that the court is faced, in the first instance with having to reach a view on the basis of all the evidence as to the age of the claimant, and if possible the claimant's date of birth. The judge will have the benefit of evidence presented, in many cases (but not all) by the claimant himself or herself, as well as the reports, witness statements and evidence from the social workers who carried out the assessment. There may well also be evidence presented on behalf of the claimant which serves as expert evidence in support of the claim.

18. All of this evidence has to be assessed by the judge, regardless of any question of who has the burden of proof. In many respects this exercise is similar (at least in my experience), for example, to assessments made by courts and tribunals whether the person has or has not a mental disorder, whether a child has or has not a special educational need requiring educating in a particular school, whether a person is suitable or is not suitable to work with children and/or vulnerable adults, and whether a care plan is or is not a choate care plan enabling a court to agree to a care order in respect of a child.

19. Of course, if the court is unable to reach a decision after conducting the assessment exercise, it will have to fall back on the burden of proof, as Ouseley J acknowledged:

‘It is for the claimant to show that he is or was under 18 at the time that he asserts a duty was owed to him as a child.’

20. This approach, namely to make an assessment first, and only if the evidence as presented does not enable an assessment to be made, to fall back on the burden of proof, is particularly relevant in age assessments cases because it must be remembered that a local authority, in reaching its assessment that a person is over 18, should already have given this person the ‘benefit of the doubt’.”

50. After the hearing we were referred to the judgment of the Court of Appeal in R (C J by his litigation friend SW) and Cardiff City Council [2011] EWCA Civ 1590 where in [21] Pitchford LJ said:

“...I do not consider that the appellant can have it both ways. It seems to me that once the court is invited to make a decision upon jurisdictional fact it can do no more than apply the balance of probability to the issue without resorting to the concept of discharge of a burden of proof. In my view, a distinction needs to be made between a legal burden of proof, on the one hand, and a sympathetic assessment of evidence on the other. I accept that in evaluating the evidence it may well be inappropriate to expect from the appellant conclusive evidence of age and circumstances in which he has arrived unattended and without original identity documents. The nature of the evaluation of evidence will depend upon the particular facts of the case.”

51. We therefore accept in accordance with the submissions made by both counsel in their subsequent notes that neither the claimant nor the defendant has a burden of proving the fact of age but it is for the court to enquire and on the basis of the evidence produced make a decision on the balance of probabilities.
52. We also heard submissions on the approach which should be taken to the findings of the immigration judge who accepted that the claimant was the age he claimed to be rather than that put forward by the local authority. Ms Luh accepted that this finding was not determinative but should be regarded as persuasive. In our view the proper approach is to accept that finding as part of the background and context in which this hearing is set. As it was a finding made by an independent tribunal we must give it proper weight but in the context of the evidence before us.

### Assessment of the Evidence of the Claimant's Age

53. We now turn to our assessment of the evidence we have heard. The claimant has been described by a number of witnesses as being polite, respectful and sociable. Having heard him give evidence we also found him generally to be a pleasant and personable young man. The claimant was asked about a recent incident which the police are investigating but there was insufficient evidence from which we could draw any adverse inference about his credibility and we have disregarded it when assessing his evidence. However, we do have considerable difficulties with a number of aspects of his evidence which have led us to the conclusion that he is not reliable when giving evidence about his age. In his oral evidence he said that he had not known what a month was before he left Afghanistan, as opposed to a year or a week, but he learned this by the time he reached the UK. We do not believe that this is the case. At his screening interview and first age assessment he gave not only his age in years and months but also described a number of other periods of time in terms of months. He claimed that he had not known how old he was until shortly before he was leaving Afghanistan when he was told that he needed to know that he was 13 years 3 months. He claims that he only became aware of months during his journey. It is not credible that he would have either not have known or would not have asked what a month was when leaving in such circumstances particularly as he said that he was given no other information, instructions or advice about the journey and that he left without any information about the provision of food, clothes or means of contacting his family.
54. If his account is correct his departure was arranged in a very short time through the village elder, the Malik, including the sale of family land to pay the agent. We do not believe that the arrangements were likely to have been made with such speed and we have doubts about whether the claimant's journey took only two and a half to three months as he claimed. In his oral evidence the claimant said that he had been in Greece for four to five days whereas it had previously been his case certainly in the documentary evidence that he had been there for 45 days. No challenge was made to this issue by the claimant's representatives the RMJ at that time in an otherwise

comprehensive response to the Secretary of State's evidence: see the letter from the RMJ at 8.1, 8.9.

55. The claimant accepted that he had sought to correct the information he had given during his first age assessment when he said that he had met the other boy who was being interviewed in Greece. He subsequently corrected that to say it was in England and now in fact says that they had met in France and that this is what he said to the social workers. In some respects these discrepancies in the evidence relate to minor matters but in our judgment they illustrate that when the claimant is pressed on an issue he will say what he feels best serves his case rather than give a truthful answer.
56. We have not found the claimant's account of the chronology of his life to be reliable. Further issues relating to when he went to school we consider later but we are satisfied that this illustrates an attempt by the claimant to fit facts around his claimed age. His evidence was that children did not go to school in his area until 6 but he was taken earlier. He said that the school refused to admit him and that there was a conversation between the head teacher and his mother but he did not hear what his mother had said about his age. Nonetheless, according to him, although he was too young for school he was admitted shortly after due to his persistence in going along with the other boys. If his account is correct he must have known his age at least to the extent of knowing that he started school before he was 6 and yet he sought to maintain a claim that he did not know his age until he left Afghanistan.
57. However, despite the unreliability of his evidence about his age there is one particular aspect to which we give some weight: his claim that he was born at or about the time of the New Year because of his nickname Nawroz.
58. We heard evidence from Ms Mejzini who was strongly of the opinion that the claimant was the age he claimed. We do not doubt that this view is genuinely held by her and we appreciate the good work being done by the Refugee Council, particularly in the light of current financial constraints. However, Ms Mejzini's assessment is based on her impressions formed of the claimant on the occasions when she has met him mainly in the context of preparation for his legal proceedings and inevitably is based on her subjective assessment and belief in this context.
59. The claimant relied on two independent social worker reports prepared by Ms Fehrman. The first report of 26 March 2010 had been in front of the immigration judge and in the light of the fact that the second report was prepared dated 6 August 2011, the defendant assumed, as indeed did we, that she would be called to give oral evidence. When it became apparent that she would not, Mr Swirsky objected to her evidence being admitted. We took the view that this would not be the right course and that her reports should remain in evidence. However, when considering the weight to be attached to them we must take into account the fact that the author has not been subject to cross-examination.

60. We do have considerable concerns about these reports. In so far as it is being put forward as an age assessment in its own right, as opposed to a critique of the defendant's age assessment, it was only completed by one social worker and her area of expertise appears to be mental health rather than carrying out age assessments. There is no suggestion in the report that there was an appropriate adult present and the assessment was conducted with relative speed as the report notes the time restriction. The very brief passage dealing with the claimant's journey to the UK at 5.3 illustrates the inadequacy of this report. A short account is concluded by saying that the claimant was not able to recollect any other particulars in relation to the journey. The comment that either particulars were not sought, whether through lack of time or a failure to press the issue or that this illustrates that the claimant was being deliberately vague, seems to us to be well made.
61. In para 15.22 of the second report it is argued that the 2010 Hounslow assessors contradict themselves on the one hand by citing the claimant's confidence as a positive indicator for him being older but then describe him as relating to staff "respectfully" even under the face of challenge, saying that this respect indicates the age difference between the claimant and the adult staff involved shows that the claimant could be younger than 18. It is then said by Ms Fehrman that the defendant has simultaneously concluded that the claimant is 18 years old and that he is under 18 years old. This indicates to us a misreading of the defendant's reports and we find that no such conclusion could properly be drawn. Her report also argues that the defendant's assessment is evidently undermined by not providing accurate and comprehensive analyses of their decision. We are not satisfied that this is a valid criticism. The reports of the social workers are full and comprehensive. Her report refers to the conflict of interest between the provision of social care and the maintenance of immigration control and to research by ILPA that social work managers place pressure on assessing social workers to gauge children as older than they are.
62. This is a point also made in Ms Luh's skeleton argument where she referred to a report albeit not produced in evidence. Ms Fehrman comments that it is essential that this conflict of interest is recognised and says that there is no acknowledgement of it in either of the 2009 or the 2010 reports. We accept the evidence from the social workers about the number of assessments they have carried out and we are not satisfied that this is a valid criticism of the age assessment reports carried out in the present case. We find that the social workers have carried out their obligations objectively and have made an assessment of the defendant's age unaffected by any pressure to give him an age older than they believe him to be.
63. Ms Fehrman's approach is encapsulated in para 16.7 where she says that her view is that there is no credible evidence on the balance of probabilities to indicate that the claimant's assertion that he is aged 15 is untrue and that she concludes that his age is as he has claimed. This approach might carry some weight if the evidence of the defendant's social workers and the dental evidence can properly be discounted and if the claimant's evidence is reliable on the issue of age but we have found that that is

not the case. In summary, whilst the evidence in these reports is of some use to highlight matters which can properly be investigated in the social workers' evidence, it does not in the light of the evidence as a whole provide any further assistance to us in our assessment of the claimant's age.

64. We now turn to the evidence of the social workers. Four have been involved directly in the two age assessments. We heard oral evidence from three, the other being unavailable as she is abroad. As we have already indicated, we accept that the social workers carried out their age assessments honestly and objectively. The first age assessment on 8-10 September 2009 recorded that the claimant's physical features are well defined and his skin texture was well weathered in a way unusual for a young person of 13. We accept the evidence that when he was asked at what age young people starting fasting during Ramadan, he said that this was when they were 15. He was then asked why he was fasting as he was 13 and not 15 and he said that initially he felt ashamed because everyone in his bed and breakfast where he was living was fasting but later commented that he was fasting because his mother was not there to stop him. We do not accept this explanation. We are satisfied that this answer is an explanation given to attempt to explain an otherwise inconsistent answer rather than an accurate reflection of the reasons he was fasting. The report also records the fact that during the assessment he had said that he and another young person being assessed had met in Greece and subsequently altered this to say that they had met in England (although he now maintains that it was France) and not seen each other on the journey at all. We find that there is some substance in the comment recorded that this discrepancy shows that the claimant and his friend had collaborated and discussed what to say in order to prove consistency in their claimed ages.
65. The second age assessment took place in October 2010. This was carried out by Ms Kayne and Mr Leroy. It was conducted as a reassessment following the report prepared by Ms Fehrman, one of the criticisms being the lack of an appropriate adult for the reassessment. We do not accept that the claimant was not offered an appropriate adult. We accept that this offer was not recorded in the notes. Both social workers conceded that it would have been better if it had been recorded and that in any event this is the general practice. The report refers to a number of inconsistencies in the claimant's account some of which they now accept have been adequately explained. The discrepancy relating to whether the Khazan and the Malik were different people has been explained and accepted and it is also accepted that there is no inconsistency in what the claimant said about whether he helped out or worked on his family's farm. These discrepancies which are now acknowledged to be incorrect do not in our view affect the overall conclusions or the weight we should attach to this report. The report points out inconsistent dates and information regarding his education and the normal starting age for school in Afghanistan. We find that these are significant discrepancies and that his explanation about when he started school and how long he was there could justifiably give cause for concern about that aspect of the chronology. The social workers took into account the claimant's physical appearance as a young person with well defined facial features

including a strong jaw, visible lines or wrinkles across his forehead, some acne and facial hair that was shaved for both interviews and his demeanour as an image conscious young person who confidently wore bright coloured clothing to both interviews. In summary we accept that the interview records are accurate records and there was in the evidence before them a proper basis on which they could reasonably reach the view that it was likely that as at that date the claimant was aged 17 years. For this reason in our assessment of the claimant we give weight to their assessment of his age.

66. We also heard evidence from Ms Dennis. The significance of her evidence is that on 9 June 2011, if she is correct, the claimant had a conversation with another student at the IEC and was heard to say that he was 17, the other student replying that he should not bother to attend as he was over the age of compulsory education. The claimant denies that he ever said this but gave evidence about a similar conversation but that the age of 17 was given by the person he was speaking to and not by him. We have no hesitation in preferring the evidence of Ms Dennis on this matter. She came across as a kind, conscientious person with no reason for telling us something that she had not in fact heard. We have considered whether she might have been mistaken or misunderstood what was being said but we do not believe this to be the case. Her evidence was that the claimant normally avoided questions about his age or said that he was 15 but on this occasion he said that he was 17. Bearing in mind what we have said about the claimant's tendency to say what fits the need of the moment, we have considered whether he was being truthful about his age on this occasion or whether he was upping his age perhaps to impress the other young man he was speaking to. On balance we have come to the view that on this occasion the claimant was giving his right age.
67. We also heard evidence from Ms Austin whose evidence we also accept. She said that when she was phoned by the social worker to give a view about how the claimant had been fitting in at college she gave a fairly quick reply but she confirmed that it remained her view that he had fitted in well with the age group in which he had been placed.
68. So far as the dental evidence is concerned, as we have already set out, there is substantial if not complete agreement between Dr Marsden and Professor Roberts. They prepared their reports and provided a joint statement which indicated the extent of their agreement. As we have already indicated we were prepared to admit the further letter of 18 November 2011 with some hesitation but in substance that simply confirms that the experts have behaved professionally and we entirely agree with the comment made by Professor Roberts in that letter that as an expert required to have a joint meeting to discuss dental age assessment, he could hardly not put forward his own data base if relevant to the matters in issue. An expert should not be artificially constrained in carrying out his responsibilities to the court. In summary, in light of the joint statement we are satisfied that the mean age of a Caucasian male with the claimant's stage of development for the third molar in June 2010 would be 16.57 using the King's data base whereas Dr Marsden had referred to

an average age for this stage of root development as 16.88, or according to a further paper 16.87. We bear in mind that these are mean ages and that there will always be exceptions from the norm. We note that the probability of this stage of tooth development for someone of the claimant's claimed age is 1.19% and that the probability that a Caucasian male at this stage would be more than 16 is 69.46%.

69. Looking at the evidence as a whole we are satisfied that the claimant is not the age he claims to be. We are not satisfied that he was 13 when he left Afghanistan or that he is 15 now. We have taken into account the evidence of Ms Austin and accept that he has been able to fit in with young people between 16 and 19 without any real problems. As we have indicated, we have accepted the evidence of Ms Dennis that on 9 June 2011 the claimant told another student that he was 17. If the date of birth allocated to the claimant by the local authority of 1 June 1993 is correct, the claimant would have turned 18 on 1 June 2011. If the claimant was in fact 17 on 9 June 2011 his actual date of birth would have to fall within the year 10 June 1993 to 9 June 1994.
70. However, there is one aspect of the claimant's evidence which we do not disbelieve and where we have a degree of uncertainty such that he should be given the benefit of the doubt. This relates to his evidence about his nickname and his belief that he may have been born around the time of the New Year which in Afghanistan would be about March. We also note his evidence that his understanding is that it would only be when he was 15 that he would be expected to observe the full fast in Ramadan. We think that this is why the claimant was fasting in this country and do not accept that he was undertaking a voluntary fast.
71. The claimant on his account left Afghanistan because of a fear of recruitment by the Taliban. This was accepted by the immigration judge but a finding that the claimant was 15 rather than 13 when he left would not be inconsistent with the judge's findings about the risk from the Taliban. The dental examination was on 14 June 2010 and his tooth development then was such that there is a high probability that he was over 16 at that date and a very low probability that he was 14.
72. When we look at the evidence as a whole we assess the claimant's date of birth as 1 March 1994. We appreciate that this almost certainly is not his actual date of birth but, for the reasons we have given on the evidence before us and assessing the matter on a balance of probabilities, this seems to us to be the most probable date of birth. It is broadly consistent with the dental evidence. If born on 1 March 1994 he would be about 16 years 3½ months on 14 June 2010. It is reasonably close to the assessment made by the social workers and fits well with evidence Ms Austin and Ms Dennis.
73. We have taken into account the finding by the immigration judge accepting that the claimant's age was as he claimed. However, following that the local authority was entitled to make a reassessment and that had to be carried out in the light of all the evidence then available. The judge clearly reached a decision properly open to him on the evidence before him but in the light of the further evidence before us and in

particular the dental evidence, the defendant's reassessment and the evidence of Ms Austin and Ms Denis, we have reached a different view on this question of fact.

74. In summary, doing the best we can on the evidence before us we assess the claimant's date of birth as 1 March 1994 and the defendant has a duty to provide services to him based on that date.
75. We make a declaration that the claimant's date of birth is 1 March 1994. The parties may make further written submissions on the terms of any further orders sought and in particular on the issue of costs. In the absence of agreement, the matter will be relisted for further oral submissions on those issues.

Signed

Date: 7 February 2012

Upper Tribunal Judge Latter

## APPENDIX: DECISION ON COSTS

1. In a determination issued to the parties on 8 February 2012 the Tribunal made a declaration that the claimant's date of birth was 1 March 1994. We gave permission for the parties to make further written submissions on the issue of costs. We have now received their submissions.
2. This was an application for judicial review of the decision made by the defendant assessing the claimant's date of birth as 1 June 1993 as opposed to his claim that it was 1 June 1996. The claimant seeks an order for costs on the basis that the only avenue by which he could resolve the question of his age was by the present proceedings. He argues that the Tribunal assessed his date of birth as 1 March 1994, and this means that he was at all material times younger than assessed by the defendant and that until 1 March 2012 he was a child, as he claimed, not an adult, as contended by the defendant. He argues that the defendant had carried out age assessments on two separate occasions but had done so erroneously.
3. In these circumstances, it is argued that the claimant should be awarded 50% of his costs but, if the Tribunal is not minded to do so, the appropriate default order should be no order as to costs.
4. The defendant argues that the claimant should be ordered to pay its costs because this was a case where the Tribunal concluded that the claimant had not been reliable when giving evidence about his age and it follows that the only inference that can properly be drawn from the findings was that the claimant knew his age and had actively sought to mislead those who had come into contact with him.
5. We remind ourselves of the provisions of CPR 43.3(4) that in deciding what order if any to make about costs the Tribunal must have regard to all the circumstances including the conduct of the parties and whether a party has succeeded on part of his case, even if he has not been wholly successful.
6. We accept that to a limited extent it can be said that the claimant has succeeded in this application because the Tribunal reached a different finding of fact from the defendant when assessing the claimant's age. However, for the reasons we gave in our full decision, we did not find him to be a credible witness and rejected many of the criticisms made of the defendant and its witnesses.
7. Taking into account the conduct of the parties, we are satisfied that the proper order in the present case is that there should be no order as to costs. There is to be a detailed assessment of the claimant's publicly funded costs.

Upper Tribunal Judge Latter

Date: 12 April 2012