

# The Fact of Age

Review of case law and local authority practice since the Supreme Court judgment in *R (A) v Croydon LBC* [2009]

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Authors:  
Laura Brownlees and Zubier Yazdani

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## **ABOUT THE OFFICE OF THE CHILDREN'S COMMISSIONER**

The Office of the Children's Commissioner is a national organisation led by the Children's Commissioner for England, Dr Maggie Atkinson. The post of Children's Commissioner for England was established by the Children Act 2004. The United Nations Convention on the Rights of the Child (UNCRC) underpins and frames all of our work.

The Children's Commissioner has a duty to promote the views and interests of all children in England, in particular those whose voices are least likely to be heard, to the people who make decisions about their lives. She also has a duty to speak on behalf of all children in the UK on non-devolved issues which include immigration, for the whole of the UK, and youth justice, for England and Wales. One of the Children's Commissioner's key functions is encouraging organisations that provide services for children always to operate from the child's perspective.

Under the Children Act 2004 the Children's Commissioner is required both to publish what she finds from talking and listening to children and young people, and to draw national policymakers' and agencies' attention to the particular circumstances of a child or small group of children which should inform both policy and practice.

As the Office of the Children's Commissioner, it is our statutory duty to highlight where we believe vulnerable children are not being treated appropriately and in line with duties established under international and domestic legislation.

## AUTHORS

**Laura Brownlees** is an independent research and policy consultant with expertise in the fields of children's rights, child protection, immigration and asylum. She has designed and managed a number of qualitative participatory research projects with children in the UK and internationally and has also provided programme development and training advice and support. As a consultant she has carried out work for national and international organisations including UNICEF, Save the Children UK, ECPAT UK, the British and the Danish Refugee Councils. Recent work includes 'Age Assessment Practices: A literature review and annotated bibliography' for UNICEF, and 'Lives in the Balance' for the Refugee Council which examines the quality of immigration legal advice and representation.

She has also worked as a Policy Officer for Save the Children UK and for Save the Children Albania, coordinating the Child Trafficking Response Programme across South East Europe.

**Zubier Yazdani** is a solicitor who specialises in litigation concerning children's rights including the rights of children and young people from abroad. He acts primarily for children and young people but also provides advice to non-governmental organisations on the rights and entitlement of young people to education, social care, health and on disputes over their age and associated decisions by public authorities to detain or remove them from the UK.

Zubier has been involved in some of the key cases involving age disputed and unaccompanied minors in the High Court and Upper Tribunal and represented the appellant in the Court of Appeal in the guideline case of *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59 which established the correct approach the Court should take in deciding whether to grant permission in a judicial review challenging an age dispute. FZ also significantly clarified the correct principles a Local Authority ought to apply in carrying out an assessment of age. He has delivered training for the Immigration Law Practitioners' Association and the Strategic Welsh Migration Partnership on challenging age assessments. Zubier recently provided training for social services in South Wales on age disputes. He works closely with and provides advice on a regular basis to national children's rights organisations such as the Refugee Council's Children's Panel and the Children's Society on the full range of issues concerning children and young people from abroad. Zubier currently works with Deighton Pierce Glynn solicitors.

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The report and the research underlying it have been co-ordinated by Adrian Matthews, Principal Policy Advisor (Asylum & Immigration).

## FOREWORD

Over a number of years my office has produced several reports and commented on how statutory authorities seek to assess the age of those who arrive undocumented from abroad and claim to be children: aged under 18. There is broad agreement on the need for a process that can reach a decision on such a young person's age and be binding on all statutory authorities. That agreement extends to a shared view that the accuracy of decision making in this area needs to improve, for the sake of the services concerned as much as for the children and young people themselves.

The consequences of getting the decision on a young person's age wrong are serious. Children who are under 18 but deemed by decision-makers to be older, can and do lose part of their childhood. By being judged over 18, they cannot be afforded the protections, nor given the necessary safeguarding and other services, that they would be entitled to if they were assessed as children. The group of age disputed under-18s with whom we are currently working have recounted serious consequences in their lives due to incorrect decision making. Assessed as over 18, they may be placed in detention with adults, or asked to live in relatively unsupported accommodation. In these adult immigration settings, they are certainly not supported - as a child would be - by appropriate children's services professionals.

Some of those judged, by the same processes, as being under 18 but who are really adults, may also be wrongly placed with asylum seeking children and young people, who are vulnerable individuals. Over-18s may pose a danger to these children for as long as the two age groups are kept together on the basis of an assessment that has classed an over-18 year old as a child. In this report, however, we are concerned with those who are judged to be adults, who are in fact under 18.

In June 2009, the then Children's Commissioner gained permission to make a written intervention in a case in the Supreme Court, known in its short form as *A v Croydon*. The Supreme Court's judgement was given in November 2009. The case proved seminal. As is explored in this report, it led to a new role for the Judicial Review Court as the ultimate fact finder in age disputed cases. It also led to changes to the way Local Authorities went on to deal with these matters. In particular, it became clear that decision makers from Local Authorities would in future be required to give live evidence and face cross examination wherever permission was granted for a case to go to full trial. The young person bringing the dispute would in general also now be expected to give live evidence to the Court.

I commissioned this research in March 2012 to look at how the judgement had played out in practice, some two-and-a-half years after it had been given.

- Had the judgement improved decision-making in Local Authorities as we had hoped and anticipated?
- How had the Judicial Review Court adapted to its new fact finding role?

Underlying these big questions lay our central concern:

- Has the new regime improved outcomes for children and young people?

I am most grateful to the researchers whose work forms the body of this report for the way they have carried out their work: diligently, impartially, and under considerable time constraint. The result, as you will read, is a detailed descriptive piece of work

that provides a clear snapshot of the Court's and Local Authorities' 'journeys' two years into the new legal landscape created by *A v Croydon*.

There are some positive changes resulting from the work that followed the Supreme Court judgement. However, the research also finds unintended and more negative consequences. These are discussed in detail in chapters 3 and 4. In addition, there are practical matters concerning children giving evidence in court settings that we find need more attention.

My intention is that this research will contribute to an ongoing, well informed dialogue between the many stakeholders with an interest in getting age assessment as "right" as it can be. However, there are major issues with the notion of its being unfailingly "right."

Too much of the debate about age assessment has rested for many years on a mistaken, time-and-resource-intensive search for a "magic bullet," something that will tell us the exact age of a young person seeking asylum, through a single medical measure which is completely reliable and consistent from case to case. The science available to us clearly demonstrates that this "magic bullet" does not exist.

I do not seek to be prescriptive about what a good system for assessing age could look like. As Children's Commissioner it is not my role to step into the shoes of policy or law makers. My role is to prompt their thinking and debates so that, in the interests of the child and services alike, we move towards a robust and reliable system. In the spirit of informing policy and practice in accordance with my statutory remit, this research shows there is still much room for improvement.

There is continuing unhappiness expressed by the judiciary about the resource implications of their current roles in these processes. This concern is expressed before we consider the same people's doubts about their own expertise in making these judgements when cases come to them for resolution.

At the same time, many social workers charged with undertaking age assessments want to involve a wider range of professionals with them as partners in the decision-making process. This multi-agency approach would help to reduce the potential for exposure to criticism that many say they currently experience.

There are further issues relating to varying approaches between different Local Authorities when professionals seek to arrive at decisions on asylum seeking young people's ages. We argue that these issues rest, at least in part, on the lack of any binding statutory guidance on this work with these vulnerable children and young people.

A consensual approach to age determination, involving different professionals at the early decision-making stage in a case, would merit further investigation. Finding that consensual, clear, scientifically sound way forward, could ultimately reduce the number of cases reaching trial, and therefore court workloads and resource pressures.

Most importantly, a holistic, thorough, multi-agency approach to age assessment is likely to result in better outcomes for children. Whether they are children deemed adults and losing both statutory status as looked after and therefore children's services' vital support, or adults deemed children misplaced in schools and other settings, they are currently having their identities questioned.

If children are wrongly judged over 18, placed inappropriately in adult settings unsupported by the right professionals, their rights to protection under the United Nations Convention on the rights of the Child (UNCRC) are being overridden or denied.

The creation and assurance of an appropriate and clear approach as described above, while necessary, would result in less pressure on immigration authorities to determine age as quickly as often currently happens. The danger speed leads to potentially dangerous inaccuracy, should be acknowledged as part of the ongoing dialogue on this difficult issue for all concerned.

For the reasons given above, there is a widespread wish to continue in a productive, positive and solution focused dialogue, This report is therefore deliberately understated on the recommendations it presents as a result of our research. The need for a national debate on this issue, however, seeking solutions rather than simply an ongoing dispute between parties who remain unable to agree, is self-evident.

This report should be a catalyst for the many stakeholders to engage in these robust discussions, seeking to ensure improved outcomes for the hundreds of young people every year who are not believed when they state their age, with all that can follow in terms of their access to services that would support them as children. I urge action, especially on behalf of those who are in fact under 18, who as Children's Commissioner for England are my central concern,.



**Dr Maggie Atkinson**  
**Children's Commissioner for England**



## EXECUTIVE SUMMARY

### The significance of age for separated migrant young people

In England and Wales, whether a person is a child determines whether or not Local Authority children's services have a duty to assess them for services as 'children in need' under the *Children Act 1989*. For migrant young people who come to the United Kingdom alone and who are separated from their families, the assistance they would be entitled to from a children's service as a 'child in need' means that the age of the young person is the most important characteristic in determining firstly whether they are owed a duty of assistance at all and secondly, if found to be a child, the nature of the support and accommodation that will be provided with.

In the immigration context, age also determines how the immigration authorities treat the young person. Under the Immigration Rules, children are provided with specific procedural safeguards in asylum interviews and the manner in which their evidence and credibility are assessed is different to that of adults. Policy also requires that separated children are not normally detained and separated children are not returned to their country of origin in the absence of suitable reception arrangements.

Unfortunately, many of the separated migrant children/young people who arrive in the UK do not hold valid documentary proof of their age, and many find that their stated age will be disputed by either the immigration or social services. This has led to disputes over age which have been very difficult to resolve, and have significant ramifications for the young people involved.

In 2003, in response to both an increase in the numbers of unaccompanied children claiming asylum and numbers of young people being age disputed, the London Boroughs of Croydon and Hillingdon devised the Practice Guidelines to assist practitioners in the task of assessing age. That same year, the Administrative Court heard the case of *R (B) v The London Borough of Merton [2003] EWHC 1689 (Admin)* ('the *Merton* judgment'). The judgement approved the Practice Guidelines and set out a number of key principles and procedural safeguards to be followed by a Local Authority when assessing age. The process of assessing age as set out in the Practice Guidelines and the other key elements of the *Merton* judgment were subsequently adopted by many local authorities across the UK. Where the process is applied correctly, it has gained the label of being a 'Merton compliant' age assessment.

From 2003 until late 2009, if a young person wished to dispute their assessed age, their primary recourse was to take their claim to judicial review to establish whether or not there had been a 'Merton compliant' assessment. If the Court judged the assessment not to be 'Merton compliant' they would 'quash' the decision and the Local Authority would be required to carry out a fresh assessment.

In November 2009, the Supreme Court gave judgment in the case of *R (A) v London Borough of Croydon [2009] UKSC 8 [2009] 1 WLR 2557 (A v Croydon)*. The judgement ushered in a new age assessment regime whereby on any judicial review the Court is expected to step into the shoes of the decision-maker and determine the fact of age for itself, with their decision being binding on both the Local Authority and the UK Border Agency.

## The research

This research was commissioned in order to review the cases that have reached the Courts since the Supreme Court judgment, and is divided into two parts. Part One examines how the lower courts have interpreted the judgment and considers the guidance given to parties in respect of directions for full fact finding hearings, the Court's approach to 'interim relief' pending the full fact finding trial, how a new test for obtaining the Court's permission to go to trial has emerged and the approach to evidence presented by both parties at the substantive fact finding hearings. It also considers the transfer of cases from the Administrative Court to the Upper Tribunal where permission has been given for the factual determination of a Claimant's age.

Part Two of the research explores six Local Authority responses to the judgment, subsequent court proceedings in which they have been involved as respondent and the impact that developing case law and court directions has had on their practice in respect of age assessment. It also considers the experience of a small number of young people who have been involved in age disputes following the Supreme Court's judgment in *A v Croydon*.

### Part One

The research in Part One is based on a review of publicly available court judgments in age assessment cases which have been determined since the Supreme Court's judgment along with information obtained through informal interviews with fifteen lawyers who specialise in age assessment cases.

#### **The significance of the Supreme Court's judgment in *A v Croydon***

Historically, an application to the Administrative Court for judicial review of an age assessment was restricted to complaining that the assessment had been procedurally unfair or that the findings of the social workers were not rational or that the social workers failed to take account of relevant material or relied on irrelevant material.

The Court could not make its own finding on the young person's age and substitute it for the Local Authority's decision. If the Court agreed that defects in the age assessment process rendered it unlawful or irrational, it had the power to 'quash' the assessment and require the Local Authority to carry out a fresh one. Age assessments could also be challenged in the Immigration Tribunal as part of the young person's asylum or immigration appeal. However, while Immigration Tribunal judges' decisions could 'bind' the Secretary or State and the immigration authorities, they could not overturn a Local Authority assessment. A Local Authority could maintain its decision to dispute the young person's age, leaving the young person in the unsatisfactory position of having 'two ages' depending on the statutory authority they were dealing with.

In 2009 the Supreme Court heard the case of *A v Croydon*. The case required the Supreme Court to consider the circumstances in which a Local Authority could lawfully refuse to comply with its duties under the Children Act 1989 to a young person who claimed to be a child but who had been assessed to be over 18. The claimant in *A* was from Afghanistan. His claimed age was not believed by the immigration officer who referred to the London Borough of Croydon for an age assessment. The conclusion of that assessment was that *A* was an adult and he was

referred to support services for adult asylum seekers operated by the UKBA as he was not deemed eligible for support and accommodation under the Children Act 1989.

The Supreme Court found that:

- (i) Judgments about what a child needs to meet his welfare needs are best left to the evaluation of social workers. There is often no one clear right or wrong answer. The Court can supervise these decisions by ensuring that they are fair, rational and take into account all relevant material while discarding irrelevant material.
- (ii) Decisions on age are a different kind of evaluation. A person's age is an objective fact. It can only admit one right answer.
- (iii) A Local Authority's duties under the Children Act 1989 are predicated on knowing whether a person is in fact a child or not.
- (iv) The fact of age is therefore a fact which needs to be established first before a Local Authority can decide that a young person is not entitled to Children Act 1989 services at all or that s/he is only entitled to certain services by reference to his / her age.
- (v) The decision on age cannot rest on the judgment call of Local Authority social workers alone.

The starting point would still be an assessment of age by the Local Authority, which would still need to comply with the *Merton* guidelines. However if after an assessment there remained a dispute between the young person and the Local Authority, the Court (if asked to do so) would have the power to resolve the factual dispute and make its own finding of fact which will be final and bind all parties. The dispute would be pursued by way of a judicial review application. However the Court will have to determine a question of fact - *how old is this young person?*

An important consequence of the Supreme Court's ruling has been to create a mechanism by which the fact of a young person's age can be finally determined and be binding on all statutory bodies and the young person.

## Research findings

### Permission hearings and directions to trial

Judicial review applications cannot proceed to trial in the Administrative Court without the Court's permission. The report describes the post *A v Croydon* operation of the 'permission filter' designed to weed out cases which have insufficient merit, and considers in particular the significance of the Court of Appeal judgment in *R (FZ) v London Borough of Croydon [2011] EWCA Civ 59 (FZ)* – the key case in determining how the Court should approach the grant or refusal of permission in a judicial review of an age dispute.

#### ***FZ v Croydon***

The Court of Appeal in *FZ* said that the judicial review Court acting as a fact-finder cannot be bound by a Local Authority age assessment. The young person should not be expected to prove that the assessment is wrong and to prove that he is the age he claims to be. The Court found that the *conclusion* of the assessment was the view of the social workers, and that the *information contained in the assessment* formed different material to be considered on their own merit. Crucially, the Court of Appeal acknowledged that the process is subjective and one which ultimately is for the Court to resolve. There should be no assumption that the Court would adopt the same view as the social workers.

- In those published judgments where permission was granted, judges have acknowledged that the Court should not automatically follow the lead or view of social workers who carried out the age assessment.
- In judgments where permission has been refused at an oral hearing there has been a prevailing view that social workers are the experts at assessing age, not judges.
- While the Court of Appeal in *FZ* made clear that the young person had to show that he had an arguable case, the Court also stated that at the permission stage it was not helpful to consider the 'arguability' question by reference to the burden of proof. Permission is a filter, not a forensic mini-trial. However, there is evidence of an expectation that young people wishing to bring a challenge should provide *positive evidence of their age*, including expert evidence, at the permission stage to get over the 'permission hurdle'.
- Following the transfer of most age assessment claims from the Administrative Court to the Upper Tribunal, the trend in the Upper Tribunal appears to be to direct that all immigration documents relevant to the young person's claim for asylum be disclosed for consideration at trial. Legal practitioners have expressed concerns that these requests have allowed matters relevant only to the asylum claim to infect the Upper Tribunal's fact-finding process on age.
- The manner in which children give evidence in age assessment cases has not been subject to standard special measures, as would be the case in family or criminal proceedings. Instead it has been left to the Court to decide what, if any, safeguards are to be put in place for the young person to give his or her evidence.

## Substantive hearings

Since the decision of the Supreme Court in *A v Croydon* there have been 17 reported judgments of substantive age assessment cases.<sup>1</sup> The trials took between two and three days of court time. 15 cases were heard in the Administrative Court and two in the Upper Tribunal.

- In five of 17 cases, a declaration was made in favour of upholding the young person's claimed age.
- In six cases, the outcome has been a declaration in favour of the age assessed by the Defendant Local Authority.
- In the remaining five cases, the Court arrived at a different date of birth, three of which were somewhere between the assessed and the claimed date of birth. In the other two, the Court took a view that none of the evidence before the Court assisted and the Court came to an entirely different date of birth older than even that of the assessment carried out by the Defendant.
- Of the 17 cases, five have gone on to the Court of Appeal. Two of these have been heard by the Court of Appeal substantively<sup>2</sup> with the Court of Appeal overturning an Administrative Court judge's determination of age in *R (AE) v LB of Croydon* [2011] EWHC 2128 (Admin). Three cases are awaiting a decision on permission to appeal.

## Application of burden of proof

In *CJ v Cardiff* Ouseley J took the view that it was ultimately for the Claimant to prove his case. The Claimant appealed this decision, and the Court of Appeal subsequently found that there was no burden on either party to prove their case, affirming that the process of assessing age by the Court is an *inquisitorial* one.

## The Court's approach to evidence

The Supreme Court stated in *A v Croydon* that the Court is the ultimate arbiter of the fact of age and the Court of Appeal in *CJ v Cardiff* stated that there is no burden on the parties to prove either that the Claimant is the age claimed or the age assessed. Therefore the judicial review Court has entered into uncharted territories in the way it is expected to marshal the evidence before it comes to a reasonable conclusion.

The judgment in *A v Croydon* was initially welcomed by professionals assisting young asylum seekers because of the perceived neutrality of the Court and the prospect of there being a way to resolve age disputes without resort to repeated re-assessments by local authorities. However, as age dispute claims have proceeded through to trial over the past two and half years, the outcomes and the approach the Court has taken to assessing the evidence has raised questions as to whether judicial age assessments are the appropriate substitute for Local Authority assessments. One judge has described judicial age assessments as a '*new growth industry*', it being unclear whether the comment was directed to those who represent young people or

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<sup>1</sup>As at May 2012

As at May 2012

<sup>2</sup>CC [2011] EWHC 23 (Admin), on appeal at [2011] EWCA Civ 1509. See also *R (AE) v LB of Croydon* [2011] EWHC 2128 (Admin)

to fact-finding hearings generally taking up a large amount of the Court's resources. Another judge has put it more bluntly, describing judicial age assessments as '*simply an expensive lottery*.' Behind these remarks is a harsh reality; that young people are subjected to a forensic inquiry into the minutiae of their lives.

## **Claimant's Evidence**

While the criminal and family courts have developed sophisticated systems for dealing with children and young people giving evidence, practitioners have raised concerns that the Administrative Court is ill prepared to deal with live evidence from child witnesses.

- In 10 out of 17 publicly available judgments from substantive age assessment trials the child was required to give evidence and face cross-examination without any apparent special measures in place.
- In many cases judges refused requests for special measures such as having the matter heard in an informal court room environment, allowing breaks in the evidence, dispensing with the need for formal court attire or making the room more child-friendly.
- In more than one case there is evidence that giving live evidence had had a negative psychological impact on the young person.
- There has only been one case which went to a full trial where the Claimant was not asked to give evidence.

Where the Claimant has given oral evidence the decisions show that the Court has been reluctant to hold that the Claimant's evidence was credible. Findings that a Claimant lacked credibility have arisen because of conflicting evidence such as a EURODAC<sup>3</sup> fingerprint match, which the Claimant denied,<sup>4</sup> disbelief as to authenticity of supporting identity (or other types of) documents and inconsistencies in accounts of schooling. There have been a very small number of cases where the Administrative Court has found the Claimant's account to be entirely credible. This is consistent with the trend that has emerged from the review of the judgments and discussions with practitioners that Claimant young people are expected to recall in significant detail the minutiae of their lives when giving evidence. In the few cases that have gone to trial before the Upper Tribunal, the Court has been even more critical of the Claimant's evidence.

## **Defendants' evidence**

The weight that the Court has attached to social workers' evidence has varied from case to case. Although there are a few decisions where the Court has been unimpressed with the evidence from the assessing social workers there are more decisions where the assessing social workers have been described as experts who are balanced and measured. The way the Court has approached the Local Authority's evidence illustrates starkly how the Supreme Court's judgment in *A v*

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<sup>3</sup> The EURODAC system enables European Union (EU) countries to help identify asylum applicants and persons who have been apprehended in connection with an irregular crossing of an external border of the Union. By comparing fingerprints, EU countries can determine whether an asylum applicant or a foreign national found illegally present within an EU country has previously claimed asylum in another EU country or whether an asylum applicant entered the Union territory unlawfully.

<sup>4</sup> *R(MC) v Liverpool CC* [2010] EWHC 211 (Admin), *R(MWA)* [2011] 3488 (Admin)

*Croydon* has shifted its approach. It is no longer sufficient to question the quality of the Local Authority's assessment. Although there is in principle no burden on the young person to prove his age, the research finds that, in reality, the focus has shifted entirely onto what the young person can say about his age and whether that evidence can be believed.

### **Independent expert evidence**

With unaccompanied asylum-seeking young people arriving in the United Kingdom without documents and often without knowledge of their precise age, legal representatives have turned to experts, such as paediatricians, independent social workers, psychiatric and dental experts, for opinions on age and child development to counter the Local Authority's assessment of age. The Court's view of such expert evidence has been mixed. However, the research suggests that it is difficult for either party, the Claimant or the Local Authority, to identify independent experts who can assist the Court in a manner independent of the interests of either party. Until a way is found for such expertise to contribute to the Court's assessment process independent of the parties' interests, it is likely that age dispute fact-findings will be reduced to a clash between the Claimant's account and the Local Authority social workers' opinion, with the Court left to work out for itself whether either account should be accepted and if not, at what view the Court could sensibly arrive.

### **Documentary evidence**

Documentary evidence was available to the Court in just under one third of the published judgments (at both permission stage and substantive trial). A small number of cases have not gone to trial because the Local Authority has accepted the Claimant's documentary evidence of age.

A common Afghan identity document, the *Taskera*, has been criticised both because it is susceptible to forgery and because it is not issued at birth but relies on the assessor making a 'guesstimate' of age once the child is around school age or when presented to an official producing the *Taskera*.

Other types of documents such as school certificates, school identity cards, vaccination records and census records are not issued in order to record a birth date: while not providing free standing evidence of age, they have sometimes been accepted by the Court as pertinent to the young person's account of their age and life history.

It seems possible that where a document is accepted as genuine and it provides a date of birth, the Court could hold this as determinative of the fact of age in line with the Supreme Court judgment in *A v Croydon*. However there has not been an instance of this approach being taken to date.

### **Immigration judges' determination**

Prior to *A v Croydon* the Immigration Tribunal would sometimes make findings in respect of age for the purposes of assessing the claim for protection under the Refugee Convention. This would often be in terms of finding only that the appellant was a child or an adult rather than ascribing a precise age. The approach of the Administrative Court to Immigration Tribunal findings on age was considered post *A v Croydon* in *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin). Although the jurisdiction of the Immigration Tribunal was acknowledged to be

different, a finding in favour of the young person being a child by an immigration judge was not to be disregarded by a Local Authority. The Local Authority must review its decision in light of the Immigration Tribunal's finding and consider whether it needed to change its initial decision accordingly.

The weight given by the Administrative Court to the Immigration Tribunal's decisions on age must be seen in the light of *PM v Hertfordshire* and the expectation that that the Local Authority will review its decision in such circumstances. However it is less clear why the Administrative Court has not felt able to consider the Tribunal's findings on the general *credibility* of the appellant. Considering credibility is a core feature of the Tribunal's practice and expertise. Why a positive credibility finding in the Immigration Tribunal should not be persuasive or material to some crucial extent in the context of a judicial review fact-finding trial on age remains unclear.

There remains a danger that where the Immigration Tribunal decides an asylum appeal in the appellant's favour, including a finding agreeing with the young person's claim about their age, the Local Authority may continue to dispute age. In these circumstances the age claim may then go to a fact finding trial before the Upper Tribunal who are entitled to arrive at a different view on the Claimant's age to that of the immigration judge who decided the asylum appeal. There is a danger that this process may disturb the finding of the immigration judge on the asylum claim itself, leading an unpredictable outcome for the young person who thought that their immigration claim had been settled.

## **Part Two**

The research in part two is based on interviews carried out in six Local Authorities with 19 Asylum or Looked After Children's team managers and social workers. The authorities were selected on the basis of reported decisions from court. Three authorities selected had been frequently litigated against and three less so. In addition, five young people who had disputed their age assessment were also interviewed.

## **Research findings**

The research findings suggest that despite having been involved in court proceedings since 2009, very few Local Authority practitioners are actually aware of the *A v Croydon* ruling and its implications on age assessment practice and decision making. However, despite this ambiguity, the experience of going to court appears to have had a positive impact on age assessment practice, and there is evidence that Local Authorities are introducing new procedures and making efforts to review existing guidance in order to tighten their standards.

Some practitioners who had been involved in cases that were taken to court had found it helpful to have an independent body in the form of the judiciary make a decision. At the same time, questions were also raised as to whether a judge is qualified to be making an assessment of age, given their lack of experience of working with this client group.

Worryingly, evidence also suggests that Local Authority managers and social work practitioners are extremely wary of being litigated against, and that this is having a detrimental impact on decision making in the age assessment process. For Local Authorities the costs involved in going to court, both in terms of money and resources, are prohibitive and many are making the decision to settle out of court



rather than pursue a dispute, even if ultimately they stand by their original assessment. For social workers, the need to appear in court and defend their assessment is a new and intimidating development that many would like to avoid, and as a consequence there is evidence to suggest that some social workers are conceding to a young person's claimed age, rather than pursue a dispute. Clearly, this has grave implications in terms of child protection and in light of this some practitioners felt there was a need to develop an independent multi-agency panel to be responsible for carrying out age assessments.

The research also found a lack of consistency in terms of training provided to those social workers who carry out age assessments. While the majority of social workers interviewed had been on training courses, many were carrying out age assessments for one or two years before they could access this training. In addition there was no consistency in the type of training on offer and a number of social workers suggested that they would like regular refresher courses in order to keep them up to date with developing case law.

Many felt that there are significant gaps in terms of the content of training and guidance documents which might help to increase their confidence in carrying out age assessments. In particular many Local Authority practitioners identified a need for more information on country of origin information and child development in relation to this. Some also mentioned a need for a national training or guidance programme.

### **Young people's experiences of being age disputed**

Of the five young men who were interviewed for this report, the length of time it took between a young person's age being disputed and finally reaching courts or being resolved was protracted, ranging from 10 months to three years. This impacted on both the young men's wellbeing and their ability to access age-relevant services, as four of the five young men were treated as adults for the duration of the dispute. Whilst there are potential resource ramifications for Local Authorities there are lifelong ramifications for young people who find themselves in limbo, sometimes for years, and these cases suggest that every effort should be made to resolve disputes at the earliest opportunity.

## CHAPTER 1 - INTRODUCTION

The age of a person seeking protection or support in the UK has acquired greater significance in recent years with the number of children and young people crossing borders and arriving in the UK.

Age is the determining factor in the type of support that can be accessed by young people from abroad. As well as unlocking or restricting access to support, age determines how a young person will be treated by all statutory authorities and in particular by the immigration authorities.

Determining the precise age of a young person from abroad has proved to be extremely difficult, particularly as many children arrive in the UK without reliable documentation that could establish this. Furthermore there is no accurate scientific way in which a young person's precise chronological age can be determined.

In the UK the determination of a young person's age has for several years been left to the judgment of social workers. Disagreement with their conclusions has spawned much litigation. This culminated in the Supreme Court case of *R (A) v London Borough of Croydon* [2009] UKSC 8, [2009] 1 WLR 2557. The decision in *A v Croydon* fundamentally changed the way that the Administrative Court was expected to resolve age dispute claims. Whereas previously the Court's role in determining these claims was purely a supervisory one of ensuring that the decision making process adopted by the Local Authority and the immigration authority was sound, the Supreme Court's decision called for the Court to step into the shoes of the decision-maker and determine the fact of age for itself, with its decision being binding on both the Local Authority and the UK Border Agency.

Although the Administrative Court has had occasion to hear oral evidence to resolve disputes of fact relevant to the exercise of a statutory duty in the past, Lady Hale observed in her speech in *A v Croydon* that the judicial review procedure is not really the proper jurisdiction for determining objective facts. Following *A v Croydon* the Administrative Court has had to make some significant changes to make the jurisdiction work for resolving age disputes.

The decision in *A v Croydon* also appears to have had a significant impact on Local Authority practice, not least because decision makers in Local Authorities can now be expected to give live oral evidence where an age dispute case reaches trial. Legal departments and managers within Local Authorities understand this and may have had to adjust their advice to social work practitioners accordingly.

The Children's Commissioner for England, Dr. Maggie Atkinson, has commissioned this report to assess the impact of the Supreme Court's ruling and to consider how that decision has affected the way in which both Local Authorities and the Court deals with disputes over the age of migrant young people.

## **CHAPTER 2 - BACKGROUND: POLICY, PRACTICE AND LITIGATION**

### **2.1 - Why is age significant?**

Age is an immutable characteristic of a person's identity. A person grows older with the passage of time, but the date of a person's birth does not itself change.<sup>5</sup> In the UK and in large parts of the world a person's age represents markers of entitlement and the manner in which a person is treated by the State.

In England and Wales, whether a person is a child determines whether obligations are potentially owed to them by a Local Authority children's service under the Children Act 1989. For migrant young people who come to the United Kingdom alone and who are separated from their families, the assistance they would be entitled to from a children's service as a 'child in need' means that the age of that young person is the most important characteristic in determining firstly whether they are owed a duty of assistance at all and secondly, if found to be a child, the nature of the support and accommodation that they will be provided with. In addition to duties under the Children Act 1989, the Education Act 1996 makes a distinction between children under 16 who are of compulsory school age and entitled to secondary schooling, and those who are 16 and 17 year olds.

In the immigration context, age also regulates how the immigration authorities treat the young person in the asylum determination process. Under the Immigration Rules, children are provided with specific procedural safeguards in asylum interviews and the manner in which their evidence and credibility are assessed is different to that of adults.

The UK Border Agency ('UKBA') also operates a policy by which it does not detain lone migrant children other than in most exceptional circumstances such as to arrange suitable care and accommodation. Additionally, lone migrant children are not dealt with using the Fast-Track asylum process and are not removed from the country unless there are adequate reception arrangements in the receiving country. The imposition in November 2009 of a statutory duty on the UK Border Agency to safeguard children and promote their welfare pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009 ('BCIA') further underscores the importance that age plays in immigration and asylum policy.

### **2.2- The approach of the State in assessing age**

There is little information in the public domain about how age was determined prior to 2003. By and large the decision was made by immigration officials when the young person presented to claim asylum. Local Authorities played a very limited role in assessing age. If a young person's age remained in dispute as part of an asylum appeal, the tribunal would tend to determine the fact of age. There were no clear guidelines on how the tribunal or the immigration authorities were to determine age. Their decisions on this were generally accepted by Local Authorities in the context of accommodation and support being requested.

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<sup>5</sup> See *LQ (Age: Immutable Characteristic) Afghanistan* [2008] UKAIT 00005 at para 5: '...age is immutable. It is changing all the time, but one cannot do anything to change one's own age at any particular time.'

## 2.3 - UKBA policy on assessing age

Historically, the UKBA's primary focus when determining age has been on a young person's physical appearance and demeanour. Prior to 2003 there was little scope for the young person to challenge the UKBA's assessment other than via the Immigration Tribunal on an appeal against refusal of asylum. There was no mechanism to appeal to the UKBA *before* a decision was made on the young person's asylum claim. This created an unsatisfactory situation where the UKBA's own age assessment determined whether the young person would have their asylum claim processed as a child or an adult. If they were incorrectly assessed as an adult, by the time the matter reached the appeal stage, the detriment of being wrongly treated as an adult would have already been suffered.

Prior to the introduction of the duty to safeguard children and promote their welfare under s.55 BCIA 2009 (the 's.55 duty'), UKBA policy required their officials to categorise young migrants in one of three ways in respect of their age: (i) those whose appearance *very strongly* suggested that they were over the age of 18;<sup>6</sup> (ii) those who were obviously children and; (iii) those who were borderline cases, i.e. they may or may not be under 18. Prior to November 2009, for this third category of young people a presumption operated that they were adults, albeit age disputed, unless they could otherwise show that they were children.

The introduction of the s.55 duty shifted the UKBA's approach to young people whose age they are disputing. The current policy, last amended in June 2011<sup>7</sup>, has only two categories for migrant young people. The first is those whose appearance *very strongly suggests* that they are *significantly* over the age of 18. All others, including those who may be borderline, are to be treated as children until their age is verified, normally through a Local Authority assessment. The change in UKBA policy was important. The presumption was shifted in favour of the young person who claims to be a child, giving the young person the benefit of the doubt whilst the question of his or her age was being determined.

Since the introduction of the s.55 duty, UKBA policy has been to accept the conclusion of a Local Authority assessment of age (if it is available to the immigration officer and if it is accepted that it was conducted in accordance with the relevant case law – see below). The policy pre-2009 was *not* to wait for a Local Authority age assessment to decide whether to treat a young person as an adult or a child.

While the amended UKBA policy stated that it would now, as a general rule, defer to a Local Authority age assessment provided it was conducted properly, the policy nevertheless still requires UKBA case officers to arrive at their own decision, particularly where there is other evidence available to them such as reliable documentary evidence.

## 2.4 - Social work practice on age disputes

In 2003, in response to both an increase in the numbers of unaccompanied children claiming asylum and numbers of young people being age disputed, the London

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<sup>6</sup> Up to 2005 UKBA policy used the phrase '*strongly suggests*'. The guidance was changed to '*very strongly suggests*' primarily to try and limit the numbers of age disputed young people who were ending up detained in the 'fast track' at Oakington Immigration Reception Centre.

<sup>7</sup> Correct as at 12 April 2012

Boroughs of Croydon and Hillingdon devised practice guidelines to assist in the task of assessing age.

The Practice Guidelines recommended a holistic child-centred approach to the determination of a young person's age. A pro forma was developed with a series of guidance notes and indicators on the areas and issues that need to be explored when undertaking an assessment so as to offer a step-by-step guide to the assessing social workers. This would be done in the course of one or two or sometimes several meetings with the young person.

That same year, the Administrative Court heard the case of *R (B) v The London Borough of Merton* [2003] EWHC 1689 (Admin) ('the *Merton* judgment') where the Practice Guidance was approved and the principles and practice to be applied by a Local Authority when assessing age were set out in some detail. In particular, the Court held that:

- Physical appearance and demeanour are not determinative of age;
- The assessment process must be a holistic one looking at all aspects of the child's life and development;
- Social workers must obtain as much information as they can about the chronological life-history and development of the young person;
- A young person may provide inconsistent information about their life but this may not have a bearing on the assessment of the young person's age. He may lie about aspects of his life unrelated to age (such as reasons for seeking asylum) and inconsistencies should not be counted against the young person automatically;
- As a matter of fairness, any inconsistencies should be put to the young person so that they have an opportunity to clarify matters before a conclusion is reached on their age;
- Reasons must be given for the decision made;
- The Local Authority must make its own decision on the young person's age and cannot simply adopt the assessment of the UKBA.

The process of assessing age as set out in the Practice Guidelines and approved in the *Merton* judgment has subsequently been adopted by many local authorities across the UK and where the process is applied correctly, has gained the label of being a 'Merton compliant' age assessment. The Court has also used the *Merton* principles as the guidelines for assessing the correctness and lawfulness of a Local Authority age assessment.

## **2.5 - The approach of the Court – pre *A-v Croydon***

To understand the significance of the Supreme Court's judgment in *A v Croydon* in determining the fact of a young person's age, it is important to understand how the Court has historically dealt with disputes between a young person and the public authorities over the young person's age.

There exists no statutory guidance on assessing age. All current guidance is derived from case law and the Practice Guidelines issued by the London Boroughs of Croydon and Hillingdon. A young person who disagrees with the Local Authority's decision on his / her age and wishes to challenge it has two avenues to do so.

The first way is by way of an application to the Administrative Court for judicial review. Until the Supreme Court's judgment in *A v Croydon*, this was a limited remedy because the remit of the challenge was restricted to complaining that the assessment had been procedurally unfair or that the findings of the social workers were not rational or that the social workers failed to take account of relevant material and relied on irrelevant material. The Administrative Court could not make its own finding of the young person's age and substitute it for the Local Authority's decision. If the Court agreed that defects in the age assessment process rendered it unlawful or irrational, it had the power to quash the assessment and require the Local Authority to carry out a fresh one. However, the final decision on age still rested with the Local Authority and they could carry out a new assessment and arrive at the same decision as before.

The second way of challenging an age dispute was to challenge it in the Immigration Tribunal as part of the young person's asylum or immigration appeal. This would only be available in circumstances where the dispute over age affected the young person's immigration application. Unlike in the Administrative Court, immigration judges were not restricted to looking only at the *process* by which a Local Authority concluded an age assessment. Immigration judges would hear oral evidence from the young person as part of the appeal hearing and questions relating to age arose in that context. Local Authorities are seldom present at these hearings to give their evidence on age. The immigration judge's determination would normally record whether he or she preferred the Local Authority's assessment or the young person's claimed age and the reasons for the conclusion. More often than not, the immigration judge would not make a firm finding on a young person's actual age but would rather express a view that the young person is either a child (under 18) or an adult. An immigration judge's decision would bind the Secretary of State for the Home Department (unless the decision was overturned on a further appeal). Thus if the immigration judge made a finding on age in favour of the young person which was not appealed by the Secretary of State, the Secretary of State would be expected to accept that finding and treat the young person according to the age determined by the judge. The Immigration Tribunal judge's determination did not have the same effect on the Local Authority, although in practice the immigration determination sometimes prompted the Local Authority to review its age assessment.

Prior to the Supreme Court decision in *A v Croydon* it was possible for a young person to be in a situation where the Immigration Tribunal (and in turn the Secretary of State) accepted his age but the Local Authority maintained its decision to dispute the young person's age. This left the young person in the position of having two different ages and two different ways in which they would be treated by statutory authorities. This anomaly led to the development of the Joint Working Protocol between the Immigration Nationality Directorate ('IND' – a forerunner of the UKBA) and the Association of Directors of Social Services ('ADSS') in 2005. The Protocol was supposed to create a mechanism by which the UKBA and local authorities could resolve their differences in their view on a young person's age. The extent to which the Protocol was actually used is unclear.<sup>8</sup>

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<sup>8</sup> The status of this Protocol is currently being considered by the Court of Appeal in a permission to appeal application.

## **2.6 - A v Croydon**

In November 2009 the Supreme Court heard the case of *R (A) v The London Borough of Croydon* [2009] UKSC 8. The case required the Court to consider the circumstances in which a Local Authority could lawfully refuse to comply with its duties under the Children Act 1989 to a young person who claimed to be a child but who had been assessed to be over 18. The claimant in A was from Afghanistan. He told the immigration officer that he was 15 ½ years old. He was not believed and A was referred to the London Borough of Croydon who carried out an age assessment. The conclusion of that assessment was that A was an adult and he was referred to support services for adult asylum seekers operated by the UKBA. As a consequence of being assessed to be an adult, he was not eligible for support and accommodation under the Children Act 1989.

The Supreme Court found that:

(i) Judgments about what a child needs to meet his welfare needs are best left to the evaluation of social workers. There is often no one clear right or wrong answer. The Court can supervise these decisions by ensuring that the decisions are taken fairly, rationally and properly taking into account all relevant material.

(ii) Decisions on age are a different kind of evaluation. The fact of a person's age is an objective fact. It can only admit one right answer.

(iii) The duties under the Children Act 1989 are predicated on knowing whether a person is in fact a child or not a child.

(iv) The fact of age is therefore a fact which needs to be established first before a Local Authority can decide a young person is not entitled to Children Act 1989 services at all or that s/he is only entitled to certain services by reference to his / her age.

(v) The decision on age cannot rest on the judgment call of Local Authority social workers alone.

The starting point would still be an assessment of age by the Local Authority, which would still need to comply with the *Merton* guidelines. However if after an assessment there remained a dispute between the young person and the Local Authority, the Court (if asked to do so) would have the power to resolve the factual dispute and make its own finding of fact which will be final and bind all parties. The dispute would be pursued by way of a judicial review application. However the Court will have to determine a question of fact - *how old is this young person?*

In answer to concerns that this would open the floodgates to more litigation, the Supreme Court emphasised that the better the quality of the decision on age by the Local Authority, the less likely it would be that the Court would come to a different conclusion when considering the matter itself.

## **2.7 - Post A v Croydon**

The judgment of *A v Croydon* was welcomed by legal practitioners and those supporting young asylum seekers in as much as it allowed a neutral independent

party, the Court, to decide a dispute which is of great importance for all parties concerned. It also was seen by many as a way to counteract a perceived 'culture of disbelief'<sup>9</sup> which many of those working with age disputed young people felt was becoming prevalent among Local Authorities - particularly those which assessed the largest numbers of unaccompanied young people. Allowing the Court to determine the fact of age was further seen as a way to resolve age disputes without repeated re-assessments by Local Authorities.

However, it became apparent quite quickly that in order to put into practice the Supreme Court's judgment, the Administrative Court had to fundamentally alter the way it approached applications. Although the procedure by which an application is made has remained the same, the approach of the Court to assessing the merits of the application and arriving at its own conclusions has changed. The Supreme Court's judgment did not itself provide any guidelines to the Administrative Court as to how it should now approach the task of resolving age disputes.

## **2.8 - The stages of a judicial review challenge to a Local Authority age assessment**

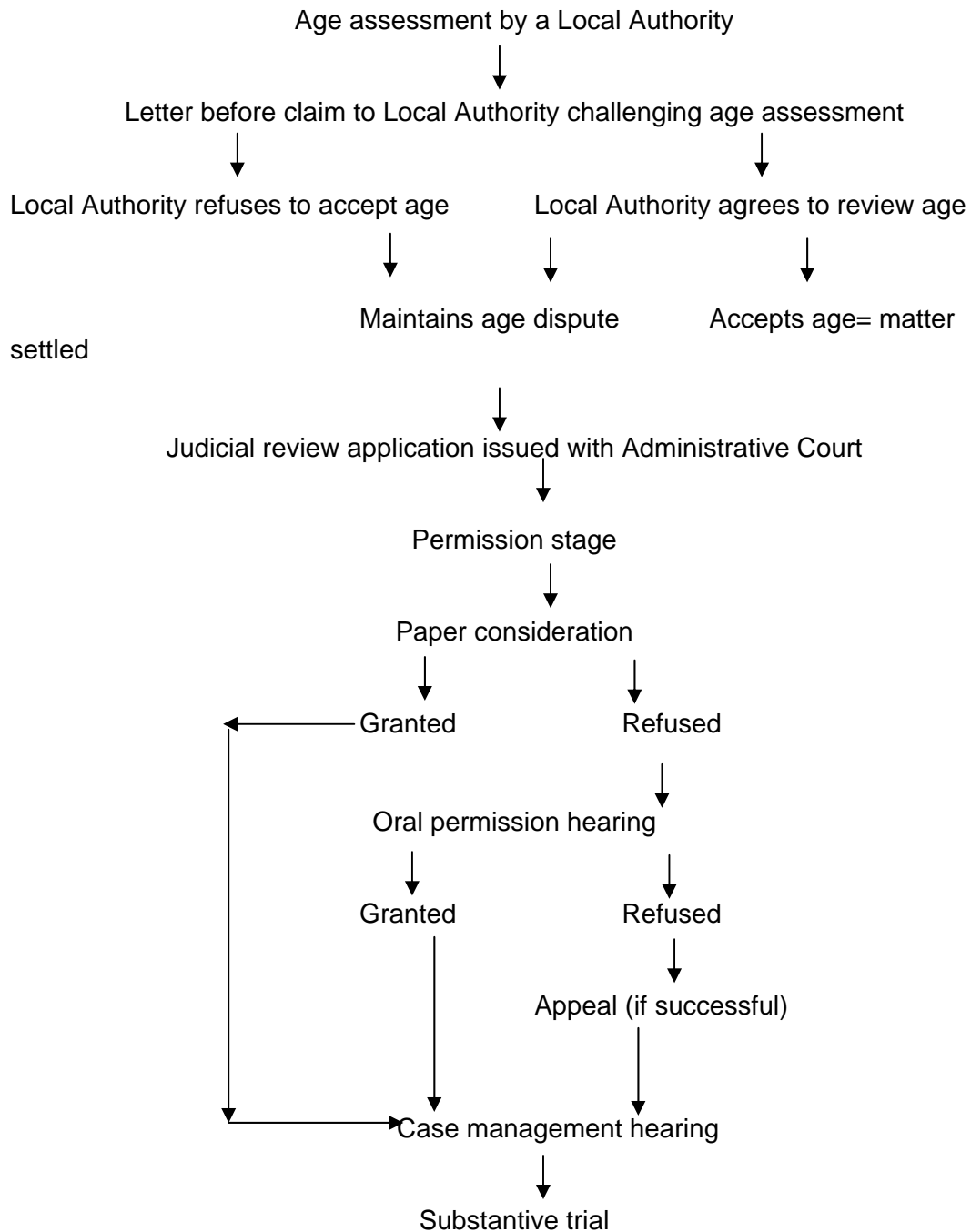
This section provides an overview of the stages of judicial review and the extent to which *A v Croydon* affected the procedure by which claims challenging a Local Authority decision on age are brought. Figure 1 (below) outlines the judicial review process:

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<sup>9</sup> Seeking asylum alone, Unaccompanied and separated children and refugee protection in the UK [Jacqueline Bhabha and Nadine Finch/Harvard Committee on Human Rights, November 2006]



**Figure 1: The stages of a judicial review challenge to age:**



## 2.9 - The Permission Filter

A judicial review application cannot proceed to trial in the Administrative Court without the Court's permission. Permission acts as a filter to weed out those cases which obviously have no merit. In deciding whether to grant permission to proceed to trial, the Court does not forensically consider each piece of evidence before it but normally takes a broad-brush approach to considering whether a claim is 'arguable'. This procedural feature remains unchanged post *A v Croydon*. The young person still needs to show the Court that s/he has an arguable case before permission is granted

for the case to proceed to trial. However, how the Court determines what an arguable case is has changed.

## 2.10 - A new test for permission

Previously, the Administrative Court could only ask itself: *Was the Local Authority's age assessment fair and / or reasonable?* Following *A v Croydon*, the Court's task is to determine a pure fact rather than a legal issue, so the question it must ask at the permission stage is: *Whether it is arguable that the Claimant is younger than assessed by the Local Authority?* If the answer to this question is 'yes', then permission should be granted. If the answer is 'no', then the case should be dismissed, and the Local Authority's assessment will stand.<sup>10</sup> Procedural lapses in the Local Authority's assessment remain relevant to the question of permission, as does consideration of the rationality of the social workers' opinion of the young person's age and his credibility. However, and importantly, the Court is not bound to follow the analysis and conclusion of the social workers.

In the Court's new fact-finding role, it is not only asked to determine whether a young person was an adult or a child at the relevant time (for example at the time of arrival in the UK or at the time s/he came into the care of the Local Authority or at the time of trial), but also to determine the young person's precise age and date of birth. Because the Court is expected to make a finding of fact with such precision, the young person's explanation of how he knows / believes he is a certain age or date of birth and the chronology of his life have taken on far greater significance. This change was highlighted by the Court of Appeal in *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59 ('FZ'), the key case on how the Court should approach the grant or refusal of permission in a judicial review of an age dispute following the Supreme Court decision in *A v Croydon*.

In *FZ*, the Court of Appeal held that at the permission stage the young person does not have to *prove* to the Court that he is the age he claims to be. The Court of Appeal agreed with the test for granting permission set out by the Administrative Court in the case of *F v Lewisham* and went on to formulate the question as one where the Court is asked:<sup>11</sup> *"whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so permission should be refused. If not permission should normally be granted, subject to other discretionary factors, such as delay."* If it cannot properly succeed, permission should be refused. Otherwise, permission should normally be granted to allow the young person to proceed to trial on the fact of his age.

What the Court of Appeal meant by *'the material before the court'* was all material which had been submitted to the Court by the parties. This includes the young person's witness evidence explaining his knowledge of his age, expert evidence if any is available and documentary evidence if available, and the information contained in the Local Authority age assessment.

*'Taken at its highest'*, meant that the Court should look at material which could support the young person's age in the best light possible. It may be said that implicit in this formulation is an acceptance by the Court that the young person should be given the benefit of the doubt, at least when assessing the evidence at the permission stage.

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<sup>10</sup> The test for permission post- *A v Croydon* was set out in the judgment of Holman J in *R (F) v Lewisham LBC* [2009] EWHC 3542 (Admin).

<sup>11</sup> At paragraph 9 of the judgment.

If permission is granted, either on the papers or at an oral hearing (see Table 1), the Court would give directions to time table the filing of evidence leading to a fact-finding hearing with live oral evidence from lay witnesses (including the young person and the social worker who made the decision) , experts and legal argument.

## 2.11 - Binding nature of the Court's decision

The other important consequence of the Supreme Court's ruling has been to create a mechanism by which the fact of a young person's age can be finally determined and be binding on all statutory bodies and the young person.

This is a significant step given that young people had previously sometimes found their age accepted by UKBA but disputed by the Local Authority, which was not bound to accept an immigration judge's decision that the young person was a child. This had serious consequences for a young person who would be unable to access children's services (including accommodation) because the Local Authority determined him to be an adult, but would also not be entitled to adult asylum support (including accommodation) because the UKBA has no legal power to support a lone child.<sup>12</sup>

In a series of cases post *A v Croydon*, the Administrative Court addressed this issue, clarified that the decision of an immigration judge on age does not bind a Local Authority and held that the Administrative Court's own decision on age will result in a declaration which will bind everyone.<sup>13</sup>

In principle, this clears up the situation of a young person having to use different ages dependent on which public authority he is dealing with. However, although the Administrative Court has said that its finding of age overrode the finding of an Immigration Tribunal, the court stressed that this did not entitle Local Authorities to ignore an Immigration Tribunal's finding on age. If the Local Authority is presented with fresh findings on age made by the Immigration Tribunal, it will need to review its own age assessment and consider whether to accept the immigration judge's finding, review its own finding or reject it altogether and maintain its original assessment conclusion.

This has created some new difficulties for a young person who might have had their immigration claim determined in their favour along with a favourable decision on their age by the Immigration Tribunal but may now be required to subject their age to further scrutiny by the Local Authority and possibly by the Administrative Court invoking its *A v Croydon* jurisdiction. This creates three main problems: (i) the young person will have to be subject to yet further age assessment, having already been assessed by the Local Authority, sometimes more than once, and by the Immigration Tribunal; (ii) it prolongs the state of limbo a lone migrant young person finds himself or herself in before s/he can settle in the UK; and (iii) the Administrative Court may make findings on credibility and facts which contradict those made by the Immigration Tribunal and may conclude that the young person is older than claimed, thus potentially reopening the question of the young person's immigration status.

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<sup>12</sup> Under s.18 (1)(a) of the Nationality Immigration and Asylum Act 2002 an asylum seeker is defined for support purposes as someone who is at least 18 years old.

<sup>13</sup> This was first determined by Hickinbottom J in *R(PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) and subsequently affirmed by *R(AS) v London Borough of Croydon* [2011] EWHC 2091 (Admin)

## 2.12 - Transfer to the Upper Tribunal

Post *A v Croydon*, both the Administrative Court and the Court of Appeal have commented on the unsuitability of the Administrative Court as a forum for holding trials on the fact of age because it is usually a supervisory court and is not normally required to hear live evidence and make factual findings.

The Government addressed these concerns in November 2010 by introducing a statutory instrument, The First Tier Tribunal and Upper Tribunal (Chambers) Order 2010, which gave the Immigration and Asylum Chamber of the Upper Tribunal power to hear challenges to age assessments of people from abroad. Previously in 2007, Parliament had passed primary legislation which gave the Upper Tribunal the power to hear judicial review claims in certain circumstances. The 2010 Order specifically named age assessments as a category of judicial review claims which the Upper Tribunal could hear.

The rationale behind giving the Upper Tribunal power to hear judicial review claims in certain circumstances is that the Upper Tribunal is a specialist tribunal which may have more expertise in certain areas of law than the Administrative Court.<sup>14</sup> As the Court of Appeal in *FZ* stated, the Upper Tribunal routinely has to make findings of fact on age in the immigration context in respect of migrant young people. As it already has the experience of doing so, it would be better placed to be the fact-finder in judicial review age dispute challenges.

Such rationale appears to be founded on a questionable assumption, which may not have been intended by the Supreme Court in *A v Croydon*, that age is an immigration matter first and child protection issue second - solely because the subject in question is a young person from abroad. The rationale directly goes against well-established child protection and safeguarding approaches which require decision makers to treat a young person from abroad as a child first and as a migrant second.

Although there will inevitably be some overlap between a young person's account of his age and his life and the reasons he has had to flee his country of origin, the two are not necessarily one and the same account. This was recognised in the *Merton* judgment where Stanley Burnton J stated:<sup>15</sup>

*Given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin.*

The above observation in *Merton* affirms the point that experience of assessing a person's reasons for seeking protection as a refugee does not equate with assessing their age.

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<sup>14</sup> See paragraphs 18 & 19 of the Explanatory Notes to the Tribunals, Courts and Enforcement Act 2007 in respect of the Upper Tribunal's judicial review powers.

<sup>15</sup> Paragraph 28 of the *Merton* judgment.

The power to transfer age disputes from the Administrative Court to the Upper Tribunal to address the consequence of the Supreme Court's judgment in *A v Croydon*<sup>16</sup> was welcomed by the judiciary, as can be seen from the Court of Appeal's judgment in *FZ*. The power to transfer cases from the Administrative Court is a discretionary one, which means the Court does not have to transfer an age dispute. However, as a general rule, age disputes will now be transferred to the Upper Tribunal. There are statutory exceptions to the rule, one of which is where the judicial review claim also challenges an immigration decision, such as immigration detention or dispersal of the young person by the UKBA into adult asylum support accommodation.

When a case is transferred to the Upper Tribunal it is supposed to act as the Administrative Court would (that is, as a court of judicial review) rather than exercising its function as the tribunal determining statutory appeals from the First-Tier Tribunal.

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<sup>16</sup> See paragraphs 31-32 of *FZ v Croydon*.

## **CHAPTER 3 - RESEARCH FINDINGS ON THE COURT'S APPROACH TO AGE DISPUTES FOLLOWING A V CROYDON**

This part of the report considers the changes outlined in Chapter 2 in detail covering the impact the judgment has had on the legal process itself and the parties involved at each stage of the judicial review litigation process. It also considers the outcomes for young people under the new process.

### **3.1 – Methodology**

This part of the research comprised of two elements:-

The first was a review of 17 publicly available court judgments in age assessment cases which have been determined since the Supreme Court's judgment.<sup>17</sup> In particular, consideration was given to how the Administrative Court has approached its new jurisdiction at the different stages of the judicial review process, i.e. the permission stage, directions / interim relief hearings and the substantive fact finding stage. (See the stages of judicial review in Figure 1 at page 24).

The 17 reviewed judgments do not reflect the true number of age assessment cases which have gone through the court system since the judgment of the Supreme Court in *A v Croydon*. This is because the majority of 'permission' and 'interim injunction' decisions are made without an oral hearing and thus are not publicly available. Furthermore only some transcripts or judgments of oral permission or interim injunction hearings are available publicly.

To supplement the publicly available judgments, the researchers sought the views of practitioners involved in litigating age dispute cases. A questionnaire was initially circulated to relevant legal practitioners. However, it was found that it was easier to elicit detailed responses from practitioners when they were approached directly for a discussion on the issues raised in the questionnaire and this was the approach adopted thereafter. Fifteen lawyers who specialise in age assessment cases were approached. The pool of lawyers who deal with age assessment cases is relatively small and those approached have dealt with the majority of the reported decisions. The anecdotal evidence referred to in this part of the report arises out of these discussions.

These discussions have been useful in supplementing the information in the publicly available judgments particularly in respect of discussions between the parties and the Court at hearings and details of evidence produced by the parties, which often are not fully recorded in the publicly available judgments. Although there is some measure of subjectivity in anecdotal evidence, the discussions have nevertheless provided further valuable insight into what the impact of the Supreme Court's judgment has been.

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<sup>17</sup> The 17 decisions on age include one decision of the Court of Appeal in *AE v LB Croydon* [2012] EWCA Civ 547. That decision on age was not arrived at after a trial.

### 3.2 - Permission hearings

The research in this section focuses on the following aspects of the Administrative Court's approach to the 'permission stage':

- Application of the legal test on permission as set out in *F v Lewisham* and *FZ v Croydon*;
- Reasons for the Court's grant or refusal of permission;
- Relevance of traditional judicial review principles to the grant or refusal of permission;
- Evidence put before the Court when seeking permission.

### 3.3 - Application of the legal test on permission

Before a full judicial review trial can go ahead, permission is sought from the Court. The Court either gives or refuses permission to proceed to a full hearing.

There were 12 publicly available permission judgments at the time this research was completed at the end of April 2012. All these arose from oral permission hearings. Not all oral permission judgments are transcribed unless requested by the parties.

Permission decisions decided 'on the papers' before the Court (that is, without an oral hearing) are not reported and are not publicly available. Reliance has had to be placed on discussions with practitioners on their experiences of the way the Court approaches the question of permission for this type of hearing.

In the publicly available judgments, it was apparent that the Court is well versed in citing the correct legal test for permission as set out in *F v Lewisham* and *FZ*. In most cases, the Court made explicit reference to the legal test set down in those cases, that is:

- Is there a realistic prospect that this young person is younger than assessed by the Local Authority? (*F v Lewisham*)
- Does the material before the Court raise a factual case which could properly succeed at trial? (*FZ*)

Practitioners confirmed that the test is applied in both paper decisions and those oral permission decisions where judgments are not available. However, it is clear both from the judgments reviewed and discussions with practitioners that there remain inconsistencies in how the Court assesses whether a claim is 'arguable'. These inconsistencies in approach reveal a lack of clarity as to what material the Court expects to be placed before it to assess 'arguability'.

The Court's displeasure and resistance to its new role in ascertaining the fact of a young person's age for itself is apparent from consideration of some of the earlier judgments post-*A v Croydon*.<sup>18</sup> In *FZ v Croydon* the Court commented "*the Supreme*

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<sup>18</sup> See for example, Burton J in the case of *R (G) v LB of Newham* [2010] EWHC 3515 (Admin) (at paragraph 9), a permission decision which happened soon after the Supreme Court's judgment in *A v*

*Court does not seem to have been concerned with the administrative consequences for the court of this.”*

Evidence from practitioners also suggests that in some early cases (before *FZ*) the Court continued to apply a traditional judicial review approach where the onus is on the person bringing the claim to show that he has an arguable case. This meant the Court would often start from a presumption that a Local Authority’s decision is correct. This has meant the Court erroneously starting with a presumption that the Local Authority’s assessment must stand unless the young person can show it was unfair, irrational or failed to take account of relevant material evidence. The Court of Appeal in *FZ* made clear that this is not the correct approach.

Even in cases where the Court has granted permission to proceed to trial, some judgments hinted at displeasure with this new role. One judge described the post-*A v Croydon* landscape as a “*new growth industry in the Administrative Court*”<sup>19</sup>, apparently without judicial notice (which was taken in *A v Croydon* by Lady Hale) of the fact that an incorrect assessment has significant ramifications for how the immigration claim is dealt with and the nature and extent to which the Claimant can access services. In that case, the Claimant was a trafficked young woman from Nigeria who, by the time she had her age determined in her favour, had already turned 18 years old. She was taken out of secondary school on account of an age assessment which was subsequently declared to be wrong. She was also treated by the immigration authorities as an adult until the age dispute was resolved.

### **3.4 - Reasons for granting or refusing permission**

The legal test for permission is whether there is an arguable case. How this is assessed has been encapsulated by the Court of Appeal’s decision in *FZ v Croydon*. That was an appeal against an Administrative Court judge’s decision to refuse permission to proceed to a substantive trial on the basis that social work expertise should be preferred to other evidence produced by the young person to support his claimed age. Before the Administrative Court and again before the Court of Appeal, the young person was able to point to flaws in the Local Authority’s age assessment, including points on fairness, factual inaccuracies and social workers’ misunderstanding of what he said which he was not given the opportunity to correct before the Local Authority made their decision.

The Court of Appeal in *FZ* said that a court of judicial review acting as a fact-finder should not and cannot feel bound by a Local Authority age assessment. The young person should not be expected to prove that the assessment is wrong and to prove that he is the age he claims to be. The Court of Appeal stated further that the court of judicial review must have regard to all of the information before it and consider whether that material raises a factual case that a young person is arguably younger than assessed and a child. When the Court of Appeal referred to all material, its analysis of the material that was put before it clearly illustrated that it considered that the age assessment was not simply one piece of evidence. The *conclusion* of the assessment was the view of the social workers. The *information contained in the*

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*Croydon*: “The court still remains as a review court and it is certainly not the case that every age assessment, if challenged, can be taken to this court for a full factual analysis. It is not only that this court has not the equipment for carrying out such hearings in terms of sufficient judge power, given that we have to deal with so many other matters including, for example, a planning review which is still in my list hereafter for today, but it is more significantly because judges are not age assessors, and have to rely on the expert views of those who are dealing every day with children, or those who are said to be children.”

<sup>19</sup> See Keith J at paragraph 1 of *R (Y) v LB of Hillingdon* [2011] EWHC 1477 (Admin)



assessment formed different material to be considered on its own merit. In *FZ* the young person's schooling (as recorded by the social workers) was reasonably consistent with his claimed age, as was his description of his upbringing. He also had an explanation for how he learnt of his age and his date of birth. All of this was information was contained in the age assessment collated by the social workers, who nevertheless disregarded or disagreed with its being relevant to determining the young person's age, or did not believe it. The Court acknowledged that the social workers were entitled to form their own view, having met the young person, observed him, and spoken to him to collect information about his age. However, the Court of Appeal stated that:<sup>20</sup>

*"We take account of the fact that the social workers will have been able to judge his general appearance and demeanour, and to make a general credibility judgment from the manner in which he answered their questions. It does not follow that the court would be bound to make the same judgments; nor is general credibility, judged by others, alone sufficient for the court to refuse permission for a factual hearing before the court, when it is for the court to determine in a disputed case the fact of the young person's age."*

This passage recognises the social workers' role in initiating the assessment process but acknowledges that the process is subjective and one which ultimately is for the Court to resolve. There should be no assumption that the Court would adopt the same view as the social workers.

In those publicised judgments where permission was granted, it is this analysis of the Court of Appeal that has resonated. As one judge put it, in giving reasons for granting permission to proceed to trial, *"it is not self-evident that the Court will simply follow the path of the social workers who carried out the age assessment."*<sup>21</sup>

In the seven judgments where permission was refused at an oral hearing (out of a total of 12 permission judgments) there was a prevailing view that social workers are the experts at assessing age, not judges. In those judgments a large measure of deference was given to the opinions of social workers who had made the age assessment which prompted the litigation in the first place.

None of those judgments provide a clear explanation for the judge's view that age assessments are squarely within social work expertise, and it is not apparent what evidence was put forward to support this view. It appears to be based on an assumption that as social workers had, in pre-*A v Croydon* days, been tasked with making these determinations, they must be the ones who are experienced and better placed to do so.

The judgments do not engage with the distinct difference between the role a social worker plays in the context of child protection and child welfare and in eliciting information about a young person's life to determine their age. As will be seen from the findings on the Court's approach to substantive fact-findings and from additional discussions with practitioners, the social workers who have given evidence before the Court at substantive hearings have all accepted to varying degrees that there is variance even within certain age groups as to how young people present and behave and that assessing age is not a topic they are specifically taught in their studies.

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<sup>20</sup> At paragraph 29 of the judgment.

<sup>21</sup> At paragraph 18 of *R (RS) v Secretary of State for the Home Department and LB of Croydon* [2011] EWHC 3313 (Admin), per Edwards-Stuart J

The deference shown for social worker expertise does, to an extent, contradict the clear judicial comment in *A v Croydon* that a social workers' view on age does not and should not determine the outcome of a dispute over age, particularly where the young person continues to disagree with that view. It was this very doubt about social workers' judgment conclusively determining age that led the Supreme Court to reach the decision that the fact of age is an objective fact quite separate from what two social workers think it might be.

### **3.5 - Relevance of conventional judicial review principles**

The Court in *FZ v Croydon* found that the process by which the social workers arrived at their conclusion was unfair according to conventional judicial review principles. Part of the unfairness was that social workers did not provide the young person with an appropriate adult to support him during the interview process. Additionally, they did not provide an opportunity for the young person to know the reasons they had for disbelieving his age, or what adverse findings they had made against him in reaching their conclusion. In evidence before the Court of Appeal, the claimant in *FZ* was able to show that had these matters been put to him, he could have explained apparent inconsistencies. Some of these fell away as a result.

The failure to offer the young person with an appropriate adult and to give him an opportunity to clarify and/or rebut the adverse inferences drawn against him before concluding the age assessment were two of the three key reasons why the Court of Appeal granted permission for the claimant to proceed to a fact-finding hearing. Although the Claimant's positive case on his age featured at the forefront of the judges' minds, the procedural flaws and the unfairness of the Local Authority's assessment of age also weighed heavily in the balance in their decision to grant permission. This approach resonated with the Supreme Court's decision to preserve judicial review as the forum for resolving age disputes.

The reasons given in *FZ* for granting permission also illustrate how conventional judicial review principles such as fairness remain relevant to the resolution of an age dispute. These principles go to the weight that the Court as fact-finder could place on the evidence put forward by the Local Authority in support of their assessment and to considering whether relevant or irrelevant considerations had been taken into account in arriving at their conclusion. The deference that the Court might give to social workers' conclusions on the age of a young person must necessarily be informed by the possibility that the Court might reach a different view and also by whether the process by which the social workers reached their view was rational and fair.

In the publicised judgments where permission has been refused, even where the *FZ* is correctly cited, the approach taken by the Court in assessing the value of the social workers' conclusions has not always correctly reflected the *FZ v Croydon* analysis. Although the Court accepted in several of these cases that there were procedural flaws in the social workers' assessment, they nevertheless relied on the assessors' experience and their assessment of the young person's credibility to refuse permission.

Where permission was granted following an oral hearing, the five publicised judgments suggest that the Court looked less to conventional judicial review principles so much as the material produced on behalf of the young person to support his positive case that he was younger than assessed by the Local Authority.

This trend is less apparent when considered together with cases where permission was granted on the papers without need for an oral hearing. A review of more than a dozen orders granting permission on the papers indicated a judicial approach on paper permission decisions which is more true to that set out by the Court of Appeal in *FZ v Croydon*, looking in a broad-brush manner at both the young person's positive case on his age *and* the critique of the Local Authority's assessment of his age on conventional judicial review principles of rationality, fairness and whether the social workers properly took account of relevant information and disregarded irrelevant matters.

### **3.6 - What evidence was put before the Court in seeking permission?**

The Practice Guidelines developed by the London Boroughs of Hillingdon and Croydon stressed the principle of giving the young person the benefit of the doubt. The *Merton* judgment in 2003 approved this approach. Subsequent judgments reaffirmed the importance of giving the benefit of the doubt as the Court accepted that age assessment was an inexact science with a margin of error.

While the Supreme Court's judgment in *A v Croydon* made clear that the evaluative judgment of social workers is not decisive in determining the objective fact of a young person's age, it provided no guidance on how the judicial review court should exercise its jurisdiction as fact-finder and whether the principle of the benefit of the doubt stated in *Merton* would remain applicable to the Court in its assessment of age. Normally in judicial review applications, there is a burden on the person who brings the claim to prove his/her case. *A v Croydon* was silent on whether this would be applicable to age assessment judicial reviews.

The 'burden of proof' question was considered by the Court of Appeal in *FZ v Croydon*. It held that at the initial assessment process by the Local Authority, the young person should not be required to *prove* his age. The age assessment process should be seen as an inquisitorial process ascertaining the information necessary to assist the social workers to come to an informed view on the young person's age, whether that is his claimed age or some other age.<sup>22</sup> Although the Local Authority asked the Court to find that when an age dispute is brought to court it should be for the young person, at the permission stage, to prove that the Local Authority got it wrong, the Court of Appeal declined to accept this view. Like Holman J in *F v Lewisham*, the Court of Appeal made no comments on which way the burden of proof ultimately fell at the substantive fact-finding stage. It did state that at the permission stage it was not helpful to consider the 'arguability' question by reference to the burden of proof. This does not mean that the young person has to do nothing other than lodge a claim with the Court. The Court of Appeal made clear that the young person had to show that he had an arguable case on the facts in the light of the evidence before the Court, the Local Authority's assessment and other relevant facts or circumstances.<sup>23</sup>

A review of the publicised judgments reveals a mixed picture of what the *FZ v Croydon* test expected the young person to show to the Court at the permission stage. In circumstances where a conventional judicial review critique of age assessments appears less relevant to the Court's determination of the fact of age, there now appears to be an expectation that young people wishing to bring a challenge need to put positive evidence of their age, including expert evidence, at the

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<sup>22</sup> At paragraph 3 of the judgment.

<sup>23</sup> At paragraph 7 of the judgment.

permission stage to get over the permission hurdle.<sup>24</sup> It is no longer sufficient for the young person to show that the Local Authority arrived at a conclusion about his or her age in a flawed and unfair manner. In the publicised judgments where permission was granted, the Court had before it not only the age assessment(s) but also witness evidence from the Claimant and often expert evidence from independent social workers, educational psychologists and paediatricians.<sup>25</sup>

Practitioners have confirmed this trend post-*A v Croydon*. They describe an increasing move toward seeking independent expert evidence relevant to age *before* making an application to the Court for permission. The expert evidence adduced by practitioners includes independent social work evidence to rebut the analysis of the Local Authority's age assessment; educational psychologist reports to assert that cognitive impairment of a young person impacted on his ability to understand the questions asked of him, his ability to recall details and his ability to provide a coherent narrative of his life and his age; psychological and psychiatric reports exploring potential mental health difficulties a young person might have and the impact this has on the quality of information provided about his age; and document experts' reports to comment on authenticity of the documents produced by the young person.

There has also been a general move toward focusing on the young person's immigration history as a proxy for determining credibility matters at the permission stage. This was illustrated in the case of *R (A) v LB of Croydon and Secretary of State for the Home Department* [2011] EWHC 3116 (Admin). The young person had entered the UK on a passport and entry clearance had been obtained by an agent using a false name and false date of birth. The Claimant had disclosed his knowledge of the deception used to enter the UK to immigration officers and to social services as soon as he presented to them. He also provided them with the name of the agent and an explanation of his life story and age. This explanation was a consistent account provided to different professionals in statutory agencies and in the legal profession. His account of how he entered the UK via an agent by deception was never investigated even though UKBA had the details of the agent including telephone numbers and home address. The Claimant was assessed to be the age recorded in the false documents. In the absence of definitive proof that the Claimant was not the person whose false name he said he used and whose age was much

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<sup>24</sup> In *R (G) v LB of Newham* [2010] EWHC 3515 (Admin), the absence of evidence to prove the Claimant's vaccination record was genuine and therefore the date of birth recorded on it as his true date of birth was found to be fatal to the Claimant's age challenge. The court also commented on the absence of a medical report as being unhelpful. In *R (YE) v Secretary of State for the Home Department* [2011] EWHC 496 (Admin), the Claimant's inability to explain the inconsistencies raised in the age assessment reports despite her circumstances as a trafficked victim was found to be fatal at the permission stage. In *R (A) v LBC of Croydon and Secretary of State for the Home Department* [2011] EWHC 3116 (Admin), the court held that the inability of the Claimant to prove with certainty that the false name and date of birth used to obtain a visa for him via an agent to enter the UK did not belong to him meant there was no prospect of the case succeeding at trial. This is despite the Claimant being noticeably consistent in his account and explanation about his life and schooling, evidenced in immigration documents, the age assessments and his own witness evidence.

<sup>25</sup> See *R (H) v Secretary of State for the Home Department and Metropolitan Borough Council of Wigan* [2010] EWHC 2414 (Admin) where the Court had before it a paediatric report and evidence from the claimant's teacher and care worker supporting his claimed age; *R (K) v Birmingham City Council* [2011] EWHC 1559 (Admin) where the Court had a paediatric report, an immigration judge's determination of the claimant's age (in his favour), and witness evidence on behalf of the Claimant; and *R (S) v Ealing LBC* [2010] EWHC 3458 (Admin) where the Court had an independent social worker's report, witness evidence from the Claimant young person and his second cousin, an educational psychologist's report on the Claimant's learning difficulties and a paediatric report in his favour.

older, the Court found it was unable to grant permission to proceed to a substantive fact-finding hearing.

This analysis clearly clashed with the view expressed in the *Merton* judgment that young people may come to the UK and / or enter the UK under false pretences for reasons entirely irrelevant to their true age. As the Court of Appeal stated in *FZ v Croydon*, the fact-finding court may not, on hearing extensive oral evidence from the young person, take the same view on credibility as the social workers did.

Neither *A v Croydon* nor *FZ v Croydon* actually envisaged that young people would be, at the permission stage, subject to such forensic analysis of their evidence on age. The purpose of allowing the Court to make its own finding of fact is to allow questions over the young person's age to be looked at in great detail at trial, not at the permission stage. Permission is a filter. It is not to be itself a forensic mini-trial of the young person's age in circumstances where not all evidence relevant to the determination of age has yet been produced before the Court.

This point is important. In discussions with practitioners for this part of the report, it is understood that the young person will rarely have full disclosure of social services records or records from the UKBA. Often these records have the potential of revealing evidence held by the Local Authority relevant to age which may be favourable to the young person.

This was indeed the case in *R (Y) v LB of Hillingdon* [2011] EWHC 1477 (Admin) where social services disclosure revealed that for 9 months prior to the contested age assessment, the Local Authority accepted the young person's claimed age by placing her in foster care, and in reviews of her care plan affirmed on numerous occasions the Local Authority's acceptance of her age. A detailed trawl of social services records at trial illustrated to the Court that there was in reality no rational basis upon which to dispute the young person's age.<sup>26</sup> It would not have been possible for the Court to carry out this forensic assessment until the young person's social services file was disclosed. The social services records revealed that the young person's social worker did not raise any concerns about her age and nor did her foster carer or teachers at secondary school. What was clear from the social services records was that the dispute over the young person's age arose following a police investigation whereby the police spoke to the traffickers who told the police she was older than claimed. The social worker who gave evidence at trial accepted that social services should not have relied on information from traffickers to dispute the young person's age, particularly as the Local Authority had accepted that she was trafficked. The records, together with the young person's oral evidence, led the Court ultimately to make a declaration on age in her favour.

In *FZ v Croydon*, there was no expert evidence before the Court. All the Court had was the Local Authority's age assessment and subsequent review, both of which the Court found to be carried out in an unfair manner. The Court also had a witness statement made on behalf of the Claimant answering to the apparent adverse inferences drawn against the Claimant in the age assessment and providing information about his life which went to supporting his claimed age. In addition the Court had the Claimant's vaccination record which contained dates of his immunisation which supported his claimed age. This record had not been verified to be authentic, but the Court of Appeal rejected the argument put by the Local Authority that because of this the record could not go to supporting the Claimant's age at the permission stage. In granting permission, the Court of Appeal's approach

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<sup>26</sup> See paragraph 33 of the judgment.

is informative of what was meant by the formulation 'material before the Court taken at its highest'.<sup>27</sup>

*In our judgment, this is a case where permission to proceed to a factual hearing on evidence should be granted. One factor contributing to that conclusion is that there were two procedural lapses. However, our main reason is that we do not consider the appellant's factual case taken at its highest could not properly succeed in a contested factual hearing. The appellant is recorded as giving a reasonably consistent factual account, and the initial apparent inconsistency between his claimed age and his claimed date of birth was capable of being explained. There were no glaring inconsistencies in his account, or clear analytical reasons why his account was unbelievable. The vaccination card is not obviously a forgery, and the series of dates which it gives for the various vaccinations is positively consistent with his claimed date of birth and positively inconsistent with a birth date two years earlier. ... We take account of the fact that the social workers will have been able to judge his general appearance and demeanour, and to make a general credibility judgment from the manner in which he answered their questions. It does not follow that the court would be bound to make the same judgments; nor is general credibility, judged by others, alone sufficient for the court to refuse permission for a factual hearing before the court, when it is for the court to determine in a disputed case the fact of the young person's age.*

In several unreported permission cases, the submission was made to the Court that because permission is a filter, allowances should be made for evidence which is likely to be adduced, for example from teachers, support workers and other experts who have already indicated that they believe the young person is a child and whose witness evidence would be filed in advance of trial to substantiate that claim. This was accepted by the Court in circumstances where there was already indication in correspondence and brief statements as to the general gist of the evidence which would be available to support the young person's claimed age. The Court's approach in granting permission in these cases mirrored the correct approach taken by the *FZ* court. Based on discussions with legal practitioners, this approach is not consistently adopted by the Court.

### **3.7 - Interim relief and directions**

There is often a gap of several months or longer between the grant of permission and the full substantive trial. In the interim and in view of the young person being assessed to be older than claimed, the question of how the young person ought to be supported pending the full hearing arises. In addition, once permission to proceed to trial has been granted directions are needed from the Court to establish the steps that the young person and the Local Authority under challenge will need to take to prepare for the substantive hearing.

This section looks at the Court's various case management powers and will focus in particular on:

- The Court's approach to interim relief

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<sup>27</sup> At paragraph 29 of the judgment.

- Directions to trial
- Special measures for young people giving evidence at trial

### 3.8 – The Court’s approach to interim injunctions

From the Local Authority’s perspective, an age assessment concluding that a person is an adult and not a child as claimed brings their duties to an end. This could mean the Local Authority terminating a placement for the young person without notice and sending them to the UKBA for asylum support which is accommodation and financial support for adults and families, not lone children. Furthermore UKBA may, relying on an age assessment, detain the young person with a view to removing him/her from the UK.

Where a young person challenges a Local Authority’s age assessment by way of judicial review, s/he may at the same time apply to the Court for an interim injunction mandating the Local Authority to discharge its duties toward him/her under the Children Act 1989 until the Court has made its determination on the fact of the young person’s age. In deciding whether to grant an injunction, the Court has to weigh up the prejudice caused to the young person as opposed to the Local Authority. Where there is a risk that an age disputed young person may be homeless, wrongly accommodated with adults or wrongly detained or removed and the risk can be supported on the face of it by evidence, the Court has tended to grant the relief sought with a caveat that the Local Authority or the UKBA could apply to the Court at a further date to set aside the injunction if there are good reasons supported by evidence to do so.

The option of seeking injunctive relief on an interim basis has not changed following the Supreme Court’s decision in *A v Croydon*. As these decisions are often dealt with on the papers, the outcomes and reasoning of the Court are not normally available publicly unless the application is heard at the same time as an oral permission application. Much of the analysis in this section is based on discussion with practitioners to supplement the few publicly available judgments on injunctive relief.

The most frequent orders sought have been for suitable accommodation to be provided by the Local Authority under their Children Act 1989 duties. According to practitioners, the Court has by and large been willing to grant such interim injunctive relief, particularly where the young person is able to show that the age assessment process has been procedurally unfair or has failed to take into account relevant material, and therefore cannot be said to be reliable.<sup>28</sup>

In two judgments<sup>29</sup> considered for this report, the Court granted an interim injunction requiring the Local Authority to provide the young person with compulsory schooling in accordance with his claimed age pending the determination of the fact of his age. Where the dispute over age is not about whether a person is a child or adult but rather than how old the young person is, the Court has been more reluctant to interfere and grant injunctive relief to move a young person from bed and breakfast or semi-independent accommodation to foster care, unless there is evidence to show that such accommodation is not suitable for the particular young person.

<sup>28</sup> See for example, *R (H) v Secretary of State for the Home Department and Wigan MBC* [2010] EWHC 2414 (Admin) where the Local Authority was ordered to accommodate the young person pending a re-assessment of the young person’s age in the light of fresh evidence.

<sup>29</sup> See *R(PM) v Hertfordshire CC* [2010] EWHC 2056 (Admin); *R(ES) v LB of Hounslow* CO/1818/2011

In terms of injunctive relief against the UKBA, where the age dispute raises an immigration issue, the Court has by and large been willing to grant interim injunctive relief against removal from the UK pending resolution of the age dispute. However, the Court's approach to release from immigration detention has been mixed, despite the UKBA's own policy that children and age disputed young people should not be detained pending verification of their age except in exceptional circumstances or where there is clear evidence of their being adults and not children.

Practitioners have reported examples where the Court has refused to release a young person on the back of fresh expert evidence such as an independent social work report stating that the young person is a minor or where the Local Authority has agreed to carry out a further age assessment of the young person whilst in detention. Many of the cases cited by practitioners were pre-permission cases. By and large, practitioners have said that where permission is granted or where the Court has been able to take a broad view that the claim is arguable, release from detention has been granted.

In one publicly available judgment, the Court granted permission to the young person to proceed to a fact-finding hearing of his age but refused to release him from detention pending trial on account of his having previously absconded. The judge directed expedition for the trial to be heard sooner rather than later.<sup>30</sup> This decision is regarded by practitioners as an anomaly which happened in the early days following the *A v Croydon* judgment.

### **3.9 - Court's directions to trial**

Following the grant of permission, the Court will normally give directions to the parties on the steps they need to take to prepare for trial. The Supreme Court's decision has had a significant impact on this aspect of court procedure. Whereas previously, there would be straightforward directions for further legal submissions to be filed by each party with supporting evidence, the Court now has to ensure that the directions are detailed enough to cover all aspects of written evidence, disclosure, oral evidence and expert evidence which will be relevant for trial.

In *F v Lewisham*, the first case to consider case management directions for age assessment trials, the Court recognised that the way in which the Court was to determine disputes over the assessment of the age of a young person had to fundamentally change. Holman J gave some general guidance in his directions order as to how such cases ought to be managed in light of the Supreme Court's ruling. This has subsequently been adapted by the Court as the Court became more familiar with its fact-finding role. Directions include:

- (i) There is a general expectation that a young person wishing for a court's determination of his age will give oral evidence to the Court;
- (ii) The question of whether a young person should give evidence orally should normally be a matter for the trial judge, although this is a question which the Upper Tribunal when hearing age dispute claims generally deal with at this interim stage;

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<sup>30</sup> *R(S) v London Borough of Ealing LBC* [2010] EWHC 3458 (Admin)



- (iii) Expert evidence is relevant to the determination of the fact of age and can be produced. It is for the trial judge to accord what weight s/he wishes to give to that evidence;
- (iv) Normally social services records are expected to be disclosed to the young person for consideration in advance of trial together with the assessing social workers' handwritten notes of the age assessment;
- (v) The parties are expected to agree on a time estimate, taking into account who they wish to call to give oral evidence at trial.

Following the transfer of most age assessment claims to the Upper Tribunal, there has been a trend for the Upper Tribunal to direct that all immigration documents relevant to the young person's claim for asylum be disclosed for consideration at trial. The Court's reasoning has been that it is necessary for the Court's assessment of the young person's credibility. However, practitioners have expressed concerns that to require disclosure of immigration documents conflates the age assessment process with an assessment of the young person's asylum claim.

It is evident from the few determinations in the Upper Tribunal which have been made publicly available and which have been subjected to the direction for disclosure of immigration documents that these claims have allowed matters relevant to the asylum claim to infect the Court's fact-finding process. In one case it is understood that on account of the ongoing age dispute between the young person and the Local Authority, the UKBA revoked the young person's grant of refugee status pending the determination of age.<sup>31</sup> In another case, the Upper Tribunal made adverse findings on a young person's credibility in circumstances where the Immigration Tribunal had already found him credible,<sup>32</sup> although in that case the Upper Tribunal did make explicit that the credibility findings should not affect the young person's immigration status. On the facts of that case, the basis of the young person's refugee status was in any event not contingent on a finding of age in his favour. These two cases raise a concern that the Upper Tribunal may tend to treat applicants as migrants rather than putative children in the first instance.

### 3.10 - Special measures for children giving evidence at trial

The manner in which children give evidence in age assessment cases has not been subject to standard special measures as are available in family and criminal proceedings.<sup>33</sup> Instead it has been left to the Court to decide what, if any, safeguards are to be put in place for the young person to give his or her evidence. The Court's approach starts with a general expectation that the young person should give live evidence because, as was stated in *F v Lewisham*, "*in most, if not all, cases there is some issue as to the credibility of the claimant and the account that he or she gives as to his or her earlier history. But I do accept that the extent to which, and manner in which, a claimant participates or gives evidence is quintessentially a matter for the judge at the hearing itself.*"<sup>34</sup>

<sup>31</sup> *R (AM) v Solihull BC* [2012] UKUT 00118

<sup>32</sup> *R (ES) v LB Hounslow* [2012] UKUT 00138

<sup>33</sup> For family proceedings, see *Re W (Children)* [2010] UKSC 12. For criminal proceedings, see Part II of the Youth Justice and Criminal Evidence Act 1999, Chapters I-III. In relation to children giving evidence at the Immigration Tribunal, see the Joint Presidential Guidance Note No 2 of 2010

<sup>34</sup> *F v London Borough of Lewisham* [2009] EWHC 3542 (Admin) §30

*YA v LB Hillingdon* [2011] EWHC 744 (Admin)<sup>35</sup> was the first case where a trial judge had to consider in detail whether and what safeguards to put in place for the young person. That was a case of a young woman who by the time of trial had turned 18. She was nevertheless an accepted victim of trafficking and a psychologist's report diagnosed her as suffering post-traumatic stress disorder. The report expressed concern that giving live evidence would re-traumatise her as it would inevitably require her to remember and recount aspects of her traumatic past, particularly as her knowledge of her age was within the context of her trafficking. Keith J was unwilling to excuse the Claimant from giving live evidence to the Court but directed that a significant number of safeguards be put in place. In so doing, Keith J noted that adverse inferences should not be drawn against the young person if she was unable to recall or recount her past in detail in view of the concerns expressed by the psychologist. At trial, the setting for the Claimant to give her evidence was changed from that of a formal courtroom to a more informal setting whereby the advocates and the judge did not wear formal court dress and sat next to the young person during her evidence.

### 3.11 - Substantive hearings

Since the decision of the Supreme Court in *A v Croydon* there have been 16 reported judgments of substantive trials.<sup>36</sup> The trials took about two to three days of court time and all save for two heard in the Upper Tribunal were heard in the Administrative Court<sup>37</sup>. The statutory order transferring cases to the Upper Tribunal only came into force in November 2010: thus those cases which were post-permission at the time of the Order remained in the Administrative Court. It has only been in this past year, (2012), that substantive hearings have started to filter through to the Upper Tribunal. Comments made in respect of trials in the Upper Tribunal are limited to the two publicly available judgments and discussions with practitioners who have had trials in the Upper Tribunal with judgment pending.

On review of the 16 publicly available decisions of trials the outcome has been mixed. In five of 16 trials, a declaration was made in favour of the young person that s/he is the age s/he claims to be (a sixth case won on appeal; *AE v Croydon*). In six trials, the outcome has been a declaration in favour of the age assessed by the Defendant Local Authority. In the remaining five cases, the Court came to a different date of birth, three of which were somewhere between the assessed and the claimed dates of birth. In the other two, the Court took a view that none of the evidence before the Court assisted and the Court came to an entirely different date of birth older than even that of the assessment carried out by the Defendant.

Of the 16 trials, five have gone on to the Court of Appeal. Two of these have been heard by the Court of Appeal substantively,<sup>38</sup> with the Court of Appeal overturning an Administrative Court judge's determination of age in *R (AE) v LB of Croydon* [2011] EWHC 2128 (Admin). Three cases are awaiting a decision on permission to appeal.<sup>39</sup>

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<sup>35</sup> *YA v Hillingdon* [2011] EWHC 744 (Admin) was the first of 2 parts of the same case.

<sup>36</sup> As at 13<sup>th</sup> April 2012

<sup>37</sup> As at May 2012 when the research was completed, only 2 Upper Tribunal determinations were available. It is understood that other trials have been heard in the Upper Tribunal and are awaiting judgement.

<sup>38</sup> *R (CJ) v Cardiff CC* [2011] EWHC 23 (Admin), on appeal at [2011] EWCA Civ 1509. See also *R (AE) v LB of Croydon* [2011] EWHC 2128 (Admin)

<sup>39</sup> *R (U) v LB of Croydon* [2011] EWHC 3312 (Admin); *R (W) v LB of Croydon* [2012] EWHC 130 (Admin) and *R (K) v Birmingham CC* [2011] EWHC 1559 (Admin)

This section will look in depth at the following issues in respect of substantive hearings which have taken place:

- Application of Burden of Proof / Standard of Proof
- Approach of the Court to Evidence
  - Claimant's Evidence
  - Defendant's Evidence
  - Experts' Evidence
  - Documentary Evidence
  - Immigration Judges' Determination
- Outcome of trial and reasons

### 3.12 - Burden / standard of proof

The general rule in court proceedings is that the party that is asking for a benefit (such as services under the Children Act 1989) has to prove his case. In civil cases the evidential standard is on the balance of probabilities, i.e. more than 50%.

In the context of age assessment judicial reviews, however, there has always been some judicial hesitance to ascribe a burden on a specific party to prove age. See Stanley Burnton J (as he then was) in the *Merton* case:

*"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."*<sup>40</sup>

As that case was heard on conventional judicial review principles in 2003, the question of burden of proof did not gain significance until the Supreme Court's decision in *A v Croydon* radically altered the way in which the Court had to deal with age assessment cases.

In *F v Lewisham*, Holman J addressed the issue of the burden of proof (in part). He stated that it was not right to place the evidential burden entirely on the Claimant, but that the question was ultimately a matter for the trial judge and not for him to decide at a directions hearing.

In the first two substantive trials on age - *MC v Liverpool* [2010] EWHC 2211 (Admin) and *A v Camden* [2010] EWHC 2882 (Admin), the trial judges did not directly deal with the question of the burden of proof. In *A v Camden* the judge found the material to be 'clear' and he did not need to decide the case by imposing a burden on either party to prove their case. In *MC v Liverpool*, Langstaff J thought that assessing age was not a process of choosing between two alternatives and therefore the concept of the burden of proof was not really appropriate to apply.<sup>41</sup> In *N v Croydon* [2011] EWHC 862 (Admin) Neil Garnham QC thought that a party having to prove that a particular date of birth is correct was not the correct approach and, following the

<sup>40</sup> *R(B) v Merton LBC* [2003] 1689 (Admin) at paragraph 38

<sup>41</sup> At paragraph 5

approach of Langstaff J in *MC v Liverpool*, what the Court was in fact doing was to select the most likely date of birth within a particular range. In *N v Barnet*<sup>42</sup> HHJ David Pearl QC considered the issue of the burden of proof with reference to the above preceding cases. He thought that it was only after the Court had made its assessment and failed to reach a particular age for the Claimant that the Court should resort to the burden of proof, which in an age assessment case where the Claimant asserts an entitlement to services, would fall upon the Claimant.

In *CJ v Cardiff* in the Administrative Court, Ouseley J took the view that it was ultimately for the Claimant to prove his case. He stated that:

*“I had intended not to decide this case by what could be an unsatisfactory resort to the burden of proof. But it has been quite a close decision.....I therefore have had to decide who bears the burden of proof. In my view 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. First, in judicial review proceedings it is for the Claimant to show that the public authority has erred in its duties. Second, but obviously related, it is the Claimant who is asserting that the duty is owed; the authority is not asserting a power to do something. It is not crucial but supportive nonetheless that the readier means of knowledge lies with the Claimant on this issue.”*<sup>43</sup>

This approach to the burden of proof being on the Claimant was followed by Keith J in *Y v Hillingdon* for the reason that it is the Claimant who seeks to assert an entitlement to services under the Children Act 1989 and therefore has the burden of proving such an entitlement.

The Claimant appealed Ouseley J's decision in *CJ v Cardiff* and the case was heard by the Court of Appeal in December 2011. The Court of Appeal disagreed that there was any burden on either party of proving their case, finding that the Court in an age assessment case was exercising an inquisitorial role and was trying to get to the truth of the matter as best as it could using the evidence brought before it. The Court of Appeal did not say anything as to how the Court should approach the evidence, only that:

*“it may well be inappropriate to expect from the Claimant conclusive evidence of age in circumstances in which he has arrived unattended and without original identity documents. The nature and evaluation will depend upon the particular facts of the case.”*<sup>44</sup>

The Court of Appeal was invited to give an indication that the lower court was wrong in its decision on CJ's age, but despite its criticisms about the incorrect analysis of the burden of proof by the lower court, it refused to set aside the decision on age.

The Court of Appeal's affirmation that the process of assessing age by the Court is an inquisitorial one raises several issues. It is not readily apparent why judges are better placed to deal with age assessments than social work professionals. As HHJ McMullen QC said in *A v Camden*:

*“The task is difficult. If it was simply put to assess this young man's age, I would confess to being in difficulty. What is my experience of judging the*

<sup>42</sup> *R(KN) v LB Barnet* [2011] EWHC 2019 (Admin) at paragraphs 9-24

<sup>43</sup> *CJ v Cardiff* at paragraphs 126 and 127

<sup>44</sup> *R(CJ) v Cardiff CC* [2011] EWCA Civ 1590

*age of teenagers in Afghanistan or those who have lived in Afghanistan and have lived in this country for a year or two?”*<sup>45</sup>

Upon consideration of the reported decisions, and despite the Court of Appeal affirming that the process is an inquisitorial one, it would seem that Claimants have a high hurdle to overcome in order for the Court's assessment to agree with their stated age. More is said about this below. The concept of applying the benefit of the doubt in favour of a young person being assessed, whilst being held as correct as against the UKBA and Local Authorities, does not as yet seem to apply as against the Court.

### **3.13 - Approach of the Court to evidence**

With the Supreme Court stating in *A v Croydon* that the Court is the ultimate arbiter of the fact of age and the Court of Appeal in *CJ v Cardiff* stating that there is no burden on the parties to prove either that the Claimant is the age claimed or the age assessed, the judicial review Court has entered into uncharted territories in the way it is expected to marshal the evidence before it to come to a reasonable conclusion.

The judgment in *A v Croydon* was initially welcomed by professionals assisting young asylum seekers because of the perceived neutrality of the Court and the prospect of there being a way to resolve age disputes without resort to repeated re-assessments by Local Authorities.

However, as age dispute claims have proceeded through to trial over the past two and half years, the outcomes and the approach the courts have taken to assessing the evidence has raised questions as to whether judicial age assessments are the appropriate substitute for Local Authority assessments. One judge has described judicial age assessments as a '*new growth industry*', and it is unclear whether that comment is directed to those who represent young people or to fact-finding hearings generally taking up a large amount of the Court's resources.<sup>46</sup>.. More recently, another judge has put it more bluntly, describing judicial age assessments as '*simply an expensive lottery*.'

Behind these remarks is a harsh reality; that young people are subjected to a forensic inquiry into the minutiae of their lives.

### **3.14 - Claimant giving evidence**

There is now a general expectation that a young person wishing to challenge a Local Authority age assessment will have to give oral evidence and be subjected to cross-examination.<sup>47</sup> Holman J stated in *F v Lewisham* that the question of whether a claimant should give evidence will be for the trial judge to determine. Whilst a sensible principle, in practice, judges are rarely allocated the case for trial until a few days beforehand whilst trial time estimates are provided much earlier. This creates problems for the Court listing office in providing time estimates for the trial without the implication that it may block out unnecessary court time, thereby affecting other claims needing to be heard by the Court. Even the most minor adjustments and special measures which the trial judge may direct for trial, such as a more informal

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<sup>45</sup> *R(A) v LB Camden* [2010] EWHC 2882 (Admin) at paragraph 46

<sup>46</sup> The question that needs to be addressed is not whether or not age assessment has become a growth industry but whether the new arrangements are delivering better outcomes for children than the previous regime.

<sup>47</sup> *R (F) v Lewisham LBC* per Holman J at §30.

court room for the young person's evidence, are logistically difficult to arrange at short notice.

The view of practitioners has been that the Administrative Court [and Upper Tribunal?] has been ill prepared to deal with live evidence from child witnesses. By comparison, the criminal courts and family courts have developed sophisticated systems for dealing with children and young people giving evidence.

In 10 out of 16 publicly available judgments from substantive trials the child was required to give evidence and face cross-examination without any apparent special measures in place. There has only been one case which went to a full trial where the claimant was not asked to give evidence.<sup>48</sup> There has been a further case where special measures were in place accounting for the vulnerabilities of the young person and her minority.<sup>49</sup>

In one stark example, the young person was a mentally ill claimant who had been detained under the Mental Health Act 1983.<sup>50</sup> He was expected to give full evidence in open court. On the face of the judgment, no adjustments were made to account for his being someone with mental health difficulties. The Court rejected the submission that his mental health difficulties could have affected his memory and the quality of his evidence.<sup>51</sup>

In another claim, a judge commented that he could not understand why an age disputed young person whose age is 'unknown' ought to be given safeguards which a child might be given in court (either in the family or criminal context).<sup>52</sup> Although that judge did agree to hold the inquiry into the claimant's age by asking all the questions (removing the need for cross-examination), he refused to put in place other special measures such as to have the matter heard in chambers, in an informal courtroom environment, with breaks in the evidence, (the Claimant gave evidence for one day with only a break at lunch), or dispensing with the need for formal court attire or making the room more child-friendly. This appeared to be based on the judge's view that a person with an 'unknown' age cannot be assumed to be a child before the Court has made its decision. This view does not sit well with the approach of the Court at the permission stage, because in granting permission for a substantive fact-finding, the Court has to find that the person is 'arguably' a child. If that is the case, there should be a presumption that the young person may be a child, not a presumption to the contrary until settled by the Court.<sup>53</sup>

In *AM v LB of Croydon* [2011] 3308 (Admin), an application for special measures at the start of the trial was rejected by the Court on account of the young person being just 18 on his own account. The legal representatives for the young person did call the Court in advance so that a less imposing courtroom was allocated for trial. However, that was the only special measure in place. In deciding to refuse special measures, the Judge also intended to dispense with the interpreter because the claimant had been in the UK for almost two years and understood some English. On further submissions, he permitted the interpreter to remain during the course of the evidence, where it became apparent that the Claimant's level of English was not

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<sup>48</sup> *R (N) v LB of Barnet* [2011] EWHC 2019 (Admin) at §§4-7 per HHJ David Pearl

<sup>49</sup> *R (YA) v LB of Hillingdon* [2011] EWHC 744 (Admin) per Keith J. The substantive trial judgment is at *R (Y) v LB of Hillingdon* [2011] 1477 (Admin).

<sup>50</sup> *R (CJ) v Cardiff CC* [2011] EWHC 23 (Admin)

<sup>51</sup> Ouseley J in *CJ v Cardiff* at paragraph 91.

<sup>52</sup> *R (W) v LB of Croydon*, CO/7380/2010, extempore judgment handed down on 13<sup>th</sup> April 2012.

<sup>53</sup> *R (H) v Secretary of State for the Home Department and Wigan MBC* [2010] EWHC 2414 (Admin) per Karen Monaghan Q.C. is the authority supporting this proposition.

sufficient to enable him to navigate through adversarial cross-examination and questioning in that language. Evidence had also been made available to the Court that the claimant suffered from psychological problems. Although the Claimant was successful, the case illustrates some of the difficulties that can arise.

In *Y v Hillingdon* there was clear psychological evidence which indicated that giving live evidence entailed a real risk of re-traumatising a victim of trafficking. The Court nevertheless directed that the young person give evidence, albeit with special measures in place.

### 3.15 - Judicial approach to claimants' evidence

Where the Claimant has given oral evidence, the judicial decisions show that the court has been reluctant to hold that the Claimant's evidence was credible. Findings that a Claimant lacked credibility have arisen because of conflicting evidence such as a EURODAC<sup>54</sup> fingerprint match, which the Claimant denies,<sup>55</sup> disbelief as to authenticity of supporting identity (or other types) documents and inconsistencies in accounts of schooling.

In one case where the Claimant was held to be credible the Court decided that he was honest in his belief but mistaken.<sup>56</sup> In *AE v Croydon*, despite the Court finding that the Claimant had been largely credible, discrepancies as to the reasons for fleeing his country of origin, his journey to the UK and demeanour led the Court to decide that the Claimant was not the age he claimed to be. The issue of credibility as to reasons for seeking protection as an asylum seeker invariably blur into the examination of the young person's chronology of their life. The decision in *AE* was subsequently overturned by the Court of Appeal who made a finding on the Claimant's age in his favour. It is to be noted that the Court of Appeal in *AE* sent a strong message about its view of the unsatisfactory nature of the current system for resolving age disputes. It said,

*'However, the fact that this court is having to consider an appeal on a pure point of fact and that it is the fifth time that this young man's age has been determined do perhaps suggest that more thought needs to be given to the question of whether this is the best way to deal with such disputes.'*<sup>57</sup>

There have been a very small number of cases where the Administrative Court has found the Claimant's account to be entirely credible. This is consistent with the trend that has emerged from the review of the judgments and discussions with practitioners – that claimant young people are expected at trial to recall the minutiae of their lives when giving evidence. This is probably because it is the Claimant's positive case that is supposed to be of the greatest evidential significance. This does present with difficulties, not least because some claimants arrive in the UK at a young age but do not have their age dispute claims heard at trial until several years later. As the publicly available judgments of substantive trials indicate, the trial process does not

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<sup>54</sup> The EURODAC system enables European Union (EU) countries to help identify asylum applicants and persons who have been apprehended in connection with an irregular crossing of an external border of the Union. By comparing fingerprints, EU countries can determine whether an asylum applicant or a foreign national found illegally present within an EU country has previously claimed asylum in another EU country or whether an asylum applicant entered the Union territory unlawfully.

<sup>55</sup> *R(MC) v Liverpool CC* [2010] EWHC 211 (Admin), *R(MWA) v Secretary of State for the Home Department & Birmingham City Council* [2011] 3488 (Admin)

<sup>56</sup> *R(A) v LB Camden* [2011] EWHC 2882 (Admin)

<sup>57</sup> *R(AE) v LB Croydon* [2012] EWCA Civ 547, Aikens LJ at paragraph 66

allow for any account to be taken of memory fading over time or the quality/type of memory an adolescent would have about his life as opposed to an adult.

In the few cases that have gone to trial before the Upper Tribunal the Court has been even more critical of the Claimant's evidence. There appears to be a different manner in which the Claimant's evidence is treated; more akin to that of an Immigration Tribunal considering an asylum appeal. In *ES v Hounslow*, the Upper Tribunal found that,

*'..although the discrepancies in the Claimant's evidence relate to minor matters but in our judgment they illustrate that when the Claimant is pressed on an answer he will say what he feels best serves his case rather than give a truthful answer.'*<sup>58</sup>

In another Upper Tribunal decision the Court found that the Claimant was not 'truthful or credible'.

### **3.16 - Other evidence in support of claimant**

Professionals and lay people who have had contact with the young person have also been called upon by both the representatives for the young person and the Local Authority to provide evidence for the Court.

In *Y v Hillingdon* the Court considered evidence from the Claimant's teachers but found that it did not assist. In *ES v Hounslow* the Court considered evidence from a tutor and a teaching assistant and found that it went against the Claimant. In *AM v Solihull* the Court was unimpressed at the paucity of information that the Claimant's foster carers could offer.

Often age disputed young people have had advocacy support from the Refugee Council and their Refugee Council caseworkers have often been called to give evidence in support. In *ES v Hounslow* the Court found that whilst the particular caseworker held a genuine view as to the Claimant's age, this view was based on her subjective assessment and belief in the context of her assisting him in preparing for legal proceedings. Little weight was attached to her opinions. In *CJ v Cardiff* the Claimant's Welsh Refugee Council worker was found not to be objective. Indeed, in the main the flavour of the judicial assessment of evidence from organisations that assist or advocate for young refugees is that they lack impartiality. An exception was the case of *AE v Croydon* where evidence from the Refugee Council was held to be credible by the Administrative Court.

### **3.17 - Defendant's evidence**

The Court's view of the importance of the Defendant's evidence varies. Although the claim is still brought against a Local Authority to challenge the assessment as a means to get a substantive trial, the focus at trial is less upon the Local Authority assessment and more about what can assist the Court in its fact-finding exercise.

The main witnesses that a Defendant Local Authority will call will be the assessing social workers. Some of them will have worked with the young person over a period of time and others may have only assessed the young person on a one off basis.

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<sup>58</sup> Paragraph 55



The weight that the Court has attached to social workers' evidence has varied from case to case. There have been a few cases where the Court has held that the social workers have been credible witnesses. In *A v Camden* the Court found that the social workers' report was balanced and thorough. In *AM v Solihull*, which was heard in the Upper Tribunal, the Court found that a one off assessment by the independent social workers for the Claimant did not assist as much as the assessment by the Local Authority which, by the second age assessment, was described as taking all relevant materials into account in a balanced way. In *ES v Hounslow* which was also heard in the Upper Tribunal the Court found the Local Authority social workers to be measured and balanced in their role as assessors and gave credit to their professional expertise. This was also the case in *MC v Liverpool* where the judge described the assessing social workers as 'experts.'

However, in *AS v LB Croydon* the judge criticised a number of procedural lapses in the age assessment and was unimpressed with the social workers' evidence. In *Y v Hillingdon*, the judge disagreed with the key adverse credibility findings made by the social workers against the Claimant to dispute her age, finding that they were unfounded. In *W v Croydon*, although the judge found the social worker to be honest, he was critical of the focus on physical appearance and demeanour and the social worker's lack of understanding of the *Merton* guidelines and what was expected of him in an age assessment.

Greater weight has tended to be placed by the Court on evidence from social workers who have had the chance to observe young people over time. In *R (Hosseini) v SSHD* [[2011] EWHC 1924 (Admin) even where the UKBA had not seen the full age assessment the Court was willing to assume that social workers from Kent County Council who had conducted the age assessment were experts and their judgement should be relied upon.

Although there are a few decisions where the Court has been unimpressed with the Local Authority's evidence from the assessing social workers there are more decisions where the assessing social workers have been described as experts who are balanced and measured. The judges recognise the great difficulties faced by assessing social workers, which they themselves face when having to conduct an age assessment of a young person at trial. Even in *AS* and *W*, although the Court disagreed with the social workers' views and were critical of their approach, it nevertheless found against the young person on the fact of age.

The way the Court has approached Local Authority evidence illustrates starkly how the Supreme Court's judgment in *A v Croydon* has shifted its approach. It is no longer sufficient to attack the quality of the Local Authority's assessment. Although there is in principle no burden on the young person to prove his age, in reality the focus has shifted entirely on what the young person can say about his age and whether that evidence can be believed.

### **3.18 - Experts' evidence**

With unaccompanied asylum-seeking young people arriving in the United Kingdom without documents and often without knowledge of their precise age, legal representatives have turned to experts in various disciplines for opinions on age and child development to counter the Local Authority's assessment of age. The Court's view on such expert evidence has been mixed. It is however important to note that where criticisms have been made, they have not been directed toward the *category* of expertise, but to the way specific experts have come to their conclusions. Whether

evidence in the disciplines discussed below could provide a more accurate assessment of age than the approach set out in *Merton* remains unanswered.

### 3.19 - Paediatric expert evidence

Paediatric evidence of age has sometimes been presented as a 'scientific' way of providing an answer to the question: 'how old is this young person?' Paediatric evidence looks at the features that mark a young person's physical development and provides some insight into how a child might have developed which, within a margin of error, can correlate to chronological age.

In 1999, the Royal College of Paediatrics and Child Health (RCPCH) issued guidance for paediatricians who deal with the health of refugee children. The guidance included a section on age assessment. Under the heading 'Puberty and the assessment of age', the RCPCH stated that an age assessment should only be conducted in the context of a holistic examination of the child. It acknowledged that,

*"in practice, age assessment is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15-18, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side. Assessments of age measure maturity not chronological age."*

The guidance went on to set out issues to be taken into account in making an assessment of age in the context of paediatrics, stating that: (i) anthropometric measures cannot be used to predict the age of an individual; at most they may play a part in conjunction with relevant facts from the individual's medical, family and social history; (ii) the situation is complicated because nutritional problems and illness can delay puberty so that an individual may be older than his physical developments appear to suggest; (iii) ethnic differences also play their part. The RCPCH guidance further stated that as there can be a wide margin of error in assessing age, it may be best to word a clinical judgment in terms of whether a child is probably, likely, possibly or unlikely to be under the age of 18.

To date, most paediatricians in the UK have not become involved in age assessments. The few who have, have become the focus of criticism by the Court (and others) on the reliability of their assessments.

Prior to *A v Croydon* in the Supreme Court, paediatric evidence was often produced as fresh evidence supporting a young person's claim to be a child of a specific age. A request would be made to the Local Authority to review and / or re-assess the young person's age in the light of the fresh evidence. Legal practitioners began to assert that such evidence carried more weight than the Local Authority's age assessment. Although paediatric evidence had an acknowledged margin of error, it would sometimes persuade a Local Authority to reconsider its decision or accept the claimed age.

In the legal process, paediatric reports were considered by the Court both in the context of conventional judicial review challenges to the Local Authority's age assessment and in asylum appeals before the Immigration Tribunal. The Court would take the paediatric evidence into account but seldom with the scrutiny that it has received since *A v Croydon*. Historically, the Immigration Tribunal often accepted

paediatric evidence as more accurate than a social work assessment by virtue of it being 'scientific'.

The methodology by which paediatric assessments of age were arrived at was scrutinised with a more forensic eye in 2009 in one aspect of the *A v Croydon* case which was hived off and dealt with on conventional judicial review principles in the Administrative Court<sup>59</sup> but not touched upon by the Supreme Court. The Administrative Court was not asked to determine the age of the young person; instead the Court was asked to consider whether a paediatric age assessment ought to carry more weight than a Local Authority assessment of age and thus override the conclusion reached by Local Authority social workers.

The Court had to consider whether the methodology of one paediatrician, Dr. Birch, could be relied upon to make paediatric age assessments more reliable than Local Authority social workers' assessments. According to Dr Birch the methodology she used was said to be a scientifically accurate estimate of age, based on a combination of medical observations and the demeanour and history of the individual.<sup>60</sup> However, Dr. Stern, an expert for the Local Authority, stated that without blind testing of those from a similar ethnic background, it is impossible to devise any exact conclusions on age. Variations between populations, the effects of poor nutrition and environmental stress increase the probability of variations from any norm, even assuming it is possible to identify a norm.<sup>61</sup> On considering the competing views of the two paediatricians, the Court accepted the criticisms of Dr Birch's age assessments and found that it is unlikely that the existence of a paediatric age assessment would attract any greater weight than the observations of an experienced social worker. The Court concluded that the social workers' assessment is likely to be a more reliable assessment because it: (i) had to be made by two specially trained social workers working together; (ii) is based on interviews and observations over a far greater time period than that available to a paediatrician;<sup>62</sup> and (iii) can receive input from those who are able to observe how the young person behaves when not being interviewed and when it can be assumed he is demonstrating normal behaviour. That said the Court found that paediatric evidence can be of assistance but is not determinative. It is important to note that in *A v Croydon* in the High Court, the Court did not hear oral evidence from either expert. The view arrived at was decided on the papers based on what appeared to have been extensive reports on methodology provided by both paediatric experts.

The question of the value of paediatric age assessments was again considered by the Court in cases post-*A v Croydon*, this time on hearing oral evidence from the experts who appeared in *A v Croydon* in the Administrative Court.<sup>63</sup> Dr. Birch's methodology was again scrutinised. The critique centred on the proposition that assessment of maturity and age was not interchangeable. There was no existing data set or reliable statistical method for assessing age accurately. Individuals mature at different rates and each characteristic assessed varies in its rates of maturation. With adolescents, in particular, growth may develop in spurts rather than observe a smooth continuum typical of statistical models.<sup>64</sup> There were no existing blinded peer reviewed studies that had been carried out and published that established a measure of statistical reliability in using various physical characteristics to estimate age. Such studies would have to be performed upon large populations of

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<sup>59</sup> [2009] EWHC 939 (Admin) with Collins J presiding.

<sup>60</sup> At paragraphs 26-30 and 32 of the judgment.

<sup>61</sup> At paragraph 31 of the judgment.

<sup>62</sup> At paragraph 32 of the judgment.

<sup>63</sup> *R (R) v LB of Croydon* [2011] EWHC 1473 (Admin), with Kenneth Parker J presiding.

<sup>64</sup> At paragraph 39 of the judgment.

different ethnicities and from a variety of environmental backgrounds, including physical, psychological and nutritional stresses, before the data collected from the studies could be used with any confidence to estimate the age of an individual young person reliably. Even then, in the absence of accurate measurements of the individual's parents some of the estimates would be difficult to place into an appropriate context. The data relied upon using the methodology put forward on behalf of the young person was in reality a measurement of maturity within an unknown and (in the cases of many unaccompanied young people), unknowable timeframe of individual development.

The specific statistical model relied upon in *R v Croydon* was also subject to individual criticism, which was accepted by the Court.<sup>65</sup> Although the Court had no doubt that Dr. Birch had very great experience in working with children and in particular with adolescents and had accumulated over the years considerable experience and expertise, the methodology relied upon to arrive at her assessments of age was not reliable.<sup>66</sup> The Court went on to find that given the unreliability of the methodology, it is unlikely that such assessments would be any more reliable than that of a social worker. Indeed the Court found that they are likely to be less reliable because of the misplaced confidence placed on the methodology which would inevitably colour the outcome of the assessment.<sup>67</sup> A similar view of Dr. Birch's assessments was adopted by subsequent courts and in one case, the Court cautioned against the use of paediatric age assessments until the statistical methods could be scientifically established.<sup>68</sup> In that case, the Court did not find it necessary to rely on Dr. Birch's report to find in favour of the Claimant child that she was the age she claimed to be.<sup>69</sup> This case demonstrated that the flaws in expert evidence should not themselves result in an adverse inference against the young person.

In subsequent case management hearings in advance of substantive trials, it is understood that the Court has made specific directions to deal with cases where reliance was placed on paediatric age assessments. The Court required that evidence be filed by the expert relied upon to explain how maturity and age could correlate with accuracy, and how in the absence of data sets and research which has been peer reviewed, it could be said that a paediatric age assessment could determine age with precision and accuracy to override any holistic assessment of age arrived at in accordance with the *Merton* guidelines.

In the light of the Court's approach to paediatric evidence as it stands and in the absence of alternative methods of assessing age in the paediatric field to that which has been criticised by the Court, it is unlikely that paediatric evidence will find any material place in a fact-finding hearing on age unless further work is able to address the concerns raised in the judgments.

### **3.20 - Psychological / psychiatric expert evidence**

Although neither the field of psychology nor psychiatry holds expertise on assessing the age of a young person, the Court has had occasion to consider the relevance of such experts' reports in the context of fact-finding hearings. The Court's consideration has related to two aspects of fact-finding hearings. The first relates to

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<sup>65</sup> At paragraphs 44-51 of the judgment.

<sup>66</sup> At paragraph 52 of the judgment.

<sup>67</sup> At paragraph 52 of the judgment.

<sup>68</sup> *R (KN) v LB of Barnet* [2011] EWHC 2019 (Admin) at paragraphs 70-76 per HHJ David Pearl sitting as a Deputy High Court Judge. See also *R (MWA) v Secretary of State for the Home Department and Birmingham City Council* [2011] EWHC 3488 (Admin) per Beatson J at paragraphs 65-72.

<sup>69</sup> At paragraph 76 of the judgment.

the question of whether a young person ought to give oral evidence in view of the psychiatric or psychological difficulties s/he is suffering. This is dealt with above in the context of special measures put in place for young people giving evidence. The second relates to directly to the question of age.

There has only been one case where psychiatric evidence has been put forward specifically to support the evidence of the young person that she is the age claimed. It must be noted that the way it was considered was factually specific to that case. In *R (KN) v LB of Barnet* [2011] EWHC 2019 (Admin) the Court heard evidence from Dr. Helen Bamber, the founder of the Medical Foundation for Victims of Torture and Co-Director of the Helen Bamber Foundation. She is an experienced psychotherapist who treated the young person for over more than 30 sessions, amounting to more than 60 hours of intensive time spent with the young person. In the context of that trial, she knew the young person better than anyone else who gave evidence before the Court. Dr. Bamber accepted that she was not tasked to assess the young person's age but rather to provide therapeutic support to the young person in respect of her mental health needs. However over the course of the time she had spent with the young person, Dr. Bamber was able to state clearly that she felt that she was a child and was, by the time of trial, about 17 years (consistent with the young person's claimed age). The Court accepted the evidence of Dr. Bamber. *KN v Barnet* is unique in that the claimant had involvement from an independent psychotherapist over a long period of time. Although many of the unaccompanied young people who have their age disputed suffer varying degrees of trauma, the dispute over their age has often been a bar to their accessing mental health services.

### **3.21 - Dental expert evidence**

Similar to paediatric expert evidence, dental expert evidence has been relied on long before the judgment of *A v Croydon* to assert a forensic method of accurately determining age. Unlike paediatric expert evidence, the methodology by which dental age assessments are carried out has never been subject to forensic scrutiny by the Court.

The Royal College of Paediatrics and Child Health (RCPCH), in issuing guidance on paediatric age assessments, said this about dental assessments:<sup>70</sup>

*"There is not an absolute correlation between dental and physical age of children but estimates of a child's physical age from his or her dental development are accurate to within two years for 95% of the population and form the basis of most forensic estimates of age. For older children, this margin of uncertainty makes it unwise to rely wholly on dental age."*

The British Dental Association (BDA) has also expressed a clear view that x-rays of dental development were an inaccurate method of assessing whether individuals have attained the age of 18 years. More importantly, the BDA, the RCPCH and the Royal College of Radiologists have questioned the ethics of taking x-rays of an individual for no therapeutic purpose.

Dental age assessment was summarised in research by Dr Heaven Crawley in 2007 in *'When is a Child not a Child, Asylum, Age Disputes and the Process of Age Assessment.'* The research observed that there was a wide margin of error in dental ageing. Dental ageing, like bone ageing measured by paediatricians, depends on the

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<sup>70</sup> At paragraph 5.6.3 of the RCPCH guidance.

environment, nutrition as well as ethnicity and race.<sup>71</sup> The problems with sample size, and the lack of ethnically appropriate data sets as comparators, have meant that dental age assessments have been widely regarded as being unreliable for assessing age.

This was noted by the Court in *R (A) v Liverpool City Council* [2007] EWHC 1477 (Admin). The statistical model used for dental aging claims to predict dental age to a precision of 90% or even 95% but does not account for any particular individual's normal variation from the 'mean' dental age or account for ethnic, race, nutrition or environmental factors which could lead to an individual varying substantially from the statistical mean dental age. The inaccuracy of dental ageing and the acceptance, even amongst odontologists, of dental ageing not capturing exceptions from the norm, was again noted by Keith J in *Y v Hillingdon*, thus affecting the weight which could be placed on dental ageing reports.<sup>72</sup>

The cases which have had occasion to consider dental ageing have yet to test in any depth the methodology used by forensic odontologists in the way that paediatric assessments have been scrutinised. It is likely that in circumstances where paediatric assessments have been found to be unreliable, dental ageing will feature as another battle ground between the parties in resolving age disputes.

This is evident from the announcement by the UK Border Agency this year that it intended to pilot a trial with the London Borough of Croydon to offer the opportunity to young people who claimed to be children but who had been assessed by Croydon Social Services as over 18 to undergo a dental age assessment conducted by Professor Graham Roberts at King's College London.<sup>73</sup> The announcement by the UKBA and Croydon provided very little detail as to how the findings of the intended research might be used, nor did it address the existing criticisms of using ionising radiation from either an accuracy or ethical standpoint. At the time of writing this report, the pilot has been suspended whilst the research is put before the National Research Ethics Service for ethical approval.<sup>74</sup>

### **3.22 - Independent social work experts**

As a response to the Court's views on paediatric evidence since *A v Croydon*, age dispute cases have seen independent social workers' reports being produced for the Court, usually to support the young person's case but on a couple of occasions for the Local Authority who has subcontracted their assessment to an independent social worker.

A review of those cases where such reports have been used reveals that the Court has taken a mixed and generally unfavourable view of independent social work reports.<sup>75</sup> In judgments where independent social workers' reports have been favourably considered and have contributed to the Court finding in favour of the

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<sup>71</sup> *Crawley, Heaven. When is a child not a child? Asylum, age disputes and the process of age assessment.* ILPA (May 2007).

<sup>72</sup> At paragraphs 28-32 of *Y v Hillingdon*.

<sup>73</sup> Letter dated 28 March 2012 from Zila Bowell, UKBA to stakeholders

<sup>74</sup> Lynne Featherstone MP to Lisa Nandy MP, 22 May 2012

<sup>75</sup> The only judgment where the report of an independent social worker was referred to with high regard was the case of *R (N) v LB of Croydon* [2011] EWHC 862 (Admin) per Neil Garnham Q.C. No oral evidence was heard from the independent social worker or anyone else in that case as the case was settled before it went to trial, with the Court only needing to consider whether a declaration on the child's age was necessary. However see the critique of the same independent social worker in the Upper Tribunal in *R (AM) v Solihull BC* [2012] UKUT 00118.

young person, they were considered on the papers without hearing oral evidence from the experts themselves.<sup>76</sup> The critique of independent social worker reports by the Courts can be summarised as follows:

- Independent social work reports have on many occasions been conducted by only one social worker;<sup>77</sup>
- Even in the cases where they have been carried out by two social workers, all the report could offer is an opinion about a young person's age based on a single meeting.<sup>78</sup> That is no different than that of Local Authority social workers where the same is the case and of less weight than assessments made by Local Authority social workers who have had the opportunity to form a view over time by observing the young person both in the context of an age assessment interview and in the more informal context of being in Local Authority care.
- The tone of the reports border on advocacy of one party's case and does not reflect a truly independent view on age.<sup>79</sup>
- Independent social workers do not have more expertise than Local Authority social workers to carry out an age assessment. The methodology that they have to adhere to should be the same. Any other methodology would have to be validated in a similar way to paediatric evidence, the absence of which calls into question the reliability of any such methodology.<sup>80</sup>

It is clear from the Court's judgments that a social worker's 'independence' has not itself swayed the Court to accept the view forwarded by one party rather than the other.

Whereas independent social work experts commissioned by claimants are expected to set out in the clearest terms the terms of their instructions<sup>81</sup>, legal practitioners report that Local Authority instructed independent social work experts have not had to do so. Further, it is understood that whereas Local Authority social workers are expected to retain their handwritten notes from the age assessment interviews there have been occasions where independent social work experts have either not kept their notes or have destroyed them, making it difficult for the young person and his/her legal representatives to challenge factual inaccuracies recorded in the typed age assessment.

### **3.23 - Summary of findings on the Court's view of experts' evidence**

In the high stakes litigation that is age disputes, it would appear to be difficult for either party, the Claimant or the Local Authority, to identify independent experts who

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<sup>76</sup> *N v Croydon; R (AS) v LB of Croydon* [2011] EWHC 2091 (Admin)

<sup>77</sup> *N v Croydon* at paragraph 23. *R (ES) v LB of Hounslow*, CO/1818/2011 (heard in the Upper Tribunal) at paragraphs 59-63.

<sup>78</sup> *R (Hosseini) v Secretary of State for the Home Department and Kent County Council* [2011] EWHC 1924 (Admin) per Collins J at paragraph 15. See also *R (AM) v Solihull BC* (CO/2467/2011) (heard in the Upper Tribunal).

<sup>79</sup> *R (YE) v Secretary of State for the Home Department and LB of Croydon* [2011] EWHC 496 (Admin) per Cranston J at paragraph 21. See also the concerns raised by Keith J in *R (Y) v LB of Hillingdon* [2011] EWHC 1477 (Admin) at paragraph 63 as to the independent social workers' understanding of their role as an expert.

<sup>80</sup> *AM v Solihull* at paragraphs 70-72.

<sup>81</sup> As per Part 35 of the Civil Procedure Rules on expert evidence

could assist the court in a manner independent of the interests of either party. Until a way is found for such expertise to contribute to the Court's assessment process independent of the parties' interests, it is likely that age dispute fact-findings will be reduced to a clash between the Claimant's account and the Local Authority social workers' opinion, with the court left to figure out for itself whether either account should be accepted and if not at what the view the Court could sensibly arrive.

### 3.24 Documentary evidence

In 11 of 38 publicly available judgments at both the permission and substantive stages, documentary evidence was forwarded on behalf of the claimant young person to support the claimed age. Given that the practice of assessing age developed out of the need to determine the age of young people from abroad who arrive *without* proof of age, this appears to be a high proportion. Evidence from practitioners indicates that the publicised judgments do not present a full picture of the availability of documentary evidence and the difficulties that some categories of documents present in being authenticated.

Although there have been cases which have not proceeded to fact finding hearings on the basis of documentary evidence having been accepted by the Local Authority, these are few and far between. There are several difficulties presented by documentary evidence which the judgments, local authorities and practitioners have identified.

A common document that has surfaced in the context of age disputes has been the *Taskera*, an identity document issued for nationals from Afghanistan. Their frequency is due to the high proportion of separated young people who arrive in the UK seeking asylum from Afghanistan. *Taskeras* are a typical form of identity document in Afghanistan. Birth certificates are rare and virtually unheard of outside Kabul according to objective evidence.<sup>82</sup> *Taskeras* are not issued at birth and do not normally contain a date of birth. Objective evidence available indicates that *Taskeras* are normally issued for purposes of enrolling an Afghan child in school or some other vocational training course. They provide a 'guesstimate' of age largely on the basis of a young person's physical appearance alongside consideration of the child's father's *Taskera* and information. The 'guesstimate' is usually just of the child's age in a certain year in the Afghan calendar. It does not provide precision as to the date and month that the young person might have been born in. Ironically, reliance on physical appearance and demeanour is precisely what *Merton* guidelines caution against. The lack of 'Merton compliance' has been a criticism asserted by the Local Authority when presented with a *Taskera*. It is unfortunate that the way in which identity documents such as the *Taskera* are issued in Afghanistan does not fit with the way the UK has prescribed as the correct way of determining of age.

There have been other concerns about reliance on *Taskeras* in addition to their production being based on physical appearance. There have been reports of a prevalence of forgeries because of the poor security protection on *Taskera* documents.<sup>83</sup> Because of variable standards of record-keeping in Afghanistan, *Taskeras* have been difficult to authenticate. There are few experts available who are able to provide reliable authentication of *Taskeras*, particularly in light of the variance in the care taken by the issuing local office in filling out all the necessary information on the document. Moreover, young people are quite understandably reluctant to seek

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<sup>82</sup> UK FCO COIR on Afghanistan

<sup>83</sup> The Guardian, 18 January 2012, John Boone & Nooruddin Bakshi 'Boom time for Afghanistan's people smugglers.'



verification of their *Taskera* from the Afghan Embassy in the UK in circumstances where they are claiming fear of persecution under the Geneva Convention from the state as this may fatally undermine an asylum claim.

It is the inability to verify the authenticity of the *Taskera* that has led the Court as well as the Local Authority to place little weight on *Taskeras* when they are produced as a way to determine a young person's age. However, this does not mean that the Local Authority (or the Court) is able to ignore *Taskeras* entirely. In *NA v Croydon* [ref – citation is at footnote 88 below], a case that pre-dated the Supreme Court ruling in *A v Croydon*, the presumption on the part of the Local Authority that the *Taskera* could be ignored formed part of the reasoning for quashing its decision.<sup>84</sup>

Even in cases of non-Afghan children, where documents are produced which are not rife with the problems which plague *Taskeras*, verification of the document has proven to be a difficult stumbling block for the child, the Local Authority and the Court. Legal representatives have been hesitant to seek verification of the documents from the embassies of the young person's country of origin as this might fatally undermine the asylum claim and has the potential to put the child at risk.

Other categories of document filed as evidence that do not themselves prove age include school certificates, school identity cards, vaccination records and census records of the claimant and his family, which refer to the claimant and his family members' dates of birth. The purpose of most of these documents is not, unlike a *Taskera* or a birth certificate, issued for the purpose of proving a person's birth date or age. They do not provide free-standing proof of age. However the Court has acknowledged in some cases that they form a part of the young person's account of his age and his life.<sup>85</sup>

Documentary evidence has more often than not formed part of the general material relevant to the consideration of age by the Court, rather than featured as a piece of conclusive evidence on age. At the permission stage, the Court has taken a more broad-brush approach to documentary evidence where it is not obviously a forgery. The weight placed on the document is considered in the context of the material before the Court as a whole, and where it supports the claimed age of the young person, weight has been placed on it to that extent. See for example *FZ*, where the Claimant young person presented the Local Authority with his vaccination record. It recorded his claimed date of birth. The vaccinations for BCG (tuberculosis) and other early childhood immunisations were broadly consistent with objective evidence of when these immunisations are normally given. The Court of Appeal found that on the face of it, the vaccination record was not obviously a forgery; the dates recorded were broadly consistent with the Claimant's own consistent account of his life. Together the material raised a factual case which could succeed at trial.<sup>86</sup> Permission was therefore granted on that basis.

Contrast this, however, with the case of *R (G) v LB of Newham*<sup>87</sup> where the Court focused not on the information contained on the vaccination record but on the provenance of the vaccination record and how it was obtained. Contact was made

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<sup>84</sup> *R (on the application of NA) v London Borough of Croydon*, [2009] EWHC 2357 (Admin) at paragraph 63: "... in my judgment this is not a case where the Social Services were entitled to ignore the document altogether on the basis that it is known that fraudulent documents have been obtained in the past to promote asylum applications, or indeed applications for age assessment."

<sup>85</sup> *R (AM) v LB of Croydon* [2011] EWHC 3313 (Admin), per HHJ McKenna sitting as a Deputy High Court Judge at paragraphs 36-44

<sup>86</sup> At paragraph 29 of the judgment.

<sup>87</sup> *R(G) v LB Newham* [2010] EWHC 3515 (Admin)

with the Claimant's uncle to obtain an explanation of how the vaccination record was obtained. However, the Court held that in the absence of the ability of the uncle to be called to give evidence, no weight could be placed on that evidence. In that case, in the absence of documentary evidence, the Court took a view that the social workers' experience should be preferred. This Administrative Court decision pre-dated the Court of Appeal's judgment in *FZ* where the appellate court commented that the Administrative Court should be careful not to feel bound by social workers' views at the permission stage as it may take a different view on hearing oral evidence in full. In any event, general credibility findings by social workers should not alone determine whether a factual case on age has been raised.<sup>88</sup> It is possible that *G v Newham* might be decided differently in the light of the Court of Appeal's decision in *FZ*.<sup>89</sup>

There have been some anecdotal accounts of documents being authenticated by the UK embassy of a young person's country of origin leading to the Local Authority conceding the dispute and accepting the young person's age. Such an approach where possible would be consistent with the judgment of *A v Croydon* which, although stating that the fact of age admits only one right answer, did not prescribe how that answer should be arrived at. In most cases it will start with an age assessment and, where a dispute remains and there is merit in a substantive fact-finding, it would be resolved by a full fact-finding trial. However, in circumstances where documents can provide a conclusive right answer, it ought to, in principle, be open to the Court, and indeed the Local Authority in the first instance, to resolve the dispute of age by accepting what is said on an authenticated document proving age.<sup>90</sup> To date, however, the Court has not taken this approach to age dispute claims. The Court has adhered faithfully and probably too strictly to the formula for holding fact-finding hearings in the UK.

### 3.25 - Immigration judges' determination on age

Prior to the Supreme Court's judgment in *A v Croydon*, the Administrative Court did not interfere with the judgment call of the Local Authority social workers on age save where there were procedural lapses and failure to consider evidence in a manner which made the decision perverse.

The Immigration Tribunal, however, routinely made findings in respect of an age-disputed asylum seeker's age for the purposes of assessing the claim for protection under the Refugee Convention or subsidiary protection under human rights instruments. Research carried out in 2006 looking at asylum determinations in 2003-2004 revealed inconsistent practice across the tribunal as to how findings of fact on a young person's age were made in the course of the asylum process.<sup>91</sup>

The remit of the Immigration Tribunal is not to determine the fact of age in the manner and with the rigour required following the Supreme Court's judgment in *A v Croydon*. For the purposes of asylum, the question of age is relevant by and large

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<sup>88</sup> At paragraph 29 of *FZ*

<sup>89</sup> *G v Newham* went on appeal but permission to appeal was refused on the basis that the claimant did not seek to produce expert paediatric evidence to support his claimed age. See paragraph 14 of the Court of Appeal's judgment at [2011] EWCA Civ 503. The Court may take a different view now with the benefit of hindsight on consideration of the criticisms of paediatric evidence in subsequent Administrative Court trials and the general view trial judges have taken on expert evidence as discussed above.

<sup>90</sup> In a different context, the Court of Appeal approved this approach in *SA (Kuwait) v Secretary of State for the Home Department* [2009] EWCA Civ 1157 –

<sup>91</sup> *Seeking Asylum Alone* report – Chapter 12

only to the extent of whether a young person is under or over 18 years old. The young person's precise age is not something that often troubled the Immigration Tribunal, although there may be occasion where the young age of a child appellant would be relevant to how the Immigration Tribunal would assess the young person's credibility. It is even rarer for the Local Authority whose age assessment is challenged in the Immigration Tribunal to be provided with an opportunity to present its case on the age assessment. It was not the normal practice in the Immigration Tribunal for the Local Authority to be directed to appear to give evidence on age, although in principle the Immigration Tribunal always had the power to so direct if asked.

It is understood that Immigration Tribunal findings on age would nevertheless carry weight with the Local Authority, not least because if the finding was positive in favour of the child and the UK Border Agency did not appeal the decision, the young person would accordingly be issued status papers recording his claimed date of birth. This approach appears to have changed since the judgment in *A v Croydon*. In affording the Administrative Court the jurisdiction to determine the fact of age, it created a forum in which the Local Authority could put its factual case forward in a manner which it does not in the Immigration Tribunals.

In the early days following the *A v Croydon* judgment, the Administrative Court had occasion to consider the status of an immigration judge's determination on age. The Administrative Court stated clearly that given the Immigration Tribunal's remit was to determine questions of protection from persecution, not age, its findings on age, whilst relevant, could not be determinative of the objective fact any more than a Local Authority assessment of age.<sup>92</sup> That did not make immigration judges' determinations entirely irrelevant. If the Local Authority was presented with a request to review its dispute over a young person's age upon a positive finding of age by the Immigration Tribunal, the Local Authority must nevertheless engage with that evidence and consider the reasoning of the immigration judge and any evidence which may not have been available to the Local Authority at the time of its original assessment. The Local Authority may, on review, decide to accept the immigration judge's analysis and thus accept the young person's age. Or it may reject it outright. Or it may decide to carry out a fresh assessment of the young person's age.<sup>93</sup> In *R (AM) v LB of Croydon* [2011] EWHC 3313 (Admin), the failure of a Local Authority to consider the immigration judge's determination of age other than to state that it did not bind the Local Authority was held by the Court to be an erroneous approach and fed into the Court's decision to reject the Local Authority's opinion of the young person's age and make a declaration in the young person's favour.

The judgment in *AM v Croydon* stands alone in the judge's correct analysis of the effect of *PM v Hertfordshire*. In other substantive hearings, the Court has placed very little weight on the positive findings made by the immigration judge of the young person's age and, surprisingly, of the positive findings on credibility. Although the approach of the Court in respect of the immigration judge's finding on age might be understandable in the context of the judgments of *PM v Hertfordshire* and *AS v Croydon* which followed a year later, the rejection of positive credibility findings made by the immigration judge has been less understandable. Although it may be correctly said that age is not a fact within the primary jurisdiction of an Immigration Tribunal to determine, the same cannot be said about credibility findings. Credibility findings

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<sup>92</sup> *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) per Hickinbottom J at paragraphs 58-61. See also *R (AS) v LB of Croydon* [2011] EWHC 2091 (Admin) per HHJ Anthony Thornton Q.C. sitting as a deputy High Court Judge affirming the principle set out in *PM v Hertfordshire*.

<sup>93</sup> At paragraph 81 of *PM v Hertfordshire*.

have been and are at the heart of asylum appeal determinations and are necessary for determining whether a person has established a well-founded fear of persecution under the Refugee Convention or should be given humanitarian protection or protection in accordance with human rights law. Although the standard of proof the Immigration Tribunal is lower than the civil standard of 'balance of probability', it is not clear that that should necessarily make a difference given that the burden in the Immigration Tribunal is on the young person to prove the claim for asylum has been established. Contrast that with fact-finding hearings on age in the judicial review context where there is no burden of proof on the young person. Quite why a positive credibility finding in the Immigration Tribunal should not be persuasive or material to some crucial extent in the context of a judicial review fact-finding trial remains unclear from the Court's current analysis.

It is in the context of consideration of immigration judges' determination that the Court in substantive fact-findings appears to have taken its inquisitorial role as afforded by the Supreme Court in *A v Croydon* and the Court of Appeal in *CJ v Cardiff* to a level not envisaged by the appellate courts. For example, in *ES v Hounslow*, the claimant young person had a full appeal hearing before the Immigration Tribunal where his oral evidence was cross-examined and he was found by the tribunal to be an honest witness whose account of his life in Afghanistan was credible. This resulted not only in a positive finding on the claimant's age but also a finding that he was entitled to protection under the Geneva Convention and he was accordingly granted refugee status. As the Local Authority persisted in disputing the claimant's age following a review of the Immigration Tribunal's decision, the Upper Tribunal (acting in the guise of a judicial review court) conducted a fact-finding hearing and concluded that the claimant was not credible and that he was not in fact born on the date he claimed he was born, but rather born 1 ½ years earlier. A declaration was made to that effect. The reasoning of the Upper Tribunal was that the Local Authority was entitled to disagree with the Immigration Tribunal and in any event the Immigration Tribunal did not have the benefit of dental evidence (credence of which was doubted as discussed above), the Local Authority's reassessment and oral evidence from the social workers. Although in this case, the outcome of the fact-finding before the Upper Tribunal had no bearing on the claimant young person's grant of refugee status,<sup>94</sup> it does have the potential of so doing.<sup>95</sup>

The tension arising from this situation was noted by the Court in *R (JS) v Birmingham City Council*; *R (YK) v Birmingham City Council* [2011] UKUT 00505 (IAC) and was described as an 'unsatisfactory and unjust' position.<sup>96</sup> As the Court notes, this leaves the young person in a position where:<sup>97</sup>

*He now has two officially ascertained ages. If he is asked how old he is, he must respond "it depends who is asking". And because of the difference in responsibility for the housing of asylum-seekers over and under eighteen years old, he may find that neither the Secretary of state (who operates the*

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<sup>94</sup> The Upper Tribunal stated explicitly (at paragraph 71) that the findings against the claimant on age did not and should not affect the finding of the immigration judge on the claimant's risk from the Taliban.

<sup>95</sup> See *R (AM) v Solihull BC* [2012] UKUT 00118, heard in the Upper Tribunal. The ongoing age dispute led the UK Border Agency to withdraw the claimant's refugee status such that at trial the claimant's immigration status was unclear. The researchers do not know what subsequently happened to the claimant's immigration status. *AM v Solihull* has not been appealed. See also *R (W) v LB of Croydon* where the Court made no reference to the immigration judge's decision and gave no weight to the positive credibility findings of the immigration judge and gave no reasons for doing so. The declaration of the Court that the young person was an adult at the time he entered the UK means that his extant leave will be curtailed.

<sup>96</sup> At paragraph 9 of *JS and Anr v Birmingham City Council*.

<sup>97</sup> At paragraph 8 of the judgment.

*NASS system for those over eighteen) nor the Local Authority for the area in which he is (which has duties to those under eighteen) is prepared to house him. The Secretary of State refuses, because she accepts that he is under eighteen; and the Local Authority refuses because it considers that he is not.”*

This puts the young person in the position where “*they challenge the one [assessed age] they do not like, but they run the risk of losing an advantage that they already have from the Secretary of State. Even if that does not happen, they can have no assurance that all the governmental and quasi-governmental authorities that they deal with will, as a result of these proceedings, or at all, agree on their age.*”<sup>98</sup> In *JS v Birmingham CC*; *YK v Birmingham CC* the Court considered the Joint Working Protocol between the IND and ADSS requiring that a dispute over age between the UKBA and the Local Authority to go to formal arbitration to resolve their differences and found that the failure of Birmingham City Council to pursue this avenue to be unlawful and wrong in conventional judicial review terms. Whether the position as set out in *JS and Anr v Birmingham* is the correct legal position remains to be seen.<sup>99</sup> There has not been a subsequent case where this issue has arisen, probably because the scenario in *JS and Anr v Birmingham* arose in the context of an interlocutory case management hearing where there was still an opportunity to dispose of the age dispute without recourse to expensive litigation at trial.<sup>100</sup>

Another important aspect of the unsatisfactory limbo that a young person finds himself in where the UKBA has accepted his age following an immigration judge’s determination but the Local Authority continues to dispute his age is the need for the young person to give repeat oral evidence and be subjected to cross-examination about his age by different courts.

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<sup>98</sup> At paragraph 35 of the judgment.

<sup>99</sup> Birmingham City Council has applied for permission to appeal the judgment of *JS and Anr v Birmingham City Council*. Permission was refused by Mr. CMG Ockelton in the first instance and he has refused to review the decision in accordance with the Tribunal Rules.. The matter is being considered by the Court of Appeal, and a decision is pending. (Case tracker for the Court of Appeal accessed on 15<sup>th</sup> April 2012.)

<sup>100</sup> This was noted as a reason for dealing with the matter in this way in *JS and Anr v Birmingham*. See paragraph 14 of the judgment.

## **CHAPTER 4 - SOCIAL WORK AGE ASSESSMENT PRACTICE**

### **4.1 – Introduction**

The second part of the report reviews Local Authority age assessment practice, with a particular focus on cases that have reached court following the Supreme Court ruling. It aims to explore the following themes in relation to age assessment policy and practice;

- Awareness of the Supreme Court Ruling and developing case law, and understanding of its implications;
- Practice response to the Ruling and experiences of age assessments and litigation;
- Impact of the Ruling on Local Authority practice both during assessments and after litigation decisions;
- Support available in the form of training and guidance for practitioners;
- Children's experiences of the age assessment process and its outcomes.

### **4.2 – Methodology**

The research was carried out in six local authorities. Three authorities who are frequently litigated against were selected on the basis of a review of reported decisions from the Court. Three further authorities were selected to provide a contrast, on the basis that they also look after high numbers of unaccompanied children and young people seeking asylum, but have a lower incidence of being litigated against on the basis of age assessment decisions.

Interviews were carried out with a range of asylum or looked after team managers, and social workers. In most cases this meant interviews were carried out with social workers who had historically more experience in the practice of age assessment. In some cases, members of the Local Authority legal team were also interviewed. A total of 19 face to face interviews were carried out, in addition to information gathered through email exchanges.

Five young men were also interviewed in order to explore their experiences of the age assessment and litigation process. The aim of these interviews was to get a snapshot of the views of a few young people, and the findings are not intended to provide a representative picture of the age assessment process and young people's experiences of this.

The Refugee Council was approached to see whether they would provide support in facilitating access to young people. The Refugee Council runs a weekly social evening for unaccompanied/separated asylum seeking children and has provided support and advice to many of those who have had their age disputed. The Refugee Council's panel of advisers also often provides the role of the appropriate adult during age assessment procedures. Cases were selected from the Refugee Council's caseload of young people who had been supported by the Refugee Council to challenge Local Authority Age Assessments.

Participants were initially selected in order to get a cross section of experiences of young people who;

1. Have successfully litigated against LA age disputes
2. Have unsuccessfully litigated against LA age dispute
3. Have challenged an age assessment at LA level since the new ruling came into being which has not gone to court

The young people were contacted and offered the opportunity to take part in a short, semi-structured interview with the researcher at the Refugee Council Offices. The young people who participated in this research did so entirely voluntarily. In addition to the interviews, the researcher was able to review information about participant's cases in their Refugee Council case file. These files included final age assessment reports from Local Authority social workers, notes from Refugee Council staff working as appropriate adults during the age assessment process, and in some instances notes from the young person's solicitors. The five research participants were all young men aged between 16 and 20<sup>101</sup>. Two of the participants were from Iran, whilst three were from Afghanistan. Whilst the researcher attempted to recruit young women to this research it was impossible to do so at short notice.<sup>102</sup>

## Research findings

### 4.3 - Initiating an age assessment

The need to carry out an age assessment is triggered by a number of scenarios. In most cases a young person's age will have been disputed by a UKBA immigration officer, who will send the young person to a Local Authority to be age assessed. Most often the young person will have presented at a port authority or at UKBA's screening unit in Croydon. Those cases that present in Croydon will form what is known as the 'Croydon rota' and will be allocated to different local authorities across London. In other cases the need to do an age assessment will be identified by the assessing social worker, when a young person first arrives at a Local Authority. Less frequently, the need to do an assessment might be triggered further down the line, when for example, a school, residential worker or foster carer might raise concerns about a young person's claimed age, or following new information that may have come to light from UKBA. These concerns can be due to suspicions that a young person is either older or younger than first perceived. Finally, assessments are also carried out at a later stage when a young person makes a much later claim that they are younger than first assessed.

In one authority it is standard practice to carry out an age assessment for every new case, regardless of whether the young person's age has been disputed by the Home Office or not. The reason given for this related to the grant that local authorities claim back from UKBA for supporting the young person. We were told that an age assessment pro forma is needed by UKA to enable the grant payment to be triggered. If this reasoning is correct, it is unclear why other local authorities do not

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<sup>101</sup> Given that age was the particular issue in question for this research the age of the young people has been taken according to the final decision in their case.

<sup>102</sup> This is partly as a result of fewer unaccompanied asylum seeking children being female, and partly because fewer young women challenge their age assessment. But it was also as a consequence of young women feeling less confident in engaging with the research, anecdotally because many of their cases are associated with trafficking. This may therefore be an area for future research].

conduct routine age assessments for the same reason. Another authority estimated that they carry out age assessments on approximately 20% of young people in their care.

Some social workers also described a trend whereby the age that young people are claiming to be is getting younger. This can cause problems in terms of care for the young person during the period of the assessment and dispute;

*“It is a problem if the dispute is around whether they are under 16 as we have to put them into foster care and school before we carry out the assessment. We had to put one young person into foster care even though he looked at least 17... we then found out he had already been refused (asylum) as an adult and had then come back claiming to be a child.”*

#### **4.4 - Age assessment process: how authorities carry out assessments**

All of the social workers interviewed understood that age assessments should be ‘Merton compliant’, and gave an overview of what this meant to them. The descriptions given did not always meet the full criteria of a ‘Merton compliant’ as outlined in Section 2.4 (page 14) and some of these discrepancies are addressed below.<sup>103</sup>

#### **4.5 - Procedure**

**Two qualified and properly trained social workers should conduct the age assessment:** All of the social workers interviewed knew of the requirement to have two social workers involved in the age assessment and only one social worker described having difficulties in meeting this requirement. This particular social worker explained that it is sometimes difficult to carry out a Merton compliant assessment when doing an ‘out of hours’ assessment due to staff shortages.<sup>104</sup>

One social worker explained that she found asking questions and making notes at the same time meant that she lost information. She also found that two social workers taking notes simultaneously have not always recorded the same information. Therefore she prefers to have one social worker taking notes, and one asking the questions.

**An appropriate adult should be present:** Social workers identified this role as being someone who provides support to young people during the interview and ensures that they are not becoming distressed by the situation. In four of the authorities it is standard practice to ensure that an appropriate adult is always present, and assessments won’t go ahead unless they are available. Most practitioners identified the role as being useful, because it helps ensure that the young person understands what is happening, and provides an assurance that assessors have carried out their role correctly. However, some practitioners did question the value of the role. Reasons given included the fact that the adult is rarely known to the young person, that the same adult might not be present throughout the

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<sup>103</sup> Some of the procedural issues ascribed to the ‘Merton Judgment’ by social workers are in fact case law established in subsequent judgements – for example both the requirement to have an appropriate adult present and to have two assessing social workers were not established by *Merton*. It appears that the phrase ‘Merton compliant’ is used interchangeably with or as a substitute for ‘lawful assessment’ in social work parlance.

<sup>104</sup> The courts have often found that an assessment carried out by an ‘out of hours’ service is not lawful as the practitioner is not only alone but may not be trained in conducting such assessments.



process so there isn't always consistency, and that it is sometimes difficult to secure an appropriate adult, thus causing delays to the assessment process.

In one authority the lack of an appropriate adult was due to difficulties sourcing them. In another they take a different approach and ask the young person if they want an appropriate adult present; in their experience the clients rarely want one and so interviews take place without them. Social workers from this authority did not think that the role always provided the support that is intended. They explained how the adult was always a stranger to the young person anyway, that young people rarely truly understood the role provided by the appropriate adult and that the presence of the appropriate adult brought the ratio of adult to children in the room to four to one which they described as being too many.

This lack of an appropriate adult was picked up on in a case that was taken to Court, and the impact it has had on practice is discussed below. In another authority they will try to have an appropriate adult present if they can, but will go ahead with the assessment if they have not been able to arrange for one to be there.

Local authorities in the London area generally use Refugee Council Children's Panel practitioners to fill the role of the appropriate adult. Others have used other practitioners from Children's Services, children's advocates, agency workers or Barnardo's, particularly if there are concerns that a young person may have been trafficked. One practitioner described the children's panel representatives as being particularly helpful, because they understand the issues and can often help when a young person doesn't understand the interpreter. She did not find agency workers so helpful because they don't understand this particular client group.

**The child should be informed of the purpose of the assessment:** while all social workers discussed the need to explain the age assessment process to young people, it is worth noting that there does not appear to be any consistency in how this is done. Most touched on the fact that the purpose of the assessment would be explained to the young person via an interpreter, and that it was therefore very important that the interpreter spoke the correct dialect and that the young person felt comfortable with the interpreter. Some emphasized that it was important to explain their role and that they were not the Home Office, a solicitor or the police, and that there were there to help the young person get the right service.

Two authorities were involved in developing new procedures that explained the process in writing, and required young people to sign that they have understood the process. In one authority these changes were being made in response to issues that were raised by a judge with regard to their assessment practice. The other has been working on developing a consent form which they are hoping to implement through the ADSS age assessment taskforce.

Finally, there was division of opinion over whether young people really do understand what is happened, even when they have the process explained to them. Some practitioners felt strongly that young people know exactly what an age assessment is, and that they have been told about it by other young people or by agents who facilitated their journey to the UK. Others felt that it is very hard to be sure that young people have understood what the process is about, and that for many young people who have just arrived, it is an alien concept.

**Child friendly approach:** all practitioners touched on the need to take a child friendly approach, and some described changes that had been made over recent years to try and improve the approach. Young people are allowed to take breaks

whenever they want and if they are tired the assessment will be stopped and re-scheduled for another time. Those practitioners who had been carried out assessments for a number of years said that the process was more relaxed and informal than it used to be. However, as described above, some practitioners had concerns that that ratio of adults to child was too high and could be intimidating for a young person.

**Procedural fairness:** All of the local authorities described how they let the young person know of any inconsistencies that have come up during the age assessment, and provide the young person with an opportunity to explain these. Following this, the assessing social workers will consult with each other about their final decision, which they will share with their manager before letting the young person know the final decision in writing. Young people are then given a chance to respond to this decision and are advised that they can challenge the decision.

**Benefit of doubt:** nearly all social workers touched upon the importance of applying the benefit of doubt. In practice this appears to mean that where there are uncertainties, social workers will apply leeway of one or two years, and if a young person is claiming to be under 18 and their story seems strong, the social worker will assess them as a child even if their physical appearance suggests otherwise;

*“If I’m not sure they’re over 18, I’ll give them 16 or 17 and they can live semi-independently.”*

#### **4.6 - Substance of assessment**

All of the social workers interviewed used the pro-forma developed by Croydon and Hillingdon as a guide during the age assessment process, and to help them reach a decision. As discussed in Section 2.4 above, the pro forma guides social workers through aspects of a young person’s life and development which should be explored in the assessment in order to build up a chronology of the young person’s life. This includes physical appearance, demeanour, facts of the case and medical or other expert evidence.

However, ultimately, evidence suggests that individual social workers have devised particular methods by which to make a final decision. These varied considerably. One described how she would try to picture the young person in a school uniform and whether they would fit in at school and in a classroom environment as a way of making a final decision in cases of uncertainty.

Another social worker spent a lot of time discussing whether the young person was telling the truth about various aspects of his or her story, and suggested that the final decision in an age assessment was significantly influenced by a child’s credibility overall. Such an approach may be inconsistent with the guidance given in *Merton* (see page 16 above).

The requirement to carry out an age assessment can emerge later on, after a young person has been in care for sometime already. In some cases the requirement to assess comes following concerns from a service provider that a young person is older than they claimed. In making decisions on these cases, one practitioner described how if it was felt that the age difference was less than 12 months they would not carry out a formal re-assessment, but if the age difference was felt to be greater than a year, they would reassess.

**Timescales:** While not a requirement of a Merton compliant assessment, four of the authorities carried out assessments over a two to three day period, which could be spread out over the course of two or three weeks in some cases. One social worker described how age assessments are a big piece of work. She does not book anything else in for that day and will spend considerable time preparing for the assessment, for example finding out background information about the young person's country of origin, the region they come from and reports from their care provider. Another described the importance of building up trust and a relationship with the young person.

Only two authorities generally carried out assessments in just one day, and a social worker from one of these authorities commented that she felt it would be more effective to spread the assessment out over more than one meeting.

#### **4.7 - Support available in the form of training and guidance for practitioners**

The findings suggest that there is a lack of consistency in Local Authority approaches to age assessments in terms of the provision of training and guidance for their staff. While most of the social workers had received training on how to carry out age assessments, there were variations in the stage at which they received training, the type of training and frequency. For example, in two authorities there were social workers who had carried out age assessments for over a year before they received any formalised training. While two of these social workers shadowed fellow social workers on a number of occasions before carrying out assessments of her own, another shadowed just one assessment before she had to carry them out by herself. She had since received training from the Local Authority but still identified a need for much more holistic and rigorous training.

Of those social workers who had received training, the majority had been on training courses organised by the Refugee Council. One social worker who had not received Refugee Council training was aware that it was available but felt that the training provided tended to challenge Local Authority practice, so she was not sure how useful it would be.

Other forms of training and support that had been accessed included in-house training provided by the authority's legal department and information updates provided by the Refugee Council mailing list and a council-run age assessment steering group. Some of the social workers had attended specific age assessment meetings as part of the London Asylum Seekers Consortium (LASC) and had found the opportunity to exchange information and practice very useful. For example, it was only at this forum that one social worker found out that some other authorities carry out assessments over a period of two or three days, rather than just one.

While all social workers were able to reference the Hillingdon pro forma, Merton guidelines and UKBA guidance, only three social knew of other information and publications that were available on the subject of age assessment. Those social workers who relied on other resources described how they referred frequently to publications such as ILPA's *Working with Refugee Children*, and Heaven Crawley's *When a Child is not a Child* to inform their practice. However, they emphasised that they knew about these materials because they had a personal interest in the subject and had carried out their research in their own time. These social workers belonged to teams where they had helped to develop resource packs which included relevant research, guidance and case law.

Only one of the local authorities had produced their own guidelines on the age assessment process, while another was in the process of devising their own guidelines. The authority that had devised their own guidance reviews it frequently and ensures it is updated in light of any relevant case law. They also run their own age assessment training which they have delivered to other local authorities.

#### **4.8 - Awareness of the Supreme Court ruling and developing case law, and understanding of its implications**

Very few of the social workers interviewed had heard of the Supreme Court ruling. Even those who said that they were aware of it were not able to describe the implications of the ruling in full, but instead suggested that it required that they were 'Merton compliant' or had an appropriate adult present at the interview. Only one social worker was able to give a more detailed description of the ruling in terms of its requirements and implications for social workers and local authorities. The social workers in one authority which had been to court on a number of occasions since the ruling, were still not aware of the context of the judicial review being different to those that took place before the Supreme Court ruling, or at least did not link any changes in judicial review proceedings to the ruling in the Supreme court.

Those team managers and lawyers who were interviewed were fully aware of the ruling and its implications. The ruling was described as having 'moved things to a different level', beyond issues concerning the assessment process, into the area of decision making and accuracy. It was also described as being helpful because it makes clear to Judges that they are the decision makers.

#### **Impact of the Ruling on Local Authority practice**

#### **4.9 - Experience of litigation**

Five of the local authorities interviewed had been to court at least once with an age dispute case, and one had a case that had been disputed and was being pursued further. Many were surprised at both the waiting time involved for cases to reach court, and for the time involved for decisions to be reported following court. Two of the local authorities interviewed described how they had a significant backlog of cases that have been disputed and are waiting for judicial review.

Despite having a significant number of assessments that are disputed, evidence suggests that the majority of cases are settled out of court on various terms, with either the claimant accepting the Local Authority assessment, or the Local Authority accepting the claimant's age. More than one social worker suggested that the Local Authority conceded in most cases.

A Service Manager explained that it was a big decision to decide to take a case to court, but that it was felt to be important to support the social workers who are tasked with making these difficult decisions, and that they should therefore defend their practice.

One Local Authority described how, in their experience, there had been lots of age dispute cases in the pipeline over the last three years which the authority had conceded because financially it would not have made sense to take them all the way

through to the high court where the authorities' decision could have been overturned.

Eight of the social workers, lawyers and managers interviewed had actually attended court with these cases. The others had been briefed by colleagues about the experience. It was evident that going to court had a big impact on social workers both in terms of their experience of the Court process and the impact the case had on practice subsequently.

Below is a summary of cases that social discussed during the interviews. Some other cases were described anecdotally, and are based on second-hand feedback from colleagues or managers.

### **Case 1**

The young person was brought to their attention by the police. They claimed to be 13 years old but were assessed to be at least 16, with the benefit of doubt. The young person's solicitor disputed the assessment and arranged for an independent social worker to carry out a further assessment. Following this, the young person's immigration appeal hearing was heard and the judge accepted his stated age. Despite this, the Local Authority in question maintained that they thought the young person was older, and so re-assessed his age and commissioned a dental assessment. They continued to believe he was older than he claimed, but because his age had been accepted by the judge, the Local Authority began providing services for the young person on the basis that he was 13 years old.

The young person's social worker found this situation challenging, because parents at the school the young person attended began asking questions and did not want their children to be at the same school because he appeared to be so much older than his contemporaries. The social worker had to make special arrangements for the young person to attend college.

The case reached the Courts three years after the first age assessment. The court decided that the young person was older than he was claiming, and assessed him to be 18, a few months younger than the Local Authority's assessment had him aged at.

### **Case 2**

One social worker who had not been to court had a case pending and had been involved in two other cases which were resolved before they reached court. In one case, the Local Authority accepted the age that the young person was claiming to be due to the young person having learning difficulties that hadn't been adequately addressed on arrival. As a result, the Local Authority pulled out of the Court case because they thought that this issue would complicate the matter.

### **Case 3**

In this case the Judge ruled in favour of the young person after a three day hearing. The Local Authority continue to believe that the young person in question is over the age of 18, and cited the fact that the Judge made his decision despite the fact that no further evidence was presented, and that they felt that the Judge was influenced by the traumatic circumstances surrounding the young person's arrival and immigration case. In making his decision, the Judge said he was employing judicial discretion, and so the Local Authority is not able to appeal his decision.

However, the Judge agreed that the Local Authority had carried out a thorough, Merton compliant assessment, and the young person had been provided with support under the Children Act during the two year period before the case came to court.

#### **Case 4**

The young person was age assessed on arrival as being 18, although he claimed to be 13 or 14 years old. He was referred back to immigration services who dispersed him to a different region and he was supported under UKBA's asylum support package for single adults. In this region, he was linked into a number of children's services who managed to enrol him in school. These service providers supported the young person to launch a legal challenge which included statements of support from the school. Although there was some medical evidence from an x-ray to suggest he was an adult, following a meeting with their legal team the assessing authority decided the best option was to concede the case, because of their concerns about the weight given to the support the young person had from his school and other service providers.

#### **Case 5**

The young person claimed to be two years younger than he was assessed to be. The young person's solicitor had organised for an assessment to be carried out by a paediatrician. The judge gave more weight to the Local Authority's assessment and also took into account the fact that the young person's uncle who lived in the UK and was in contact with the young person, had not been able to provide any information to prove that the young person was the age he claimed to be.

The social worker involved described the period before the case reached the Courts as being very frustrating, because the young person's solicitor prevented the authority from discussing the age dispute. The social worker found herself in a situation where she was called into the young person's college because they wanted to discuss his behaviour which they thought was inappropriate. The social worker was frustrated that she couldn't say anything about his age.

#### **Case 6**

In a case that has not yet been reported, the Judge agreed with the Local Authority's assessment that the young person was an adult, but the Judge's assessment went beyond the original assessment.

### **4.10 - Local Authority treatment of disputed cases following a court decision**

In all the examples given, local authorities were happy to provide an age-appropriate service following a final decision from either the Courts or from a re-assessment.

Following the outcome of one decision where a young person was assessed by the judge as being just under the age of 18, the Local Authority transferred their client from foster care into semi-independent living arrangements. Once he has adapted they intend to move him on to independent living. The young person was already attending college because he was refused permission to attend school because of his perceived age, so he continues to study ESOL at college and the Local Authority can now get funding for this, whereas previously they had to fund his place themselves.

In one case, the authority had initially assessed a young person to be an adult, and they had been dispersed to adult accommodation in a different authority. The assessment was challenged and the social worker interviewed had conducted the re-assessment. In this case, the social worker felt confident that the young person was between the age of 16.5 and 17. The authority then took responsibility for him and accommodated him under Section 20 of the Children Act. They helped him to enrol in a college and transferred him to the looked after children's team.

Where the outcome of a final decision on a child's age differs from the age originally documented by the Home Office, there are implications for the young person's identity documents, as well as the Local Authority's ability to access age-appropriate services and funding for the young person. There did not appear to be any consistency in terms of whether a young person's social worker or their solicitor was responsible for supporting young people to have these documents amended and updated. Most social workers made attempts to contact the Home Office themselves, and in some cases where there were significant delays affecting the young person, the social workers had had to call on support from their own solicitor which incurred costs. Other social workers thought that it was the responsibility of the young person's solicitor from the outset. In general all practitioners described experiencing problems in trying to get UKBA to change documentation, although one had not had too many problems in dealing with UKBA case officers.

#### **4.11 - Impact of going to court on age assessment practice**

Four of the local authorities felt strongly that there was learning from their court experience which should result in changes to age assessment practice in general. Of those social workers who had been to court, four felt that the experience had had a significant impact on their practice, and outlined a number of changes that they had made. One social worker described how she felt more confident in standing by her decision following her experience in court, and that both standards of practice and levels of confidence improve all the time.

Changes that have been made since their experience in court in one authority include:

- Making sure that they always have two social workers present to conduct age assessments. In the past they approached things differently, with a lead social worker carrying out the assessment, and a second social worker providing a second opinion on the second or third meeting with the young person
- Taking care to ensure that they record all aspects of the age assessment process. The judge had criticised the fact that they hadn't always recorded reasons for making decisions
- Introducing a letter for a young person to sign, agreeing that they have understood what the age assessment process is about and their right to have an appropriate adult present and that they have made the decision that they do not want an appropriate adult present.

In other authorities, social workers described the following changes:

- No longer providing clients with the outcome of their assessment on the same day, but calling them back the following day to discuss the decision
- The importance of recording everything from the outset
- The importance of taking everyone's view into account, and for social workers to recognise their role in protecting all children, including children who might be accommodated with the age disputed child
- Adding an addendum to the age assessment report which includes the views of the young person
- The overall assessment process becoming 'tighter'.

One service manager identified the challenge of implementing the ruling being in the need to be able to justify final decisions on age. This manager had taken away from their court experience the need to be mindful over the use of giving a young person the benefit of doubt, and the need to identify an absolute age, following the judges criticism of expert witnesses who gave an age span of plus or minus two or three years.

In response to their court experience, the authority that had devised its own specific age assessment training and guidance has already incorporated learning into the training package with the help of in-house solicitors. It was explained that it was seen as a quasi-legal process that practitioners needed to know about.

#### **4.12 - Impact of going to court on the social worker's role**

Most of the social workers who had been to court had found the experience quite traumatic. One social worker found the build up to the Court proceedings particularly stressful, especially because the case was postponed and then delayed by over a year. She said that she developed stress rashes as a result. A service manager also described the process as a 'big shock' for social workers. However, all those social workers who had been to court said that they had always felt completely supported by their managers and the Local Authority:

*"There was no pressure from [the authority]. My supervisor was with me as well, there was no pressure from any of them."*

Two social workers who had been to court described having problems ethically as they found themselves in the witness box standing against a young person who was their client, and for whom they carried out the role of corporate parent. One social worker described finding it very awkward being in court one day in an adversarial role, and then having to slip back into the role of being the young person's social worker the following day.

Following her court experience, one social worker took a break from carrying out age assessments for a few months, because she had found the process so 'full on'. Whilst those who had only had one experience of being in court had found it a useful learning experience, they did question whether it was cost effective in the long term, due to the time and resources spent both preparing for the case and during proceedings.



#### 4.13 - Impact of going to court on Local Authority decision making

Service managers and Local Authority lawyers were clear that the costs involved in going to court are prohibitive. One estimated that a case they had taken to court had cost in excess of fifty thousand pounds. They described how they have cases that have 'gone to the wire' where they have decided to concede at the final hour, despite a social worker's conviction that the young person is an adult.

*"We have to decide if our case is strong enough. If it is 60:40, do we do it?"*

Others described the additional costs in terms of resources such as time spent arranging a good barrister, preparing for court, organising paperwork and then spending at least three days in court. Two service managers suggested that if they had known how long the hearing would take, they would have been less inclined to pursue it, despite the fact that they won the case.

Three social workers also suggested that the threat of going to court had the potential to skew the outcome of initial assessments in order to avoid having to go to court, for reasons of fear on the part of the social worker and resource concerns on the part of the Local Authority.

One social worker described how when she first started working with unaccompanied asylum seeking children's team, social workers didn't go to court with age disputed cases, but managers did. She suggested that since social workers have had to appear in court, practice has changed and some of her colleagues have begun to 'give ages more freely' and not age dispute a case, even when they have serious doubts and believe that the client might be an adult. She said that decisions are being made politically, on the basis of whether or not the authority feels they will be able to defend their decision in court. This means, that if a young person has given a 'tight' story, their age might be accepted, even if the practitioner or authority believes them to be significantly older. She expressed real frustration and concern about this and the fact that she had to work with clients who she feels are much older than they claim. She suggested that much greater support in terms of training and guidance was needed in order to enable social workers to feel more confident in sticking with their decisions.

*"We do a holistic assessment, but it's not an exact science.... and it's scary going to go to court and be asked to defend something you don't know with 100% certainty."*

Other social workers also described sometimes feeling overwhelmed by the importance of age determination which many referenced as not being an 'exact science';

*"It's scary doing age assessments as a social worker – what if you get it wrong? As a social worker we all do the job for children. What if we get it wrong and deem a child an adult?"*

A service manager suggested that even with ample age assessment training and support as well as significant experience, social workers don't necessarily feel comfortable doing age assessments and therefore are intimidated by the idea of going to court. One social worker raised her concerns in terms of child protection about the implications of making a wrong decision, or settling a dispute out of court despite continued convictions that a young person is older than they claim;

*“It is so hard to put someone you think is older into foster care....I am frightened that something big will happen soon and will have huge repercussions for us”*

#### **4.14 – Social workers views on the impact of going to court on the young person**

Three social workers thought that the experience of going to court had been helpful for the age disputed young person involved, because it provided clarity and a final decision. One described how he felt that the judge had carried out a holistic assessment, considering evidence from all sides as well as critically examining the young person’s story, and that that this had been helpful for the young person. One social worker suggested that the young person had been empowered by the Court experience. She said that he had threatened to take her to court on a number of occasions, and that he was pleased to have been able to do so.

Other social workers suggested that the Court experience could be quite traumatic for young people, and questioned whether it was right that age disputes should be taken to court especially when young people had their immigration claim to deal with. However, some felt that a young person’s experience of immigration hearings equipped them to deal with court and so they were not overawed by the experience. In one case that was described, it was clear that the Court had made efforts to try and reduce the formality of the Court setting, for example not wearing their wigs and providing regular breaks.

A number of those interviewed questioned the extent to which young people who were disputing their age assessment actually understood what they were doing, and thought it was rare that solicitor’s actually took instructions from their client to launch a dispute. It was suggested that their solicitors were not always acting in the young person’s best interests, but were perhaps looking to make a name for themselves. The Local Authority lawyers interviewed mentioned that it was the same firms of London based solicitors behind most of the cases that are taken to Court. One social worker described the constant disputes as a waste of time and felt strongly that they should not be happening as significant time and effort was put into initial assessments, which are Merton compliant. The social worker felt that the fact that so many of the disputes were settled out of court, in favour of the Local Authority assessment, reflected this.

Social workers in three authorities had noticed a new pattern emerging whereby young people are raising an age dispute once their asylum case has become appeal rights exhausted. One social worker gave an example of a young person who had been with them for over a year and only at this point claimed to be younger than they had originally assessed. She said that in many of these cases, their claims are being accepted rather than the authority having to go to court. Another found that in her experience, there has been a steady pattern of young people claiming to be younger and younger.

Legal practitioners in one authority raised concerns about the validity of identity documents, particularly a document from Afghanistan known as a ‘*Taskera*’. The *Taskera* is not a birth certificate but is an identify document which will have a comment on it about the person’s age. However, it was the practitioners understanding that the comment is not based on a date of birth but appearance, and they understood that it was relatively easy to get such a document at the Afghan embassy. The Embassy stamp makes it a legal document and therefore makes challenging a claimant’s age particularly difficult.

Two practitioners suggested that a lot of cases that were being disputed would have been settled out of court prior to the Supreme Court judgment.

#### **4.15 - Is the Supreme Court judgment viewed as a positive development by social work practitioners?**

Four social workers thought that it was helpful to have a judge involved in making the final decision. One thought it was particularly helpful because it helped move the situation on from the previous situation where undue weighting was given to medical assessments over social work evidence. A service manager also found that because the upper tribunal is less concerned with process, it makes an evidential decision on the balance of probabilities, which is fairer on both parties involved.

However, the majority of those interviewed made a point of saying that they did not think that Judges were the best placed to be making a final decision. They believed that the final decision was made on spurious evidence, such as a young person's demeanour in the witness box, and wondered how a Judge would react when confronted with someone with a deep voice or beard, emphasising that without training and experience, it can be hard not to make an initial judgement.

*'I'm not sure about Judges' qualifications. We have had young people on the 18+ team who are then re-assessed by a Judge to be 15.'* (L-C)

One legal practitioner emphasised that in his experience, Judges themselves frequently make the point that they are not trained to make judgments on a young person's age. He suggested that if decision making stays in the judicial arena, then Judges need to be trained on the issue of age assessment.

Another social worker thought that local authorities needed more powers to be able to say to the Courts that their assessments are thorough. She felt that they needed to be able to feel more confident about their assessments.

The majority of social workers thought that a better option was to have an independent panel of experts responsible for making a final decision. This was described as a 'multiagency' approach that should be made up of social workers, medical experts, psychologists and other relevant practitioners. One explained that she thought this would help overcome the problem of constant disputes and challenges and resources involved in reassessments.

Some of the practitioners made reference to suggestions for such a panel made in UKBA consultation documents from 2007 and questioned why the idea had been dropped. One social worker suggested that the independent panel that has been developed to facilitate family returns should be used as a model.

#### **4.16 - Gaps and needs identified by social workers**

Nearly all of the social workers interviewed identified a need for greater knowledge on country of origin information and child development. For example, it was felt that information about festivals, local calendars, cultural expectations of children's roles and responsibilities according to age and gender would be a great help in the assessment process. It was equally felt that more information on child development in the context of age assessment would help, for example, more information on the impact of growing up in different environments and signs of ageing.

Social workers also identified a need for more information about the outcomes of judicial reviews and the impact cases have on age assessment practice. A service manager identified a need for national training standards. While various agencies provide training packages there are huge variations between them.

Some social workers were disappointed that they were no longer able to use dental x-rays or medical opinions as part of the age assessment process. While acknowledging that it shouldn't be the main part of an assessment, they felt that it helped them to be more holistic and also meant that the weight of the decision was not resting entirely on their shoulders.

*'I sometimes don't understand. Age is linked so closely to medical science and biology. Social workers are not medically trained. Age assessment questions are quite general... but if we are saying that a child is this particular age we need to back this up with something. My personal feeling is that doctors are in the best position to say the age of a baby is so many months, not a social worker, so why is this different for adolescents?'*

However, another social worker described the use of independent social workers and other experts as having become a business.

Social workers described feeling under a huge amount of pressure yet were honest that they did not always feel qualified to make an accurate assessment based purely on asking background questions and judging how true the information is, along with the young person's visual appearance and demeanour.

*"There isn't much support out there, you are seen as the 'expert' but that's not the case. It's not instinctive, it involves lots of probing and we're not always right."*

## **Young people's experience of disputing their age assessment**

### **4.17 - Background to the cases**

The initial trigger for the age dispute varied from case to case. In one case, a young person arriving by lorry was initially picked up by the police, and social services were called to do an age assessment immediately. In another case, immigration officers disbelieved the age of the young man, and referred him for an age assessment to the local social service department. In a third case, whilst immigration accepted the age of the young person as being 14, concerns were raised at his accommodation regarding his age, leading to an age assessment by social services. Whilst the other cases were all related to believing the young person was 18 or above, in the case of the 14 year old he was assessed as 16 by the Local Authority.

In some instances the age dispute process went on for years. The shortest case lasted for five to six months, although in this instance, the young person was simply awaiting a final decision about his age from the Local Authority. The other cases ranged in duration from 10 months to three years. Two of the five cases were in contact with three different local authorities whilst they were age disputed.

### **4.18 - The age assessment process**

In terms of the age assessment process itself, some aspects, such as the questions asked, and the presence of two social workers to undertake the assessment, seem to

be consistently applied. However, young people reported a wide range of experiences, which they felt unhappy with. This included being interviewed whilst newly arrived and exhausted, having interviews cancelled at short notice, and being interviewed without an interpreter who spoke their dialect as the quotes below illustrate.

*“I came out from the lorry and the police caught me and took me straight away to the police station. Two people came to the police station. They said we want to assess you about your age, I said to them I'm newly arrived; I'm not fit to do the interview at this time. They said to me that if you don't go ahead we will assess you as over 18. So I did the interview.”*

*“Three times I had an appointment with children services. One was cancelled because there is no interpreter. The next time no one came there. The second time they asked some questions, but it only lasted five to 10 minutes, then they change the dates two or three times for the next meeting. The third time I was interviewed, two months after they gave a result, and then said I was 16... When I did the interview for the first time the interpreter spoke Farsi. This wasn't quite the same language as I spoke it was a different dialect. So I didn't talk. The social worker was also from my country, and told me if I didn't talk they couldn't help.”*

Two cases also cited a lack of communication about the result of the age assessment, sometimes leaving them without knowing the outcome of their assessment for months.

*“At the meeting, there were present two ladies and one interpreter, and they questioned me lots and asked me lots of questions for example, can you cook for yourself? Can you clean? Can you wash? My hair had one or two white hairs and they asked me why is it white? The ladies told me it means you are older than you claim. They told me ‘just stay here, we want to get advice from our manager’. They came back and said that ‘my manager says to take you to another accommodation’. They said ‘just stay there and we will give you your result shortly’. Instead of one week. I stayed there for six months.”*

For this piece of research the sample was drawn from the Refugee Council caseload. This meant that all these cases had had some support from Refugee Council, at least in the later stages of their case. The Refugee Council often played the role of the appropriate adult during the age assessment process, taking detailed independent notes. However, at least two cases explained that only social workers and an interpreter were present in their earlier age assessment interviews. In one case, a young person had their solicitor in the room with them during his third assessment. Where the young men talked of their rights and entitlement this was often in terms of the social worker during, or after the age assessment informing them that they were entitled to complain if they did not like the decision.

In all cases bar one, the initial age assessment had deemed the young person to be over 18. According to the young men interviewed, social services cited a number of different reasons for disbelieving age, including:

- Physical appearance: such a build, shaving, and the existence of white hairs.
- Mature attitude: such as the ability to answer questions coherently or to undertake self-care tasks such as cooking and washing

- Lack of evidence or documentation to prove age

#### **4.19 - Being treated as over 18**

One common theme running through the interviews was the placement of young people in adult accommodation once assessed as 18, or sometimes when awaiting an age assessment. This was the case with four of the five young men interviewed. One young man, who waited for five to six months for a final decision from the Local Authority on his age, was placed in adult accommodation. This is despite no final decision from the Local Authority as to his actual age.

*"I lived in a hotel with a friend who was age disputed as well. There were five people in one room. We were the only young ones there. Some older people were in the next room. As young people we were talking openly, but we made the older people angry by making noise. The situation was really hard."*

The young people all spoke of living in adult accommodation with some unease, finding it noisy, alienating and threatening.

In a further example of poor practice a young man, having been assessed by social workers as being over 18, was taken to a number of police stations by those social workers in an attempt to hand him over to the care of the police. Each station refused to take him, and he was eventually left on a beach and told to wait for 15 minutes whilst social workers phoned the police to come and collect him. Two hours later he was still waiting, and eventually left to stay with friends. Three of the cases reported experiences of having been held in detention, one for a few days, another for a month, and a third for three and a half months.

Two of these young men were threatened with deportation, one back to Afghanistan and one to a third EU country.

#### **4.20 - Challenging the Local Authority decision**

The initial age assessment by local authorities led in all instances to the young people challenging judgement of the local authorities. Even the young person who did not get a negative decision on his age assessment required the support of an advocate, in the form of the Refugee Council, to ensure that a decision was made and communicated to him. This process took more than five months. Challenging the initial age assessment was not always immediate. Sometimes the challenge came as a result of new evidence, such as a national identity card, sent from the country of origin, or a medical assessment completed at the request of a young person's solicitor. In two cases concerns were raised by another professional, a psychiatric nurse and a social worker in a detention centre some time later which lead to further age assessments.

#### **4.21 - Young people's experiences of court**

Three of the young men had experience of attending court in relation to their age dispute. In two instances their age was initially considered as part of their immigration case and in both these cases the judge ruled against them, judging them to be over 18. In one case, the young person was able to appeal to the high court thanks to new evidence. One of his relatives back home was able to send through his national identity card. In this case, the Local Authority involved in the age dispute accepted his age according to the identify card and the Court hearing was cancelled. In the

second case, the young man was in detention and a judge, looking at his case ruled that there was nothing to suggest he wasn't a child and released him into the care of the Local Authority. The Local Authority then did an age assessment and judged him to be 16.

In the third case (which was not initially seen by an immigration judge) the young man did go to the High Court. Whilst age disputes loomed large in the young people's lives in terms of the day to day impact of the decision, the Court hearing itself, as experienced by this young man was unremarkable:

*"...finally the court decided that I was the age I said I was. There were four court hearings altogether, but I just attended court once. The other hearings were attended by my solicitor. The one time I did attend it only took a few minutes and I came out with a good result."*

#### **4.22 - What changed once judged as under 18?**

*"The day after the decision, everything changed. They asked me to bring all my stuff; they gave me accommodation and education. Like you can get involved yourself in college, you get a key worker and if you have any problems you can speak to them. If you're 16, you're going to live in semi-independent accommodation. If there's a parents evening a key worker is going to come."*

As the above quote illustrates, the impact on some young people of being judged as under 18 had an immediate and positive effect. Being judged a minor enabled them to access support from social services in the form of accommodation, key worker support and leaving care support on turning 18. It also ended a period of limbo in which some young people had found themselves for years.

However, some of the young people reported on-going ramifications from the age assessment process. One young man told how he had received papers from the Home Office to say his claim was refused and he was to be deported. On checking the papers he realised they still had the wrong date of birth on them, despite having received an earlier letter from the Home Office informing him that his records had been changed and that he has been granted limited leave to remain on the grounds that he was under 18. This required his solicitor to challenge the letter which was later withdrawn by the immigration services. The same young person was left in adult accommodation, despite being judged as 16, and was only moved to more suitable accommodation when his solicitor raised a legal challenge with the Local Authority.

For the young person who was judged to be 16 rather than 14 by the Local Authority there were also ramifications. His accommodation changed to semi-independent accommodation and he was left for a long time uncertain as to their decision.

#### **4.23 - Impact of the Age Dispute Process on Young People**

Those interviewed raised a range of emotions regarding their situation including feeling alone, disbelieved and angry. One young man had to seek psychological help to deal with the age assessment process as he had started to self-harm.

*"It affected me seriously, I thought about it a lot of the time. I didn't go to college. I was in a very bad condition. It has a bad result on my life. If they would accept my life at the beginning, then I would have had a good*

*opportunity to continue my life properly in the UK. All these things destroyed my life. All my friends, they came at the same time as me, their age was accepted by the Local Authority. They are now in university and getting on with life. But unfortunately my life didn't turn out like my friends and I can't continue my education."*



## RECOMMENDATIONS

### To the Judiciary:

1. In all age dispute cases, whether heard in the Immigration and Asylum Chamber of the Upper Tribunal or by the Administrative Court, there should be a procedural presumption that the age disputed person is treated as a child throughout the appeal, including any preliminary or interim stages.
2. Procedural adjustments should always be made to ensure that the Court setting and the conduct of proceedings are child-sensitive, in accordance with existing guidance and best practice, for example as contained in *Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance*.<sup>105</sup>
3. In the listing of hearings, the “no delay” principle in children’s hearings should be applied to age dispute proceedings at all stages.

The President of the Upper Tribunal should consider providing a separate Guidance Note for Tribunal judges, specifically for the conduct of age dispute hearings. It would be helpful to include in such guidance:

- Advice on the differences between the immigration and asylum appeals functions of the Upper Tribunal and its new age determination function
  - Advice that there is no burden of proof in age dispute cases as per *CJ v Cardiff* along with guidance on the application of the correct standard of proof as per *Rawofi (age assessment – standard of proof)* [2012] UKUT 00197(IAC))
  - Advice on achieving best evidence from child witnesses and in particular the examination and cross-examination of age disputed witnesses and the possibility of obtaining their evidence other than by examination at court
  - The consideration of expert evidence and the examination of expert witnesses
  - The role of the litigation friend/responsible adult.
4. Training on age dispute cases, including the conduct of child-sensitive proceedings, assessment of the age disputed person’s evidence and an understanding of the range of expert evidence used, its techniques, methods and accepted scientific value, should be provided to all

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<sup>105</sup> <http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/ChildWitnessGuidance.pdf>

judicial office holders before they hear age dispute cases, whether in the Upper Tribunal or in the Administrative Court. Such training might be developed with the Judicial College as part of the continuing professional development of judges. The Children's Commissioner is willing to offer her assistance to develop such training.

### **To Local Authorities**

5. Assessments should be conducted in line with the *Framework for Assessment of Children in Need and their Families*.<sup>106</sup> This includes adhering to statutory timeframes to respond to referrals and conduct assessments, as well as good practice in inter agency collaborative working. Reference is made to the need to conduct assessments of children seeking asylum and separated from family members with *particular care and attention* in section 3.58 of the guidance.
6. Social workers should be adequately trained for the difficult task of conducting age assessments. Training should:
  - include guidance on how to interpret and adhere to emerging case law
  - enable social workers to fully appreciate the impact that a young person's experience and background will have on the way s/he presents during the assessment process.
  - discuss how to analyse and give weight to the information gathered in the assessment process.
7. Local authorities should ensure that the young person being assessed fully understands the process and what avenues are available to them to challenge the findings of the Local Authority assessment.
8. All placements provided for young people who are still in the assessment process, or awaiting the decision on their assessment must be appropriate and in accordance with the statutory guidance laid out in DCSF-15005-2010.<sup>107</sup>

### **To UKBA & Local Authorities**

9. The UKBA and local authorities should work together on a joint protocol to ensure that disagreements about the age of a young person are resolved and no asylum seeker, child or adult, is left with no support as a result of the two agencies being unable to agree on the age of a young person.

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<sup>106</sup>

[http://www.dh.gov.uk/prod\\_consum\\_dh/groups/dh\\_digitalassets/@dh/@en/documents/digitalasset/dh\\_4014430.pdf](http://www.dh.gov.uk/prod_consum_dh/groups/dh_digitalassets/@dh/@en/documents/digitalasset/dh_4014430.pdf)

<sup>107</sup> <http://www.communities.gov.uk/publications/housing/homelessseventeen>



## INDEX OF CASES REFERED TO

Item No	Case Authorities
1.	<i>R (A) v Camden LBC</i> [2010] EWHC 2882 (Admin)
2.	<i>R (A) v Cardiff and Ors</i> [2011] EWHC 1216 (Admin)
3.	<i>R (A) v Croydon LBC; R (M) Lambeth LBC</i> [2009] UKSC 8
4.	<i>R (A) v LB of Croydon and Secretary of State for the Home Department</i> [2011] EWHC 3116 (Admin)
5.	<i>R (Abdul Rahman) v Secretary of State for the Home Department</i> [2010] EWHC 1620 (Admin)
6.	<i>R (AE) v Croydon LBC</i> [2011] EWHC 2128
7.	<i>R (AK) v Secretary of State for the Home Department and Leicester City Council</i> [2011] EWHC 3188 (Admin)
8.	<i>R (AM) v Solihull LBC</i> [2012] UKUT 00118
9.	<i>R (AS) v LB of Croydon</i> [2011] EWHC 2091 (Admin)
10.	<i>R (CJ) v Cardiff CC</i> [2011] EWHC 23 (Admin)
11.	<i>R (CJ) v Cardiff CC</i> [2011] EWCA Civ 1509
12.	<i>R (ES) v LB of Hounslow</i> [2012] UKUT 00138
13.	<i>R (F) v Lambeth</i> [2011] EWHC 1754 (Admin)
14.	<i>R (F) v Lewisham LBC</i> [2009] EWHC 3542 (Admin)
15.	<i>R (FZ) v Croydon LBC</i> [2011] EWCA Civ 59
16.	<i>R (G) v Newham LBC</i> [2010] EWHC 3515 (Admin)
17.	<i>R (G) v Newham LBC</i> [2011] EWCA Civ 503
18.	<i>R (H) v Secretary of State for the Home Department &amp; Wigan MBC</i> [2010] EWHC 2414 (Admin)
19.	<i>R (HA) v Hillingdon LBC</i> [2012] EWHC 291 (Admin)
20.	<i>R (Hosseini) v Secretary of State for the Home Department &amp; Kent CC</i> [2011] EWHC 1924
21.	<i>R (J) Secretary of State for the Home Department</i> [2011] EWHC 3073 (Admin)
22.	<i>R (JS) v Birmingham CC; R (YK) v Birmingham CC</i> [2011] UKUT 00505

23.	<i>R (K) v Birmingham CC</i> [2011] EWHC 1559 (Admin)
24.	<i>R (KN) v Barnet LBC</i> [2011] EWHC 2019 (Admin)
25.	<i>R (M) v Secretary of State for the Home Department &amp; Brent LBC</i> [2011] EWHC 1599 (Admin)
26.	<i>MC v Liverpool CC</i> [2010] EWHC 2211 (Admin)
27.	<i>R (MWA) v Secretary of State for the Home Department and Birmingham City Council</i> [2011] EWHC 3488 (Admin)
28.	<i>R (N) v Croydon LBC</i> [2011] EWHC 862 (Admin)
29.	<i>R (PM) v Hertfordshire CC</i> [2010] EWHC 2056 (Admin) – not a trial but needed for analysis.
30.	<i>R (Prenga) v Barnet LBC</i> [2010] EWHC 1765 (Admin)
31.	<i>R (R) v Croydon LBC</i> [2011] EWHC 1473 (Admin)
32.	<i>R (RS) v Secretary of State for the Home Department and LB of Croydon</i> [2011] EWHC 3313 (Admin)
33.	<i>R (S) v Ealing LBC &amp; Secretary of State for the Home Department</i> [2010] EWHC 3458 (Admin)
34.	<i>R (U) v LB of Croydon</i> [2011] EWHC 3312 (Admin)
35.	<i>R (Y) v Hillingdon LBC</i> [2011] EWHC 1477 (Admin) – age assessment trial
36.	<i>R (YA) v Hillingdon LBC</i> [2011] EWHC 744 (Admin) – special measures
37.	<i>R (YE) v Secretary of State for the Home Department</i> [2011] EWHC 496 (Admin)
38.	<i>R (W) v LB Croydon</i> [2012] EWHC 130 (Admin)
39.	<i>R (AM) v LB Croydon</i> [2012] EWHC 3308 (Admin)
40.	<i>R (AE) v LB Croydon</i> [2012] EWCA Civ 547 – (Court of Appeal decides age - no trial).