



Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of MK) v Wolverhampton City Council AAJR [2013] UKUT 00177 (IAC)

Heard at Field House

On 11- 13 March 2013

Before

UPPER TRIBUNAL JUDGE PETER LANE

Between

THE QUEEN ON THE APPLICATION OF
MK

Applicant

and

WOLVERHAMPTON CITY COUNCIL

Respondent

Representation :

For the Applicant: Irena Sabic , instructed by Public Law Solicitors

For the Respondent: Charles Bourne , instructed by Fiona Davis, Acting Solicitor to
Wolverhampton City Council

JUDGMENT

A. I ntroduction

1. The applicant is a citizen of Bangladesh, who asserts that he came to the United Kingdom from Bangladesh with his parents and sister on 15 December 2007. On that date the applicant was, on his account, ten days short of his 12th birthday, since it is his case that he was born on 25 December 1995. The applicant understands that the family came to the United Kingdom for a holiday. He describes them visiting various places in this country. After a few weeks, however, his parents took him and his sister to a mosque in Birmingham, where the children were abandoned without any prior warning. They managed to secure the assistance of a stranger, Mr Miah, who helped them.

2. On 25 February 2008, Mr Phil Beaumont of Birmingham City Council undertook an age assessment of the applicant, as a result of which he was assessed as being born on 25 December 1991. A second assessment dated 25 February 2008, again by Mr Beaumont, concluded that the applicant was, in fact, born on 25 December 1989.

3. On 4 April 2008, the applicant and his sister claimed asylum. Following the refusal by the Secretary of State for the Home Department of those applications, the applicant and his sister appealed to the First-tier Tribunal. On 2 February 2009 Immigration Judge Sommerville, sitting in Birmingham, heard the appeals. According to [8] of the judge's determination, the applicant "relied on the evidence of his sister". The judge did, however, hear evidence from the applicant "but most answers were provided by his sister". In a determination which, apparently as a result of having to be amended twice under rule 60 of the Asylum and Immigration Tribunal (Procedure) Rules 2005, was not sent out by the Home Office until 11 September 2009, the judge dismissed the applicant's appeal on asylum grounds and humanitarian protection grounds, but allowed it on human rights grounds. This was because the judge considered that the applicant was the age he claimed to be, which meant that the Secretary of State's decision "was not in accordance with the law because it was contrary to the respondents [sic] stated policy of granting discretionary leave to remain until the age of 17.5" [59]. Having, thus, answered the third of the questions in *Razgar* [2004] UKHL 27 in the negative, the judge, nevertheless, appears to have considered it necessary to address the fifth question (proportionality), which he resolved as follows:-

" As I have found that the [applicant] is a minor and because the [applicant] should benefit from the respondents [sic] policy of granting discretionary leave to remain then this is sufficient for me to find that the appellants [sic] decision is not a proportionate response. Accordingly, I find that the removal of the [applicant] will engage Article 8 of the ECHR ."

4. In concluding that the applicant was born on 25 December 1995, the Immigration Judge, in essence, preferred the assessment of the applicant's age that had been undertaken by Dr Birch in June 2008, rather than the two assessments of Mr Beaumont. The Secretary of State did not challenge the Immigration Judge's determination. The applicant was, accordingly, given leave to remain by the Secretary of State until June 2013. I should mention here that in a separate determination Immigration Judge Sommerville allowed the appeal of the applicant's sister, accepting her date of birth as 1 January 1994.

5. On 9 September 2009, Mr Swaran Singh and Mrs Diana Bazurto of Birmingham City Council's Social Care and Health Department carried out a further age assessment of the applicant. They estimated that the applicant had been born on 25 December 1990.

6. As a result of the Secretary of State's acceptance of the applicant's claimed age, UKBA informed the applicant on 1 September 2010 that he no longer qualified for support. This led the applicant to approach the respondent's social services department. The respondent treated the applicant as a "looked after child" and, in January 2011, it instructed Mr Patrick Mukalazi, an independent social worker, to undertake an age assessment of the applicant. Mr Mukalazi completed his assessment on 3 October 2011. He concluded that the applicant was "at least 19.4 years old" (B20). The applicant's advisors were informed of and given an opportunity to respond to the assessment of Mr Mukalazi. On 9 March 2012, the respondent stated by letter that it was proposed to cease accommodation and support for the applicant on 26 March 2012.

7. An application for permission to bring judicial review proceedings in respect of that decision was lodged on 29 March 2012. Interim relief was granted by a Deputy High Court judge on 30 March 2012 and permission to bring judicial review was granted by Singh J on 26 April 2012.

B. The Law

8. Following the judgment of the Supreme Court in R (A) v Croydon LBC [2009] 1 WLR 2557, the basic purpose of these proceedings is to resolve the issue of the applicant's age, as a matter of fact. In R (AE) v London Borough of Croydon [2012] EWCA Civ 547 Aikens LJ said that:-

" This is because the determination of a young person's age is a 'precedent fact' to the local authority exercising its statutory powers under section 20(1) of the [Children Act 1989]. There is a right and a wrong answer and that, ultimately, is for a court to decide" [3] .

9. In carrying out that exercise, the Tribunal must, effectively, act in an inquisitorial role and decide, on the balance of probabilities, whether the applicant was or was not a child at the time of the age assessment: R (AE) at [23] and R (CJ) v Cardiff CC [2011] EWCA Civ 1590 at [22] and [23].

10. There is no burden of proof in these proceedings (R (CJ) at [22]. I am mindful that at [21] of R (CJ) the Court made it clear that, whilst there is no formal "benefit of the doubt" principle, the Tribunal is not thereby expected to eschew a "sympathetic assessment of evidence" and:-

" In evaluating the evidence it may well be inappropriate to expect from the claimant conclusive evidence of age in circumstances in which she has arrived unattended and without original identity documents. The nature of the evaluation of evidence will depend upon the particular facts of the case ."

C. The Proceedings

11. The hearing in the Tribunal took place over three days, beginning on 11 March 2013. On that day, I heard oral evidence from the applicant. He spoke with the assistance of Mr Karim, a Tribunal appointed interpreter. Both Counsel and I had regard to and followed, as appropriate, the provisions of the Joint Presidential Guidance Note No.2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance. In particular, the applicant was informed of his ability to ask for breaks, as necessary. Irrespective of any such requests from the applicant, I remained mindful of the need to ensure that the applicant did not become overtaxed, whilst giving his evidence. Both Counsel and I endeavoured to frame questions in the manner appropriate to a person of the applicant's claimed age. Overall, I consider that the giving of the applicant's evidence was undertaken compatibly with the Guidance.

12. I also heard oral evidence from Lynn Mallin, a YMCA support worker to children and young people; Liam Stacey, a YMCA peer mentor; Mr Mukalazi, whose age assessment report forms the basis of the decision under challenge; Dr Sarah Newth, a consultant child psychiatrist; Sophia Bowland, a social worker in the Children and Family Locality Team South West, Wolverhampton City Council; and Swaran Singh, a Senior Social Worker in the Unaccompanied Asylum Seeking Children's Team of Birmingham City Council.

D. The Evidence

13. As well as the oral evidence from those mentioned in the preceding paragraphs, I had before me two ring binder volumes of "trial bundle" evidence and two volumes of case law and other materials, including Practice Guidance for Age Assessment of Young Unaccompanied Asylum Seekers and a UNICEF-sponsored Report: Age Assessment Practices: a Literature Review & Annotated Bibliography.

14. The trial bundles also included statements or other forms of written evidence from the following: Mrs Christina Haddon, a dentist practising in Birmingham who examined the applicant on 7 April 2009; Professor Helen Rodd, a Professor/Honorary Consultant in Paediatric Dentistry, Sheffield Dental Hospital; an email from Professor Rodd of 9 March 2013, responding to certain questions put to her

by the respondent (given that Professor Rodd was outside the United Kingdom at the date of the hearing); and ZA, the applicant's sister, who signed a witness statement on 18 February 2013 but did not give oral evidence, since she was said to be undertaking exams.

15. There is one item in the volumes of written materials which I have not taken into account in reaching my judgment in this case. This is the witness statement of Joy Wright, a social worker with Allwrights Associates Limited who, in 2011, was employed as a locum social worker by the respondent. On 12 March, I was informed that difficulties had arisen regarding the existence and location of notes that Ms Wright may have made during the course of Mr Mukalazi's age assessment. In the circumstances, Mr Bourne informed me that the respondent did not intend to rely upon Ms Wright's evidence.

16. Otherwise, however, in reaching my decision I have had regard to all the evidence, both oral and written, whether or not the same is specifically referred to in this judgment. Finally, as well as the material in the ring binders and the e-mail from Professor Rodd, on 13 March the applicant filed a copy letter of 20 February 2013 from the receptionist at "First Dental" in Walsall stating that the applicant had been referred to First Dental "for possible orthodontic treatment under the NHS". The letter indicates that the applicant has not yet been to First Dental. It refers to the applicant as a "child".

E. Mr Mukalazi's Assessment of the Applicant's Age

17. At the beginning of his assessment, Mr Mukalazi acknowledged that the applicant had remained consistent, throughout his engagement with children's services and UKBA, that his date of birth was 25 December 1995. Mr Mukalazi noted, however that "numerous professionals had disputed [the applicant's] claims regarding his age, including his social worker, teacher and various dentists".

18. The assessment report continued by noting that, in a case such as this, it was "necessary to utilise the concept of developmental stages, which enable age to be measured against a range of acceptable benchmarks of normal developmental expectations; including a range of behaviours, and emotional and physical characteristics associated with the idea of growth". However, "the use of phases of development as a precise determinant of age can be potentially problematic, as it is difficult to assign stages of development to fixed points in time with accuracy; which is further exacerbated by the fact that key life changes in significant physical growth can occur at variable ages".

19. Adopting "a multi-disciplinary approach in conducting the assessment", Mr Mukalazi took into account "the views of other professionals and significant figures involved with" the applicant. These included health and educational professionals, as well as previous social workers, and past and present residential workers. The applicant had been observed "to ascertain how he interacts in different social situations". Thus, the assessment "incorporates observation over a three year period".

20. Mr Mukalazi's report stated that he had met the applicant "in person on four occasions over a period of six months, on 21 January 2011, 05th February 2011, 13th July 2011 and 15th July 2011. A Bengali interpreter and the children's advocate were present during the core age assessment interview, which took place on 13 and 15 July 2011".

21. In addition, meetings took place with Sophia Bowland, Laura Fowler (the applicant's key worker at the children's home), Linda Watson, the applicant's schoolteacher, and Terri Reekie, a team leader at the children's home.

22. Mr Mukalazi also considered various documents, including the age assessment of Mr Singh and Mrs Bazurto, Dr Birch's report of June 2008, the determination of Immigration Judge Sommerville, what was described as a "dental assessments report" by Mrs Haddon of 8 April 2009 and the applicant's case files as held respectively by Birmingham City Council and the children's home where the applicant was residing.

23. Having noted the applicant's stated love of wearing hats, Mr Mukalazi, unlike Mr Singh, did not consider that the applicant had a "receding hairline". He did, however, consider the applicant's voice to be "noticeably deep". Although the applicant said that he did not shave much, staff at the children's home suggested that he shaved "at least once per day".

24. Information obtained from Mayfield Medical Centre on 30 September 2011 indicated the applicant's height to be 148 centimetres and his weight 38.8 kilograms, with a body mass index of 17.7:-

" These results are slightly less than those reported by Dr Diana Birch in June 2008, which documents a height of 150 cms, weight at 41 kilograms and BMI of 18.2. This therefore indicates a lack of physical growth throughout the period of June 2008 to present, which is surprising considered that based on [the applicant's] stated date of birth, this timeframe spans the ages of 12-15; thus representing the developmental stage during which [the applicant] would be expected to experience quickest physical growth.

Indeed, studies into human physical growth and development suggest that children/teenagers of the age [the applicant] claims to have been in June 2008, will undergo many physical changes in their bodies, as they experience growth surges and their muscles change shape. These changes are frequently quite dramatic, especially in boys, who would tend to grow most quickly between ages 12-15. By age 16, most boys will stop growing, although muscles may continue to develop. However, by age 21, skeletal growth will have stopped.

Nevertheless, consideration was given to the fact that development can vary a great deal between individuals and environmental factors can have pronounced effects on growth, as well as undernourishment or malnutrition. This is more prevalent in less wealthy countries like Bangladesh...

However, it should be noted that these figures refer to a period when [applicant] was living in the United Kingdom and was a 'looked after child' under Section 20 of the Children Act (1989); and as such neither malnourished, nor living in poverty. Furthermore, [the applicant] has not disclosed any significant traumatic incidents in his life that might have impacted on his growth, and has stated that he did not experience hardship when living in Bangladesh.

I am therefore of the view that because [the applicant] has not achieved any physical growth between the period of June 2008 to present, his growth had already stopped by June 2008, and as such he must have been between the ages of at least 16-21 at this time ."

25. The report then turned to "interaction and general presentation". During the visit of 21 January, the applicant was observed by Mr Mukalazi to be "very unsettled... stressed and preoccupied by his relationship with his social worker". On Mr Mukalazi's second visit, on 5 February 2011, the applicant stated that he "wants a laptop, a bank account and a passport". He also said he wanted "a new social worker". The applicant then "stated that he had developed a headache and did not want to talk to me anymore". Also at this meeting, the applicant appears to have informed Mr Mukalazi that the applicant's solicitor "has advised him not to engage in the age assessment process".

26. Nevertheless, on 13 and 15 July 2011 a “core age assessment interview” was held, involving the applicant, Mr Mukalazi and Ms Wright, together with Mr Pinches, an independent adult appointed from the children’s society. An interpreter was also present.

27. It appears that the applicant was angered by the way in which Ms Wright had spoken to him on 13 July, specifically when she had asked him to provide “additional information in regards to his home town of Sylhet, by describing what his neighbourhood was like, and how far the nearest house was to his family home”. At the second part of the core assessment interview, held on 15 July, the applicant appeared “calm and relaxed”. Separate interviews with staff at the children’s home (Mr Reekie and Ms Fowler) revealed that the applicant “presents as the most vulnerable among the home’s residents”. They also stated that “he lacks in confidence, has very low self-esteem, and has no friends”. The applicant appeared to prefer to spend time on his own, although he did like going on “long drives with staff”. The applicant’s attitude was considered by Mr Reekie to have been exacerbated as a result of “being the victim of a violent mugging by six or seven youths, who physically assaulted him and stole his mobile phone”. Ms Fowler considered that the applicant was “depressed and very anxious, and is worried about his stay in the country. She also added that [the applicant] is worried about his sister’s immigration status”. He was also “very angry about not having a bank account or passport”.

28. Mr Reekie noted that the applicant was “an experienced cook, with a very good understanding of food and ingredients”. He added that, whilst cooking, the applicant did not use measurements, but determined quantity by eye. Both of the children’s home staff members were concerned about the applicant’s mental health, citing a recent incident when he had stabbed his wrist with a fork, “stating that he wants to die”. The staff members’ conclusions were that, although his physical appearance and expertise in the kitchen suggested that he was older than he claimed to be, he presented as emotional, immature, vulnerable and lacking in confidence and “for those reasons, they are of the view that he is under 18 years of age”.

29. Mr Mukalazi considered that the behaviours and emotional problems cited by the children’s home staff were “common in adolescents between 15-19 years. However, it must be taken into consideration that since coming into the UK [the applicant] has spent, and continues to spend, a significant amount of time around children and young people. As such, he is very much aware of their behaviours”.

30. Mr Mukalazi found that, so far as concerned the applicant’s behaviour at the interviews, “he was generally vague in his answers, and presented as reluctant, subtly obstructive, defensive, angry, and less than honest regarding particular issues. In addition, he was evasive and claimed to have a headache whenever he was challenged, or asked what he perceived as a hard question”.

31. As regards “family composition and social history”, Mr Mukalazi noted that the applicant said he had lived in a small three room rented house with his mother, father and sister. The applicant gave the names of his father and mother, as well as his sister, who he said was 17 years old. He did not know the ages of his parents, nor their physical appearance. His father used to work in Singapore and came home to Bangladesh every two weeks. The applicant did not know what the father did in Singapore. The family came to the United Kingdom on holiday on a direct flight from Bangladesh. He claimed to have “no recollection of the day before the family left Sylhet or what airline they boarded, as to him all aeroplanes look the same”. He could not remember how long the flight was or what it was like nor did he have a recollection of passing through immigration and customs. The family went to stay in a house in London, where they spent a month. On the day the parents disappeared, they had spent time in a park with them, before taking a taxi to a mosque. The parents asked the applicant and his sister

to sit down and promised they would come back for them “but they did not”. They found a man who spoke English and Bengali, who tried to find the parents and then took them to his uncle’s house. The applicant did not remember how long he lived with this person; but a time came when they could not live there anymore and the man’s uncle “contacted social services and they started living in a care home in Birmingham”.

32. The applicant was “visibly emotional when talking about his parents”. He said he would not hesitate to go back to Bangladesh if he knew they were there. He did not consider that he or his parents had any enemies in Bangladesh or were in any sort of danger there. The applicant became “visibly excited when he was shown the Bangladesh flag, which he recognised instantly”. He was, however, unable to describe his home town in any detail, stating that he did not remember any landmarks or whether the roads were made of gravel or tarmac.

33. Mr Mukalazi noted from social care records that the applicant had engaged in “various forms of risk-taking behaviour”. This included an incident in April 2008 when, while staying at Chamberlain Road Children’s Home, the applicant was the subject of a police investigation following an allegation of conspiracy to rape. The applicant and two adult males had allegedly intoxicated and sexually assaulted two young females, who were “well-known” to the applicant. Another incident recorded that the applicant had “inappropriately touched a female staff member’s hand whilst being transported in a car”. The applicant’s schoolteacher reported that the applicant “had told another girl that he would like to be more than friends, and that he was looking for someone to love and look after him. She added that on another occasion, [the applicant] had turned up to school covered in love bites, and had disclosed that this had been done by his girlfriend in West Bromwich. At around the same time, [the applicant] informed the school that a girl at school had asked him for sex”. Mr Mukalazi also noted that the applicant had in the past “admitted using illegal substances including smoking cannabis”. Under this heading, Mr Mukalazi assessed the applicant as being 16-18 years of age in April 2009, when the “risk-taking behaviours” were most prevalent.

34. Under “general developmental consideration” Mr Mukalazi noted that the applicant said his mother was his main carer, and said that he did not socialise with schoolfriends “due to the distance between the school and their family home”. Mr Mukalazi noted what he considered to be a disparity between this detail and the applicant’s inability to remember other details regarding his neighbourhood. The applicant told Mr Mukalazi that he and his sister “attended a fee-paying school and in his opinion, they lived a comfortable life”. The applicant said he did not do any chores at home as his mother did all the work; but otherwise he was considered to be “very evasive about questions around his life in Bangladesh”.

35. Under “education”, Mr Mukalazi noted the applicant’s teacher’s concerns regarding the applicant’s mental health and that he “appeared to be frustrated by the behaviour of the children at school, and seems to prefer the company of adults”. In her view, the applicant was “older than he claims to be, and she believes that he is struggling to fit in at school because of his age”.

36. Under “life experience, independence and self-care skills”, Mr Mukalazi contrasted the applicant’s evidence about household chores in Bangladesh with the applicant’s observed “high level of skill” in the kitchen where he had an “exceptional ability preparing a variety of meals”. This information came from Ms Laura White, who had observed him.

37. Mr Mukalazi then turned to “health and medical assessments”. He noted that a dental assessment undertaken by Dr Birch in June 2008 revealed that the applicant’s third molars (or wisdom teeth) were then assessed to have “emerged by 50% on both sides of his upper jaw, and that one third molar

had 25% emerged on right hand side of his jaw". On 7 April 2009, Mrs Haddon had undertaken a medical examination of the applicant at the Kings Heath Dental Practice in Wolverhampton. This revealed that the applicant "has a full adult dentition, with all four wisdom teeth erupted". Mrs Haddon considered that the applicant's wisdom teeth "had been present for a significant amount of time, and as such refused to treat him as a minor at the surgery. She stated that she was convinced that [the applicant] was older than 18". Mr Mukalazi then noted that on 13 August 2011 the applicant's dentition had been queried again by a dentist at Bilston Health Centre, according to information from Ms Fowler. This dentist "who was unaware of the age dispute regarding [the applicant] stated that to date, he has not seen any 15 year old with a dentition like [the applicant]". All of this suggested to Mr Mukalazi that the applicant "could be at least 21 years of age".

38. After some concluding remarks, Mr Mukalazi's report ends as follows:-

" Taking into account that [the applicant's] age is estimated to be 24 years as per physical development assessment, 19 years as per the 1st dental development assessment, 20 years as per the 2nd dental development assessment, 16years as per social presentation assessment, 18 years as per life experiences assessment, I conclude that [the applicant] is at least 19.4 years old."

E. Credibility

(a) General

39. In *R (AE) v London Borough of Croydon* [2012] EWCA Civ 547, the Court of Appeal accepted that "in the absence of any documentary evidence of AE's age nor any reliable dental or medical evidence, the starting point for the deputy judge's task of assessing the age of AE was the credibility of his own evidence". In the present case, there is dental or medical evidence, the significance of which I shall address in due course. I consider, nevertheless, that it is appropriate to begin by considering the credibility of the applicant. A positive credibility finding may well be determinative, or at least call for the evidence relied on by the respondent to be highly cogent, if it is to negate what would otherwise be the consequence of that finding. On the other hand, problems with an applicant's credibility, albeit not destructive of the reliability of everything he or she says, may result in other elements, such as dental or medical evidence, assuming a greater role in the assessment of age.

40. Before venturing into the details of the evidence touching on the applicant's credibility, however, it is necessary to examine the significance for the purposes of these proceedings of (i) the findings of Immigration Judge Sommerville; and (ii) the subsequent acceptance by the Secretary of State for the Home Department of the applicant's claimed age.

(b) The Immigration Judge's findings as to age

41. Neither party submitted that the Immigration Judge's findings in respect of the applicant were to be regarded as determinative. Plainly they are not. As found by Hickinbottom J in *PM v Hertfordshire County Council* [2010] EWHC 2056 (Admin), the First-tier Tribunal does not have jurisdiction to make a declaration in rem. That Tribunal's jurisdiction being confined to deciding appeals against immigration decisions, Hickinbottom J held it had no jurisdiction to make an age determination. I consider that the same must be true of the First-tier Tribunal's predecessor in this regard, the Asylum and Immigration Tribunal, of which Immigration Judge Sommerville was a member when he determined the applicant's appeal in 2009. Commenting on PM in *R (AS) v London Borough of Croydon* [2011] EWHC 2091 (Admin), the deputy judge found that :-

“ The Immigration Judge’s conclusion that the claimant was an adult was a credibility finding which assisted him in disbelieving the appellant’s evidence and in concluding that his article 8 claim to a private and family life in the United Kingdom failed” [53].

42. That, essentially, was the approach adopted by Immigration Judge Sommerville in respect of the applicant; except that, of course, he used his finding as to age to conclude that the applicant’s Article 8 claim succeeded.

43. Ms Sabic submitted that I should place significant weight on the Immigration Judge’s finding as to the applicant’s age. Mr Beaumont submitted that I should not do so. On this matter, I find Mr Beaumont’s submissions have greater force. My reasons are as follows.

44. Even though the Immigration Judge was, as is common ground, applying a lower standard of proof than the balance of probabilities that I must apply, his credibility findings are still much less than a ringing endorsement of the reliability of the applicant’s account. This is clear from, amongst other places, [44] where the Immigration Judge appeared to regard it as significant that he had been provided with no “correspondence or documentary evidence” to support assertions that the school “which the appellant said she [sic] had attended in Bangladesh had been contacted and they reported to have no one missing of the appellants’ claimed age of name [sic]” and that “enquiries had been made with Emirate Airlines, with whom the appellant stated he travel [sic], but no record has been found. Similarly no record has been found of any visa application made in Bangladesh in him or his family’s name”.

45. At [45] the judge found that:-

“ Although there are inconsistencies between the appellant’s history insofar as it is related by the appellant in his statements and in his interview and the account as set out in Dr Birch’s report, I find that there are not [sic] of such significance that they adversely impact upon the age assessment .”

46. Both here and at [48], it is apparent that the Immigration Judge was, in effect, finding that there was nothing in the credibility of the applicant’s account to preclude the judge from making a finding as to the applicant’s age, which involved preferring the age assessment of Dr Birch to the two age assessments of Birmingham City Council. I will turn to the issue of the judge’s use of Dr Birch’s report in a moment. First, however, it is necessary to observe that the Birmingham age assessments before the Immigration Judge were, it is common ground, those prepared by Mr Beaumont. It is not part of the present respondent’s case that Mr Beaumont’s assessments of age should carry any material weight. On the contrary, in his evidence to me, Mr Singh accepted that, at the time Mr Beaumont made his assessments, he was not suitably qualified to do so. In short, the criticisms levelled at the assessments in [38] and [39] of the judge’s determination were sound.

47. Accordingly, much turns upon the Immigration Judge’s reliance upon the 2008 age assessment of the applicant, undertaken by Dr Birch.

(c) The age assessment of Dr Birch

48. In his determination, the Immigration Judge made it clear that he was aware of criticisms levelled at Dr Birch’s methodology:-

“ 41. The respondent did not accept the conclusions of Dr Birch and in the refusal letter dated 29 October 2008 gave reasons why it was rejected which was that Dr Birch’s methodology was criticised

by an expert instructed by the respondent in the case of M & R v London Borough of Lambeth [2008] EWHC 1364 (Admin) 20 June 2008.

42. In response to the foregoing Dr Birch has produced an addendum to her report dated 1 December 2008. She refers to the case of M & R and sets out her understanding of the judgment. She also expands on her methodology as to X-rays and dental records.

43. Having considered M & R I see that case [sic] Bennet J declined to determine as a preliminary issue the contention by the local authority that Dr Birch's methodology was unscientific and unreliable.....

48. I am not satisfied that the respondent has given a sufficient reason why the first age assessment found that the appellant was 16 and the second age assessment concluded that he was 18. As between the first age assessment and the expert opinion of Dr Birch I prefer that of Dr Birch because of the concerns I have expressed above in respect of the first age assessment. Dr Birch has impressive professional credentials. Her methodology has not, as contended by the respondent been subjected to judicial criticism. I accept her conclusion as to the age range of the appellant namely that he was born on his stated date of birth of 28/12/95 and is therefore 13 years old ."

49. Since the Immigration Judge made those observations in February 2009, matters have moved on. Dr Birch has been criticised in a judicial context in a number of cases, including R (WK) v Kent CC [2009] EWHC 939 (Admin), R (R) v Croydon LBC [2011] EWHC 1473 (Admin), R (KN) v Barnet LBC [2011] EWHC 2019 (Admin) and R (MWA) v Secretary of State for the Home Department and Birmingham City Council [2011] EWHC 3488 (Admin). In several of these cases, the Court strongly preferred the evidence of Dr Stern to that of Dr Birch. This is noteworthy, given that the addendum to Dr Birch's report, relied on by Immigration Judge Sommerville, concerned criticism of Dr Birch's methods made by Dr Stern.

50. In the present proceedings, it was accepted on both sides that Dr Birch's statistical methodology was problematic. It was, however, the applicant's case that, in the light of what is now a general consensus as to the unreliability of Dr Birch's statistical methods, weight could nevertheless be placed upon other aspects of her report. However, in R (R) , Kenneth Parker J did not consider that what one might describe as such a "blue pencil" approach could be taken to Dr Birch's report, so as to enable her statistical methodology to be ignored. Having explained his concerns as to that methodology, Kenneth Parker J considered:-

" 52. That creates a problem in the context of this particular case. I do not doubt, nor did Dr Stern, that Dr Birch has very great experience in working with children and, in particular, with adolescents and therefore has accumulated over a number of years very considerable experience and expertise that would bear upon her credibility as an assessor of the age of such young persons. If Dr Birch had employed what I might call conventional techniques for assessing age, her evidence would have carried very great weight. However my concern is that Dr Birch, on the basis of the evidence that she gave to the court, has in my judgment an erroneous confidence in the accuracy and reliability of the statistical methods that she has employed. That misplaced confidence undermines the other evidence that she has given. It appears to me that that confidence leads her to rely primarily upon her statistical methods. Therefore she is very likely to be biased in her assessment of age by reason of that misplaced confidence. Therefore it seems to me that I must approach with very great caution the conclusions that she has reached. In short, I do not believe that Dr Birch's assessment of the age of the Claimant is any more reliable than that of a social worker. Indeed, her assessment, in my judgment, is likely to be less reliable because she places such considerable confidence in her

statistical methods that I conclude, on the basis of Dr Stern's essentially unchallenged evidence, to be not scientifically established and unreliable ."

51. R(R) is not the only recorded instance of problems regarding the interaction between the statistical method adopted by Dr Birch and her clinical assessments. In Beatson J's judgment in MWA we find the following:-

" 70. I did not find Dr Birch's evidence satisfactory. She stated that she accepted that, in the light of R's case, until she had completed more statistical work she had to rely on her clinical assessments and not on her statistical methodology. But she maintained that her method was sound and claimed that she had been given no opportunity in R's case to explain the basis of her statistical methodology as a result of the instructions of the solicitors for the claimants in those cases and this was unfair. Moreover, she stated that Dr Stern's evidence was unchallenged and he was not experienced in adolescent work. I accept Mr Cowen's submission that, if one reads Kenneth Parker J's judgment, there was considerable consideration of the process in Dr Birch's reports and her methodology. It is also clear that she was cross-examined on her method.....

71. Secondly, although Dr Birch stated that, in the light of Kenneth Parker J's decision, she no longer relies on her statistical method, it is of some significance that her most recent report (a) does not clearly distinguish findings in the earlier reports which did use the statistical method from findings as a result of the more recent examination and (b) does not consist of a fresh look at her assessment of the claimant in the light of the fact that the statistical material she used in the earlier reports has been criticised in this way.

72. Thirdly, Dr Birch's approach to a number of the factors in the assessment was unsatisfactory. So, in relation to height, her explanation of why, contrary to her first report, the fact that the claimant had not grown did not affect her original assessment, was unsatisfactory. She, in effect, assessed him as being older than he had said he was in order to explain the absence of growth. Secondly, in relation to facial hair, apart from the contradiction between her evidence and Mr Singh's... her statement that the presence and frequency of shaving is less important than the distribution and nature of the hair differs from her earlier reports gives no explanation for the difference... ."

52. Ms Sabic relied upon the following passage from the judgment of the deputy judge in R(AS) [2011] EWHC 2091 (Admin):-

" 31. However, it has to be noted that both judgments [Collins J in [2009] EWHC 939 (Admin) and Kenneth Parker J in R(R)] acknowledged Dr Birch's very great experience of working with children and in assessing their ages that she has accumulated over many years that would bear upon her credibility as an assessor of the age of an individual child. In cases where the challenge related to an age assessment following a Merton compliant assessment, a successful challenge to that assessment can only rarely be possible. However, where the challenged local authority assessment has to be treated with caution or even to be disregarded due to the nature and extent of the errors and of the non-compliance with Merton compliant procedures, the assessment evidence of Dr Birch will be given appropriate weight so long as it was not dependent on the faulty statistical methods described and found to be unreliable in Collins J's and Kenneth Parker J's respective judgments in **A** and **R** ."

53. The obvious point to make about the deputy judge's observations is, of course, that, as the extracts from the previous judgments indicate, it has been found not to be possible to hermetically seal the discredited statistical aspects of Dr Birch's reports from those aspects which appear, at first sight, to involve more orthodox methods, such as clinical observation. In the present case, Dr Birch's

report of June 2008 comes from the period when she was still firmly employing her statistical methods. An examination of her report (E27 et seq) makes clear the extent to which those methods infected her overall findings. Thus, at E42, where one finds Dr Birch's general observations and comments, including the applicant's "scores at the following average levels", it is clear that Dr Birch has employed her statistical methodology in relation to "physical growth" and "physical development". These two attributes produce two of the lowest average age calculations in respect of the applicant: 12.7 years and 12.3 years respectively. They are to be contrasted with the average age calculation for "maturation", based on the applicant's dentition, which produced an age of 17.0 years.

54. I therefore find that, in giving significant weight to the age assessment of Dr Birch in making his findings as to the age of the applicant, Immigration Judge Sommerville adopted an approach which he would undoubtedly not have taken, were he to have been hearing the applicant's case today. In her closing submissions, Ms Sabic submitted that even if one were to discount entirely Dr Birch's assessment and the two assessments of Birmingham City Council that were in front of the judge, one would still be left with "a clear finding in favour" of the applicant's credibility. However, as my analysis of the determination has demonstrated, this submission pitches the matter too high.

(d) Conclusions as to the Immigration Judge's findings

55. For the above reasons, I have concluded that the weight to be attached to the finding on age of Immigration Judge Sommerville is limited. That conclusion is reinforced by the following factors. Unlike the judge, I have the benefit of a much more extensive amount of evidence touching on the issue of the applicant's age. In particular, there is the medical and dental evidence, postdating the hearing before the judge. I have also heard extensive oral evidence, including from the applicant, who appears to have made only a minimal contribution in this regard at the hearing before the judge.

(e) The Secretary of State for the Home Department's acceptance of the applicant's age

56. Ms Sabic submitted that I should place significant weight on the fact that, following promulgation of the Immigration Judge's determination, the Secretary of State accepted that the applicant had the date of birth found by the judge. Although I have not discounted this factor in reaching my own finding, I do not consider that it merits the weight for which Ms Sabic contends. The submission that the Secretary of State had a public law duty to make her own assessment of age has to be seen in the light of the fact that, unless a determination can be successfully challenged on the basis that it was wrong in law, the Secretary of State has a public law duty to act in accordance with a decision of the First-tier Tribunal, which has allowed an appeal under section 86 of the Nationality, Immigration and Asylum Act 2002. The fact that the former Asylum and Immigration Tribunal and, now, the First-tier Tribunal have power under section 87 of that Act to "give a direction for the purpose of giving effect to its decision" cannot properly be construed as absolving the Secretary of State from her general obligation of giving effect to appellate tribunal decisions.

(f) My assessment of credibility

57. I turn to my assessment of the applicant's credibility. In doing so, I reiterate that I have had regard to the findings of Immigration Judge Sommerville, albeit that I do not regard them as having the weight contended for by the applicant. I have also borne in mind that, both when giving evidence to me and in his interaction with social workers and other professionals who feature in this judgment, the applicant is, if not still a child, nevertheless a young person, even on the respondent's assessment. His evidence needs to be assessed in that light. It also needs to be assessed against the background of the applicant's life experiences. Even if certain aspects of his account are to be regarded as unreliable

(as to which, see below), it is undoubtedly the case that he was brought to the United Kingdom when a child and has faced various challenges since, not least the attitude of various authorities towards his claimed age, and the legal proceedings that this has generated. I reiterate that, in evaluating the evidence, I have sought to apply the sympathetic assessment described in paragraph [10] above.

58. In favour of the applicant's credibility is the fact that he has consistently asserted a date of birth of 25 December 1995, throughout the many interviews he has undergone since arriving in Birmingham in December 2007. Although the applicant's provision of detail regarding his life in Bangladesh has varied, it is also a common thread that he lived in Sylhet with his mother and sister, went to school with his sister there, had a father whose employment was in Singapore but who visited the family regularly, and that the family came together to the United Kingdom in late 2007. Also consistent is the applicant's description of how he came to be abandoned by his parents in a mosque in Birmingham.

59. I also take account of the evidence of Dr Newth. Both Counsel agreed she was an impressive witness; a view which I endorse. Dr Newth's diagnosis of depression in the applicant may well account for his inability to answer questions, which his interlocutors from various local authorities considered he could, and should, have answered substantively, or in more detail.

60. I am, furthermore, mindful of the witnesses who have spoken positively of the applicant, including the applicant's sister, ZA, whose own date of birth of 1 January 1994 was accepted by Immigration Judge Sommerville and, subsequently, by the Secretary of State, and who has provided a short statement, dealing with events after she and the applicant arrived in the United Kingdom. Mr Bourne described ZA as a "shadowy figure", so far as the present proceedings are concerned. I agree that her evidence is somewhat exiguous. As a result of the rule 60 amendments made to Immigration Judge Sommerville's determination, it is apparent that ZA's determination from him was essentially in the same terms as those relating to the applicant. There is, thus, nothing that can be said to constitute a ringing endorsement of her credibility, just as there is no such endorsement of that of the applicant.

61. There are, however, some troubling aspects regarding the applicant's credibility, notwithstanding all the caveats described above. Some of these concern the age assessment of 9 September 2009 carried out by Mr Singh and Mrs Bazurto of Birmingham City Council.

62. Ms Sabic established in cross-examination of Mr Singh that no appropriate independent adult was present at the interviews with the applicant, undertaken by Mr Singh and Mrs Bazurto in 2009. This was because, at the time, Birmingham City Council did not have a policy of requiring the participation of such a person. Mr Singh said, correctly, that the requirement was not one of the original Merton guidelines. Nevertheless, Ms Sabic was, I consider, entitled to point to the absence of such a person, as an issue going to the weight to be placed upon the Birmingham assessment. By the same token, she was right to point to the absence of any notes of the interviews. Mr Singh said that these had not been supplied because they had not been asked for by the respondent.

63. That said, Mr Singh's experience as a social worker is considerable, amounting to more than twenty years. He has been found in previous age assessment proceedings to be a witness whose evidence deserves weight. No criticism was levelled on behalf of the applicant at Mr Singh's professionalism (or, for that matter, that of Mrs Bazurto).

64. I accordingly consider that regard can properly be had to this passage in the assessment, describing a home visit on 28 April 2009:-

“ The school was in the Meera Bazar district of Sylhet but [the applicant] could not remember the name.

In previous interviews [the applicant] and his sister had stated they both attended Jamiya Hatim Ali School. According to [ZA] this is a secondary school. This school was contacted by the previous Social Worker and the school had no record of [the applicant] or [ZA], [the applicant’s] sister.

Now [the applicant] states he cannot recall the name of his school and the sister states her school was in an area called Uposhor, Sylhet....

I asked [the applicant] his view as to why he and his sister were not known at Jamiya Hatim Ali School? His reply was that they were taken off the roll when they left. I said schools would still have a record of them attending. [The applicant] did not offer a response other than he does not know .”

65. In oral evidence, the applicant gave what, in effect, was the same school name, although he then said that, after his parents brought him here, he had forgotten everything, owing to the situation he had gone through, which made him stressed. This was why he could not remember the names of any of his friends at school.

66. Ms Sabic did not take issue with the statement by Birmingham City Council that they had contacted Jamiya Hatim Ali School. In any event, I see no reason to doubt the truth of what is said in Mr Singh’s age assessment.

67. The applicant’s recorded response, to the effect that he and his sister were taken off the roll when they left, strikes me as an odd thing for a 13 year old boy to know (or allegedly know), particularly given the vagueness of much of the rest of the information proffered by the applicant regarding his life in Bangladesh. It also strikes me as inherently implausible, even making allowance for relevant cultural and administrative differences between the United Kingdom and Bangladesh. In short, the evidence points strongly towards the applicant and his sister giving Birmingham deliberately false information. No explanation has been advanced for this, other than that their behaviour was designed to frustrate attempts by the authorities to establish who they were and how old they were.

68. This segues into the finding at [44b] of Immigration Judge Sommerville’s determination, where he noted that the Secretary of State stated that “enquiries have been made with Emirate Airlines, with whom the appellant stated he travelled, but no record has been found. Similarly no record has been found of any visa application made in Bangladesh in him or his family’s name”. The Immigration Judge rejected this evidence on the basis that he had not been provided with “correspondence or documentary evidence in support”. This led him to conclude that he could not be satisfied “that full and complete enquiries had been made”. From my wider and later vantage point, I do not take the same view as the Immigration Judge. On the contrary, the evidence before him strikes me as another incidence of the applicant and his sister wishing to put the United Kingdom authorities off the trail leading back to Bangladesh.

69. By the same token, even making all previously described allowances, the applicant’s evidence about coming from Sylhet is unsatisfactory. At one point, although not in his oral evidence, he had said that his home was a long way from school, which contrasted with the applicant’s inability to say whether the roads he travelled were tarmacked or merely laid with gravel.

70. I also take account of the evidence of Ms Bowland, that UKBA had made enquiries in an attempt to verify the account being given by the applicant and his sister of their background in Bangladesh, which included going to the alleged school, but without success.

71. There are also instances recorded by various professionals, which call the applicant's credibility into question. At C142, a weekly report from Brooklands Children's Home in March 2011, records the applicant as telling staff that he wanted to "kill himself, as his girlfriend finished with him". This was on 12 March. On 13 March, he was observed to spend "a lot of time crying when he woke up, and would not say why. Later he told staff it was because his girlfriend had finished with him".

72. When this was put to the applicant in cross-examination, he said it was "a joke" and "not true". The terms of the report, however, give no inkling that the applicant gave this answer (on two separate occasions) in a humorous manner.

73. At E258, in a weekly report from Brooklands of January 2011, it was recorded that the applicant "has been advised about love bites seen on his neck and about sexual health". The applicant denied that this was true. He said that when he went to school, the effect of his school tie on his soft skin had caused these marks. Again, it is difficult to accept that professional caring staff would confuse what they said they saw with the chaffing effect caused by a school tie.

74. The finding regarding incorrect information being provided to the authorities about the applicant and his sister in Bangladesh leads me to the issue of the abandonment of the children in Birmingham by their parents. Ms Sabic criticised the respondent and, in particular, Mr Mukalazi for wrongly assuming that the applicant had not been abandoned by his parents, when the evidence was plainly to the effect that the applicant had no contact whatsoever with his parents and that, regardless of the circumstances, they were not around and have not been since the end of 2007. One of the reasons it is necessary to address the issue of abandonment is because there is a suggestion that the applicant's undoubtedly small stature may have been caused by the trauma he experienced of being unexpectedly left with his sister at the mosque in Birmingham.

75. In Mr Singh's assessment (D42) we find this:-

" 11. Both [the applicant] and his sister have given a detailed address in Sylhet - there have been some variations in the house and road numbers - but the people, Mr Miah, Mr Fiaz and Mrs Begum, who volunteered to care for them, have made no attempt to contact the parents or pass these details on to the Bangladeshi Embassy, Consulate or any other agency to unite [the applicant] and [ZA] with the mother at least, given the father works in Singapore; instead, they have taken the siblings to solicitors and the UKBA to register for immigration; home visits were made to Mr Fiaz, Mr Miah and Mrs Begum but no one was at home. A note was left for them to contact me as soon as possible to discuss how and why they volunteered to care for [the applicant] and his sister. Mr Miah rang me and said he did not accommodate [the applicant] and [ZA] but took them to an elderly relative, Mr Fiaz. Mr Miah denies any relationship to [the applicant] and [ZA] or any previous knowledge of the family. However, it has been Mr Miah who has been active in seeking legal representation, immigration application to the UKBA in Liverpool and directing others to provide accommodation for the brother and sister. This is another example of people not being open and honest as to the true events of [the applicant] and [ZA] being in the UK.

12. Given that there are no other children in the family, no grandparents and no extended family, it seems inconceivable that mother would [completely] desert her only offsprings in a distant land with even less familiar people and surroundings. If the parents wanted to leave [the applicant] and [ZA] in the UK for a better standard of life, surely the best place to leave them would have been with the family they were staying with in London. According to the case history [the applicant] and his family were picked up by friends from London Airport ."

76. Mr Singh's experience in dealing with unaccompanied asylum-seeking minors has to be borne in mind, when assessing that passage and also the following passage from the same report:-

" When [the applicant's] parents deserted him and his sister, he accepted support from a stranger very readily and lived with this man for a number of months. This person did not request the assistance of any statutory agency until he was going abroad to Bangladesh. This is a frequent scenario given by 'carers' who look after unknown and unrelated 'abandoned' minors ."

77. Standing back and looking at the evidence overall, it strongly suggests that the applicant's coming across Mr Miah was not an accident at all but part of a pre-arranged plan involving Mr Miah and the applicant's parents. The applicant's account of how he came across Mr Miah is difficult to reconcile with this finding, although it is not inconceivable that Mr Miah would have been on hand to encounter the applicant and his sister, as if by accident.

78. However, the applicant told me in oral evidence that he would have liked someone to help him locate his parents in Bangladesh. If that was true, it is to say the least difficult to see how it can be compatible with what is, at best, unhelpful and, at worst (and as I have found), positively misleading information given to the authorities in the United Kingdom about the applicant's circumstances in Bangladesh. It is also difficult to reconcile with the fact that, as Mr Bourne pointed out, there is no evidence that the applicant has asked any of those in the United Kingdom who have been representing his various interests for help in locating his parents.

79. In making these findings, I do not ignore or underestimate the undoubted fact that the applicant has been without day-to-day physical contact with his parents (in particular, his mother) since the end of 2007. However, I find that it is more likely than not that the applicant was fully aware of what was about to happen, when he arrived in the United Kingdom with his parents.

(g) Conclusions on credibility

80. In conclusion, I agree with Mr Bourne that, although the problems identified with the applicant's credibility are not such as to destroy the reliability of everything that the applicant says, they are such as to require one to look carefully at the remainder of the evidence, in order to reach a conclusion as to the applicant's age. In short, the applicant's own evidence as to his age is in no sense determinative.

G. The Dental Evidence

81. Whilst acknowledging the limitations of dental evidence in fixing the age of a person, Mr Bourne submitted that, in the present case, dental evidence concerning the applicant was the "clearest area of the evidence". Even applying "wide confidence limits" in respect of such evidence, he contended that the dental evidence put the applicant "in serious difficulty". By contrast, Ms Sabic submitted that the dental evidence should be treated with caution and the evidence of the dentist, Mrs Haddon, who had seen the applicant in her surgery on 7 April 2009, should be afforded "minimal weight". I have come to the conclusion that the dental evidence in this case is of substantial significance. My reasons are as follows.

(a) Dental examinations of the applicant

82. There is nothing to indicate that Mrs Haddon had any preconceptions about the applicant, other than that he was brought to her as a child. In her letter of 8 April 2009 to Birmingham City Council, Mrs Haddon records the applicant's claimed age as 14. In fact, on his asserted date of birth of 25

December 1995, he would have been just over 13 years and 3 months old, although, as we shall see, this is not helpful to the applicant. Upon inspecting the applicant's mouth, Mrs Haddon found there was "full adult dentition, including presence of four wisdom teeth, all well erupted. There is evidence of attrition on posterior teeth, widespread staining on all teeth, consistent with smoking or betel nut chewing". On the basis of this examination Mrs Haddon said that the patient was, in her view, "in his early 20s, certainly not aged 14 as he claims, as wisdom teeth rarely erupt before age 18, and there is evidence of wear on these teeth indicating that they have been present for some time". Since she was unable to regard the applicant as a minor, under the age of 18, Mrs Haddon could not treat him on the NHS.

83. As we have already seen, Dr Birch, examining the applicant in June 2008, found some evidence of third molar emergence. At E41, Dr Birch noted, "no extractions. Teeth stained with Betel nut". The applicant "has emerging third molars on both sides of his upper jaw. They are approximately 50% emerged". She found "on the lower jaw he has an emerging third molar (25% app) on the right hand side and has no third molar on the left". Dr Birch estimated the applicant's dental age "at approximately 16-18 years". In making these findings, Dr Birch appears to have applied the findings of Mincer: The ABFO Study of third molar development and its use as an estimator of Chronological age, Journal of Forensic Science Vol.38 No.2 379-390. As previously noted, in her general observations and comments, Dr Birch ascribed an average age calculation for "maturation" of 17.0 years, based on the applicant's dentition.

84. At B19, in Mr Mukalazi's age assessment, he records Ms Fowler as reporting "that the dentist at Bilston Health Centre, who was unaware of the age dispute regarding [the applicant], stated that to date he has not seen any 15 year old with a dentition like [the applicant]". I have mentioned above the letter adduced in evidence by the applicant on 13 March 2013 from the receptionist of First Dental in Walsall. This letter, dated 20 February 2013, refers to a planned initial visit by the applicant to First Dental's dentist, Mr Thompson, for "possible orthodontic treatment under the NHS". It ends by urging the parents/guardian to "contact the surgery to arrange a suitable appointment".

85. In her written closing submissions, Ms Sabic submitted that the applicant "was recently seen and examined by a dentist who treated him as a minor and advised that he ought to have various treatment before he turns 18". It is the case that, in his witness statement of 15 February 2013, Mr Stacey, the applicant's YMCA peer mentor, describes a visit he made with the applicant to a dentist "this week at the City Dental Practice in Wolverhampton", where the dentist told Mr Stacey that she would refer the applicant "to another dentist to be seen about a brace" being fitted before the applicant turned 18. It appears that the letter of 20 February is the result of this referral and that there is no evidence that the appointment with the other dentist has yet taken place. Mrs Sabic's submission must, therefore, relate to the visit described by Mr Stacey.

(b) Professor Rodd

86. The final person to mention in respect of the dental evidence is Professor Rodd. She has twenty years' specialist experience in the provision of dental care of children. She was asked to comment on Mrs Haddon's evidence. Professor Rodd states that an assessment of dental development "is widely used as a reliable approach for determining the age of a child/young person in the absence of known chronological (actual) age" and that it is "acknowledged that dental age correlates more closely with actual age, than any other biological marker, such as skeletal (bone) age. Furthermore, dental development appears to be less affected by other factors such as nutrition and endocrine (hormonal) influences".

87. Having described the methodology of Dermijian as the most reliable technique of dental age determination in current use, Professor Rodd states that this methodology “can only be employed for individuals up to the age of 15 years” because “the third permanent molar is not included in the assessment”.

88. Turning to the presence of wisdom teeth (third permanent molars) in dental age assessment, Professor Rodd has this to say:-

“ The use of third permanent molars (wisdom teeth) in any age assessment must be viewed with caution. The third permanent molar is not an ideal development marker as it is frequently absent, malformed or impacted and is the most variable of all teeth in terms of times of formation and eruption. However, they provide the only biological marker of growth from late-teens until early 20s. By this time period, all other teeth have completed their development and hand-wrist bones have also achieved maturity.

Previous studies have shown that, using Dermijian’s developmental stages, one can be reasonably certain [original emphasis] that an individual is less than or over 18 years of age according to the radiographic appearance of any third permanent molars... This empirical dichotomous cut off has been selected to aid legal cases where the critical question is whether or not an individual is a juvenile (under 18 years). Determination of a precise chronological age, using third permanent molars, carries greater uncertainty and requires the use of complex regression equations. Liversidge and co-workers have also undertaken a number of investigations, using different dental age assessment techniques, to evaluate the contribution to third permanent molars to age determination... They concluded that the likelihood ratio of an individual being at least 18 was 13.6 if the third permanent molar was fully developed .”

A study, relevant to the current case, undertook a dental age assessment of 221 Indian subjects (68 males, 153 females; age range 15-21 years) based on the radiographic appearance of third permanent molars and three different statistical approaches... All three statistical methods correctly predicted an individual as being \leq 18 years in 73.2% of test subjects. The authors concluded that this level of accuracy may be inadequate for courts of law to rule with sufficient levels of certainty about the juvenile/adult status of an individual using third molar development.

In summary, the use of third permanent molars, in determining the chronological age of young people from around 16-24 years, should be used with caution. Adopting a simple threshold of \neq 18 years may offer the most robust approach.”

89. Professor Rodd then noted Mrs Haddon’s examination and findings, before saying this:-

“ In my experience, I have never seen a child under the age of 14 years with the eruption of any third permanent molars. I have, on occasions, seen some children aged 15-16 years where one or more third permanents molar have commenced eruption. A study of tooth eruption in a young Indian population would concur: investigators did not observe any erupted wisdom teeth in a large sample (n=528) of 14-year-olds (Lakshmappa et al., 2011).

In summary, an accurate and detailed dental age assessment, using a well-accepted technique, was not employed for the presented case .”

90. Finally, in terms of variation in dental age according to ethnicity, Professor Rodd, having summarised the literature, stated that, “the available evidence suggests that Asian (including Bengali) children have a similar rate of dental development to their white northern European peers”. Under

“Additional Comments” Professor Rodd said that “reliance purely on dental emergence can be subjective and imprecise”.

91. Although I have not reproduced all the references in Professor Rodd’s report to the relevant academic literature, it is apparent that the report takes full account of that literature. I was specifically referred to C23 of volume 2 of the materials bundle, where there is a paper by Terry Smith and Laura Brownlees, working under the supervision and guidance of UNICEF’s Child Protection Section in New York. The paper, published in 2011 describes itself as a “discussion paper”, wherein the findings, interpretations and conclusions remain those of the authors “and do not necessarily reflect the policies or views of UNICEF”. Furthermore, the text “has not been edited to official publication standards”. At C44 to 46 the authors refer to dental age assessment. The following passages are worthy of setting out in full:-

“ X-rays to look at the existence and development of wisdom teeth are often used for older children, generally those who are between 16 and 22 years of age. This is because with this age group, most teeth are fully developed and only the third molars have some root development left. However, age assessments based on wisdom teeth eruption are thought to be even less precise than other methods, giving a confidence interval of over two years around the estimated age (Kullman, 1995: 01). This method is used by the American Board of Forensic Odontology but is criticised in the Netherlands where dental age assessment is regarded as being unsound because 25% of all people grow no wisdom teeth and because root development of the wisdom tooth demonstrates an extreme degree of inter-personal variation in the maturation process. According to a report by the Committee on Age Determination, ‘about 10% of all girls and 16% of all boys reach the criterion for exclusion before they are 18 years old and they therefore would be unjustly refused treatment as a minor’ (Committee on Age Determination, 2006, in Crawley 2007: 33).....

As with bone examinations, most studies agree that dental age can only provide an indication of chronological age. The Royal College of Paediatrics and Child Health concludes that ‘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 +/- two years or 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 (1999: 14). Colman (1995: 1) concluded that ‘the accuracy and precision of most of the dental methods used during childhood, have been studied and found to be rather low, since many more developing parameters can be used in younger years and the development rate is faster in young children, it is to be expected that accuracy and precision are inferior in older juveniles’. Colman states that most methods of age determination have arrived at a 90-95% confidence interval of about two years around the estimated age (1995:01) .”

92. Finally, on 12 March 2013 I was provided with an e-mail from Professor Rodd to Emma Burgess of the applicant’s solicitors, in which Professor Rodd responded to this question from the respondent:-

“Bearing in mind (i) the references on P3 of your report to what you have seen in practice, and (ii) any reasonable variation between what different dentists might describe as ‘well erupted’ wisdom teeth (and the meaning which you would give to those words), from your clinical experience, how usual or unusual would it be for a child under 18 to have ‘all 4 wisdom teeth, all well erupted’ and showing evidence of wear’ ?”

93. Professor Rodd responded as follows:-

“ My clinical practice, as a paediatric dentist, is predominantly limited to young people under the age of 16 years and I see few 18 -year-old patients. However, I do see children and young people from a wide range of ethnic minority backgrounds and thus I feel I have sufficient clinical experience to respond to the question raised. In my professional opinion it would be extremely unusual for a young person, under the age of 18 years to have all four wisdom teeth, all well erupted and showing evidence of wear .”

(c) The applicant’s criticisms of Mrs Haddon’s evidence

94. Ms Sabic urged me to afford Mrs Haddon’s evidence “minimal weight”. She based this on a number of propositions. The first was that Mrs Haddon did not provide her opinion for the purpose of assessing age. I agree with Mr Bourne that the circumstances in which Mrs Haddon’s evidence came into being in fact give that evidence particular cogency. There is nothing to suggest that she approached her examination of the applicant on 7 April 2009 with any negative preconceptions as to his age. Her reaction, upon examining the applicant, appears to have been entirely spontaneous.

95. Ms Sabic urged me to have regard to the fact that Mrs Haddon had given no reason why she had not appeared at the hearing to give evidence. There is, however, no indication that either side had considered her attendance to be necessary. I was not told that any application had been made on behalf of the applicant to summon Mrs Haddon.

96. It is true that there is said to be some discrepancy between Mrs Haddon’s observation in April 2009 that the third permanent molars were worn and stained and Dr Birch’s observation ten months previously, that these molars had not fully emerged. There are three responses to this. First, regardless of what Dr Birch saw, the mere fact of four fully erupted third permanent molars being observed in April 2009 is itself significant, as regards the applicant’s age at that time. Secondly, although Dr Birch is an experienced paediatrician, she is not a dentist, unlike Mrs Haddon. Thirdly, Dr Birch’s assessments, as we have seen, have been adjudged to be qualitatively problematic, not merely from the statistical point of view. Indeed, in the present case, it is noteworthy that Dr Birch on two occasions (E30) inaccurately recorded the applicant’s stated age on 19 June 2008 as being 13 years 6 months when it was plain that age was 12 years 6 months.

97. Ms Sabic submitted that the fact the applicant had been recently seen and examined by a dentist and was treated as a minor “neutralises” the evidence of Mrs Haddon. I disagree. There is evidence that Mrs Haddon has not been the only dentist to express surprise at the applicant’s dentition (paragraph [37] above). In any event, whilst, as we have seen, there is evidence from Mr Stacey that suggests a dentist who saw the applicant in February 2013 may not have reacted to the applicant’s dentition in the way Mrs Haddon did in 2009, we simply do not know whether that dentist applied her mind to the significance of the applicant’s wisdom teeth. Nor do we know her level of experience or awareness of the relevant literature on the relationship between wisdom teeth and age.

98. The final set of submissions from Ms Sabic on this issue concerned the limitation in using the eruption of third permanent molars as an accurate or determinative method of assessing the applicant’s age. Mr Bourne accepted that limitation but submitted that, even with it, the dental evidence still pointed to the applicant’s being nowhere near as young as 13 or 14 when he saw Mrs Haddon.

99. That is plainly right. Professor Rodd’s statement, referring to Liversidge and Marsden’s research, indicates that a person is thirteen or more times more likely than not to be at least 18, “if the third permanent molar was fully developed”. That supports (if support were needed) Professor Rodd’s

candid answer to the respondent's question, that it would be "extremely unusual" for someone under the age of 18 to have all four wisdom teeth, all well erupted and showing evidence of wear, such as were observed by Mrs Haddon in April 2009. Professor Rodd cannot be said to lack expertise or professional experience in this area. Nor can it be said she has based her conclusion only on her experience of a particular ethnic group. (In any event her report notes that Asian children have a similar rate of dental development to white northern Europeans.)

100. I should also mention that my attention has not been drawn to anything in the evidence, including the relevant literature, to support a proposition that sudden trauma or, indeed, a traumatic upbringing, can cause third permanent molars to erupt earlier than would otherwise be the case. There is, in conclusion, nothing in the applicant's background that might explain the dental evidence, in a way that begins to be compatible with his claimed age.

H. Physical Development

101. It is unquestionably the case that, when one compares the measurements taken by Dr Birch in June 2008 with those taken at Mayfield Medical Centre in or around September 2011 (paragraph [24] above), the applicant had not grown at all since he was examined by Dr Birch. That is, in itself, an important piece of evidence, which was plainly not available either to Dr Birch or Immigration Judge Sommerville, when they made their respective findings regarding the applicant's age.

102. In R (AM) v Solihull Metropolitan Borough Council [2012] UKUT 00118 (IAC), the Upper Tribunal held at [17] that if:-

"...accurate measurements of the claimant's height and weight are available extending back over a considerable period of time (say 18 months or more) and show no, or no significant, change, we think that that is likely to be a sign that the individual is now over about 18 ."

103. There was, in the present case, no dispute between the parties that the fact the applicant had ceased growing by June 2008 had implications for his claimed age then of 12½. None of the materials in Dr Birch's report, such as her Bengali growth chart, suggest Bengali boys stop growing at that age. Both sides, nevertheless, accepted that there could be medical or other explanations for this unusual developmental history. But Mr Bourne said that there was no evidence for such explanations, with the consequence that the applicant must have reached the age of at least 16 when he saw Dr Birch.

104. The only evidence to suggest that the applicant might, in truth, be exceptional in this regard was what Dr Birch noted about the applicant's voice not having broken. Dr Newth told me in oral evidence that it would be unusual for growth to stop before the voice had broken. I have concerns about the evidence of Dr Birch on this issue. All that she records on the matter, following a single meeting with the applicant, is "voice - pitch/break/changes - not broken". By contrast, Mr Singh and Mrs Bazurto in their assessment of 9 September 2009, based their observations that the applicant's "voice is mature and not commensurate to that of a 13 year old teenager" on two home visits of 23 April and 28 April 2009. I prefer their evidence on this issue.

105. What other explanations might there be for the applicant's having stopped growing at 12½? At E36, Dr Birch considered why the applicant might be smaller than the statistics suggest he ought to be. She concluded that he might be "younger than he states, or that he is very short for his age - his height may have been stunted by poor nutrition and neglect in Bangladesh". It is possible that such explanations could also account for why the applicant had (as we know to be the case) stopped growing entirely by the time he met Dr Birch. However, there is no credible evidence, either of poor

nutrition or of neglect in Bangladesh. The general thrust of the applicant's evidence has been that he was properly fed and looked after in Bangladesh, where he and his sister attended a fee-paying school and where they enjoyed a lifestyle that meant the entire family could afford to come to the United Kingdom.

106. We are therefore left with the possibility that trauma might have caused the applicant to stop growing. However, as I have already found, the applicant's account of how he was unexpectedly abandoned with his sister by his parents is not credible. It is, of course, possible that, even though the applicant was aware in advance of a plan to bring him to the United Kingdom, so as to be cared for and educated by the authorities here and thus gain a chance of securing permanent residence, the stress involved in actually undertaking that enterprise caused the applicant to stop growing. But I consider that such a possibility (which in any event finds no real support in the documentary or other evidence) is, in all the circumstances of the case, much less likely than that the applicant is significantly older than he claims.

107. What I would describe as Ms Sabic's fall-back proposition is that, whatever the reason, something "highly unusual" has occurred in relation to the applicant's physical growth. Ms Sabic relied on the fact that "on any assessment, [the applicant] is unusually short, even as an adult".

108. The problem with this proposition is that it takes the applicant's case nowhere. The fact that the applicant is unusually short, even for an adult, could plainly be explained by his growing by less than average amounts until the point when most Bengali boys stop growing. Ms Sabic's observation that "no suggestion has ever been made that it is impossible for growth to cease at age of 12", whilst correct, evades the issue that the standard upon which I must assess the evidence is the balance of probabilities. If, however unlikely on its own terms, there had been strong factors pointing towards such a state of affairs, such as credible official documentary evidence recording the applicant's birth, or other strongly positive credibility findings, then it might be possible to reach a finding on the balance of probabilities that was compatible with the applicant's stopping growing at 12. That is, however, not the case.

I. Behaviour and the Observations of Others

109. The evidence under this heading is, I consider, mixed and does not take matters significantly in either direction. On occasions, the evidence from those tasked with looking after the applicant depicts withdrawn, needy and generally immature behaviour, quite possibly indicative of the applicant's claimed age. At other times, however, such as in the weekly reports from Brooklands Children's Home, the picture is markedly different. Dr Newth, whilst considering that the evidence of behaviour was indicative of the claimed age of the applicant, nevertheless accepted that a link between behaviour and age might be readily disturbed by various factors, such as anxiety and depression, both of which she has diagnosed in the applicant. Although there is evidence of the applicant's spending time with those of or around his claimed age, there is also evidence of his associating with adults, not involved in the children's home, and of smoking tobacco and cannabis and drinking alcohol.

110. A senior residential worker, Mr Reekie, and the applicant's key worker, Ms Fowler, were both of the view that the applicant was under 18. Their views require to be accorded some weight, given the extent of their interaction with the applicant. I also have no reason to doubt the view of Lynn Mallin, of the YMCA, although she has only known the applicant as a support worker since 1 December 2012 and I note that she says she has "not thought much about [the applicant's] age whilst supporting him. I support [the applicant] as I would with any other child or young person in my care; in a way that is appropriate for him. I have never had any concerns about his age or had reason to think that he is

much older than he says he is". I consider that these candid comments of Ms Mallin are indicative of an understandable but nevertheless relatively superficial consideration by her of the issue of his age.

111. Essentially, the same applies to the evidence of Mr Stacey, the applicant's peer mentor. Mr Stacey's main role is to assist in looking after the applicant: "I have never really thought about [the applicant's] age before as this is not really my role as his peer mentor. In my role, I do not judge the children and young people I work with. But I wouldn't say he is any older than he says he is, 17, I wouldn't say he is older than me" [Mr Stacey is 19].

112. By contrast, Mr Mukalazi records the evidence of the applicant's schoolteacher, Ms Watson, who was of the view that the applicant was "older than he claims to be, and she believes that he is struggling to fit in at the school because of his age", being frustrated by the behaviour of the children at the school, and "seems to prefer the company of adults". In similar vein, at E68 there is a letter of 12 November 2012 from Gill Mansell of Steps to Work Walsall Limited, which states that, having worked alongside the applicant for three months "I would be inclined to put his age at 19-20 and after discussing this with colleagues they are inclined to agree".

113. Overall, I consider that the evidence under this heading is modestly favourable to the applicant and is a factor to which I should have regard when assessing the use to be made of the dental and general medical evidence (see Part K below).

J. The Age Assessment of Mr Mukalazi

114. I have, in the course of this judgment, made numerous references to Mr Mukalazi's report. It is that report which forms the basis of the respondent's decision, which is the subject of the present proceedings.

115. Ms Sabic undertook a lengthy and probing cross-examination of Mr Mukalazi. Although, as I shall explain, I find many of those criticisms of his report to be well-founded, I nevertheless consider that Mr Mukalazi is, as Mr Bourne submitted, a committed professional who has brought independent judgment to bear on the case. I do not doubt Mr Mukalazi's good faith. I also consider that Mr Mukalazi's description of the evidence provided by third persons, such as the staff at the children's home, as well as the dental evidence, has not been shown to be problematic in any material respect. In summary, Mr Mukalazi has, I consider, demonstrated a reasonable overview of the relevant issues concerning the applicant's age.

116. That said, there are serious problems with his report. Mr Mukalazi was unable to produce any notes of the various interviews or meetings with the applicant. There was some confusion as to whether Ms Wright had any notes but, in the event, none were produced and, indeed, she was not called to give evidence on behalf of the respondent. Unlike Mr Singh, who said the respondent had not asked him to produce notes and who, in any event, has considerable expertise in conducting age assessments, no adequate explanation has been provided for the absence of any notes to underpin Mr Mukalazi's assessment.

117. A proper age assessment involves putting adverse potential findings to the subject of the assessment, in order to obtain his or her response. There is no satisfactory evidence in the present case that this happened. Mr Mukalazi told Ms Sabic in evidence that he had done this at the end of the interview. I agree with Ms Sabic that, in the light of Mr Mukalazi's evidence, this was not sufficient. Furthermore, Mr Mukalazi did not take account of any of the representations made by the

applicant's representatives on 21 November 2011, as he did not consider that these were relevant to the issue of age.

118. Mr Mukalazi had particular difficulty explaining how the various headings in his report, and the findings made in relation to them, fed into his overall conclusions at B20. In particular, I accept that, important though I consider the dental evidence to be in the present case, Mr Mukalazi appears to have triple-counted this evidence in his "averaging" exercise in the last paragraph of his report. I also share Ms Sabic's inability to understand why Mr Mukalazi chose to place the applicant in the highest age in the range used for physical growth.

119. What Mr Mukalazi described as "risk-taking behaviour" (inappropriate sexual behaviour and alcohol and drug use) appears to have been used as positively supportive of the applicant's age, whilst Mr Mukalazi also appears to have taken those factors as operating against the applicant's claimed age. My own view of those behaviours is that they are mildly indicative, in all the circumstances, of the applicant not being as young as he claims; but they do not point strongly in that direction. Thus, at the end of the day Mr Mukalazi and I are probably not far apart on this particular issue. However, I agree with the criticism levelled by Ms Sabic against the idiosyncratic way in which Mr Mukalazi appears to have reached that result.

120. It was also unorthodox for Mr Mukalazi to have had two meetings with the applicant, without any other social worker being present, let alone an independent adult. I also consider that Mr Mukalazi ought to have had regard to the evidence of the applicant's sister and the fact that she had been found to be of the age she claimed. This is so, even though, if properly analysed, that evidence may not have had a material bearing on the outcome.

121. In all the circumstances, I do not find that I can derive any material assistance from the methodology adopted by Mr Mukalazi in his report.

K. My Assessment of the Applicant's Age

122. It is now time for me to draw together my various findings and reach a conclusion as to the applicant's age. For the reasons I have given, I consider that, although this is not a case where the applicant's credibility has been comprehensively demolished, there are problematic aspects to it in connection with the issue of age, which mean that one must look elsewhere in the evidence for the most probative material relating to that issue.

123. In essence, the problems concern the applicant's attempts, as I find them to be, to hamper the various United Kingdom authorities in their efforts to find information in Bangladesh concerning the applicant, including information as to his age. This is linked with the frankly incredible role played by Mr Miah and the others in Birmingham whom Mr Singh attempted to contact. Ms Sabic submitted that "there was no advantage in support or immigration terms for [the applicant] to say he was abandoned when in fact he was not". Since, on any view, the applicant was a child when he came to the United Kingdom he would, she said, "have had to be accommodated and supported by social services and further, even if he was of the age assessed by [the respondent] he would have been entitled to discretionary leave".

124. That is, with respect, not the case. If the applicant had been, for example, apprehended with his parents in the United Kingdom, and if the parents had no leave to enter or remain, the Secretary of State could have been expected to take steps to remove the entire family to Bangladesh, notwithstanding the minority of the children. Similarly, if the applicant's parents could be located in

Bangladesh or elsewhere and the Secretary of State was satisfied that they could and would provide satisfactory arrangements for the applicant's care, as a child, then the Secretary of State's duty under section 55 of the Borders, Citizenship and Immigration Act 2009 to treat the best interests of the child as a primary consideration may well have resulted in her making arrangements to secure the return of the applicant to his parents, notwithstanding his being a minor.

125. Whilst in no way ignoring the holistic nature of my task, I consider that, in the present case, the most helpful evidence as to the applicant's age is the dental evidence. I shall not repeat here what I have earlier said about that evidence. It is, however, necessary to apply it for the purposes of giving the applicant an age which most properly corresponds with the totality of the evidence.

126. Although Mrs Haddon considered that she was looking at someone who was in his early 20s, I consider that, bearing in mind the need to adopt a "sympathetic assessment" of the evidence (paragraph [10] above) and having regard to the two year range in respect of the eruption third molars, as recognised by, amongst others, Dr Birch, the most appropriate course is to treat the applicant as at the bottom of the range described at paragraph 38 on E41 of Dr Birch's report. This would make him 16 years old when she saw him on 19 June 2008, giving a date of birth of 19 June 1992.

127. As a result, Mrs Haddon would have seen the applicant when he was around two months short of his 17th birthday. This conclusion might be regarded as a generous one to the applicant, so far as concerns the dental evidence. But, significant though that evidence is, I have to make my assessment by reference to the entirety of the evidence in this case. This requires me to take appropriate account of those elements of the evidence, such as behaviour, which may be said to assist the applicant, albeit not to the extent of taking him to, or even close to, his claimed age. The inevitable consequence of my approach is that it is plain from the dental evidence that the applicant is highly unlikely to have been any younger than 16 years and 10 months old when he was seen by Mrs Haddon.

128. This approach is also compatible with and supported by the findings in relation to the applicant's having ceased to grow by the time he saw Dr Birch. Mr Bourne submitted that "the growth evidence in combination with the dental evidence points overwhelmingly ... to the probability that [the applicant] had reached the age of at least 16 when he saw Dr Birch". I agree, albeit that I have decided to find the applicant was exactly 16 when he saw her. That the applicant had stopped growing by the age of 16 is, on all the evidence, much more likely than that he had stopped growing by the age of 12 (see Part H above).

129. Accordingly, I propose to make a declaration that the applicant was born on 19 June 1992.

L. Submissions regarding Relief

(a) Delay

130. Mr Bourne submitted that the proceedings brought by the applicant should, in any event, fail on the grounds of delay. Ms Sabic responded that, having regard to R (Lichfield Securities) v Lichfield DC [2001] EWCA Civ 304, it was not open to the respondent to raise the issue of delay at the substantive hearing. The circumstances which, she said, were identified in the Lichfield case as permitting delay to be raised at this stage were not present.

131. I do not propose to spend much time dealing with this issue. Both submissions, with respect, strike me as misconceived. I consider that the restrictions laid down by the Lichfield case apply only where the issue of delay has been dealt with at the permission stage. In the present case, the grant of

permission by Singh J is entirely silent on the matter on delay. The issue was raised in the summary grounds of defence; but these were filed only after permission had been granted (albeit in breach of directions).

132. Mr Bourne conceded that the delay in this case concerns only the period from 9 March 2012, when the decision based on the age assessment was taken, to the lodging of the claim form on 29 March. Mr Bourne contended that, although within the three month period prescribed by CPR 54, the application was, nevertheless, not brought “promptly” as required by those Rules. Given the history of the matter, including previous pre-action protocol letters served on behalf of the applicant, Mr Bourne’s case was that, once the decision of 9 March had been made, the applicant should not have wasted any time at all serving yet another pre-action protocol but should have immediately proceeded to make his application.

133. Ms Sabic, by contrast, submitted that a further pre-action protocol was still required. I accept that, in all the circumstances, the applicant and his advisors might reasonably have regarded that to be the case. In any event, I do not consider that the delay is, in all the circumstances, material. Mr Bourne has not pointed to any damage to good administration or other legitimate interests of the respondent, which might justify withholding any relief that I might otherwise be inclined to grant the applicant, still less justify refusing to make a declaration as to the applicant’s age.

(b) The lawfulness of the respondent’s assessment etc.

134. Ms Sabic submitted that it was important for the Tribunal to make “a full and reasoned assessment on the lawfulness of the [respondent’s] approach, regardless of what the [Tribunal] decides on chronological age”. In this regard, she prayed in aid what she said had been shown to be the starting point on the part of the respondent, which was that the applicant was to be generally disbelieved and a finding made in his favour only if he was able to disprove a relevant matter. She also submitted that Mr Mukalazi’s evidence to the Tribunal disclosed that he appeared to think he had been instructed in order to see if there was any evidence to support the respondent’s case. She supported this submission by reference to E114, where case notes recorded an employee of the respondent as saying:-

“ I am meeting with the SW and TM team next week to review this case and look at the available evidence gathered in the Core Assessment. We will then arrive at a view as to whether there is a case to say [the applicant] is over 18+. If we conclude there is evidence to support this then we will seek legal advice with a view to discharging him .”

135. Ms Sabic’s final point was that the fact the applicant was never assessed under the Children Act or given a care plan was a serious failing on the part of the respondent, regardless of what his age was ultimately found to be.

(c) Discussion on lawfulness

136. I have considered both sides’ submissions carefully. Having done so, I have concluded that, in all the circumstances, it is neither necessary nor appropriate to do more than make a declaration as to the applicant’s age, in the terms set out above. The effect of that declaration is that the applicant was not a child at the date of Mr Mukalazi’s age assessment, albeit that my finding makes the applicant 16 days younger than the date produced by Mr Mukalazi’s assessment.

137. Although I consider that that assessment is seriously flawed and that the issue of the missing notes is of particular concern, I do not find the respondent or Mr Mukalazi have approached the case

in the way asserted by Ms Sabic. Unlike her, I find nothing sinister in the case notes at E114. On the contrary, they suggest that the status quo as to age would be maintained, unless there was something to indicate that the applicant was over 18.

138. The issue of the care plan was raised as a matter of concern only in closing submissions. Having taken instructions, Mr Bourne submitted that the “looked after child” plan was, according to the respondent, the care plan. Be that as it may, the effect of the interim relief granted by the deputy judge has been to preserve the status quo , so far as the applicant’s treatment by the respondent is concerned (paragraph [7] above) during the period when the applicant was not, on my finding, a child.

139. I do not intend to repeat here all that I have said about Mr Mukalazi’s assessment. In essence, although the relevant evidential elements concerning the applicant’s age were, in effect, identified by Mr Mukalazi, the procedures he adopted and the process by which he arrived at his conclusion as to the applicant’s age were both problematic. What I have had to say about them stands as part of my judgment in this case. It is to be expected that the respondent will draw the necessary lessons, as regards any future age assessments it may need to undertake.

140. In all the circumstances, I do not therefore consider that anything useful would be served by quashing the decision of 9 March or by making a discrete declaration as to the legality of that decision and/or the age assessment.

141. In his closing submissions, Mr Bourne acknowledged that any criticisms I might make of the age assessment and its associated procedures may well have implications for any order as to costs. I invite the parties’ written submissions on that issue and as to the form of the declaration referred to in paragraph [129] above.

Signed Date

Upper Tribunal Judge Peter Lane 26/03/13