Neutral Citation Number: [2008] EWHC 1364 (Admin)

Case No: CO/2130/2007 & CO/2334/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/06/2008

Before :

THE HONOURABLE MR JUSTICE BENNETT

- - - - - - - - - - - - - - - -

Between :

THE QUEEN On the application of **(1) M** **(2) A**	**Claimants**
- and -	
(1) London Borough of Lambeth **(2) London Borough of Croydon** **Secretary of State for the Home Department**	**Defendants** **Interested Party**

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(Transcript of the Handed Down Judgment of
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Timothy Straker QC and Christopher Buttler(instructed by **Bennett Wilkins**) for the **Claimant (1)**
Ian Wise (instructed by **Harter & Loveless**) for the **Claimant (2)**
Charles Béar QC and Jon Holbrook (instructed by **Sternberg Reed**) for the **Defendant (1)**
Bryan McGuire and Peggy Etiebet (instructed by **Croydon Legal**) for the **Defendant (2)**
Ms. Deok Joo Rhee (instructed by **Treasury Solicitors)** for the **Interested Party**

Hearing dates: 4-6 and 9 June 2008

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Judgment

Mr Justice Bennett :

1. The hearing before me has come about as the result of the order of Holman J of 14 April 2008. He ordered, at paragraph 7, that in these judicial review proceedings, the following preliminary legal issues be determined:-

   i) Were the age determinations of each claimant by the respective local authorities contrary to section 6 of the Human Rights Act 1998 in that they were contrary to the procedural protections of Article 6 and/or Article 8 of the European Convention on Human Rights?

   ii) Is the question whether an individual is a child for the purposes of section 17 and 20 of the Children Act 1989 one of precedent fact, which the court may review on the balance of probabilities?

   iii) Was the departure of the London Borough of Lambeth from the decisions of the AIT and the Secretary of State on M's age lawful?

2. Paragraph 8 provided that if he considers it proper to do so the trial judge may decide an issue raised by the London Borough of Lambeth, as follows:-

   > "For the purposes of assessing whether a child is a child, is paediatric evidence of the sort produced by Dr. Michie and/or Dr. Birch in these cases scientifically ill-founded and of no evidential value?"

3. On the morning of 4 June 2008, the first day of the hearing before me, I heard submissions from Counsel as to whether or not, and if so how, I should address the issue set out in paragraph 8 of the order of Holman J (to which I shall refer as "issue 4"). At the end of the submissions I told them that in my judgment issue 4 was not an appropriate issue to be determined within a preliminary hearing and that I would give my reasons in my judgment on the issues specified in paragraph 7 of the order of Holman J, to which I shall refer as issue 1, 2 and 3 respectively. I further told them that I would hear submissions in the directions hearing on Friday 13 June as to what part issue 4 should take in the final hearing. My reasons for this decision are to be found between paragraphs 165 and 173 of this judgment.

Background

4. Both judicial review proceedings were started by foreign nationals, M and A, having arrived in the UK, each seeking asylum. Both claimed they were children, i.e. under the age of 18, and thus were entitled to have performed in their favour the duties said to be imposed upon the London Borough of Lambeth and Croydon respectively under Part III of the Children Act, 1989, particularly section 20. Each local authority through their social workers assessed the age of each claimant as being over the age of 18 years. In both cases the claimants submitted reports from consultant paediatricians, Dr. Michie and Dr. Birch respectively, to the broad effect that the claimant was under the age of 18. Neither local authority was persuaded by these reports. Furthermore, in the case of M only, M appealed to the AIT from the SSHD's refusal to grant him asylum. On 1 May 2007 (but promulgated on 14 May) the AIT determined in that appeal, to which Lambeth was not a party and in which it was not

in any way involved, that M's stated date of birth of 15 December 1989 was correct. If M's birth was in fact 15 December 1989 then as at the AIT's determination he was then 17 years old. In September 2007 the SSHD, the intervener in both sets of proceedings, granted M discretionary leave to remain in the UK on the basis that he was a child (i.e. under 18 years old).

5. As I have said M says that he was born on 15 December 1989. On 1 December 2006 he arrived in the UK from Libya and claimed asylum. His age was disputed by the SSHD. On 14 December 2006 Lambeth carried out an assessment of M and concluded that he was over 18 years old. On 17 January 2007 the SSHD refused M asylum. On 2 February 2007 (it is said) Dr. Michie, a consultant paediatrician, assessed his age as more likely than not as 17. On 2 March 2007 Lambeth, having considered the report, was not persuaded to change its mind.

6. On 13 March 2007 M began judicial review proceedings. After the AIT's determinations, about which Lambeth knew nothing until August 2007, on 16 May a consent order was agreed between the parties that provided for a further age assessment by Lambeth. At M's request on 20 May Dr. Michie responded to questions put by Lambeth. On 12 July Lambeth again assessed M as over 18. On 22 August, by which time M's solicitors had served the decision of the AIT on Lambeth, M asked Lambeth to reconsider his age in the light of that decision.

7. On 12 September Lambeth again assessed M as over the age of 18 years.

8. On 29 February 2008 HHJ Mole QC granted M permission to apply for judicial review on amended grounds, which were filed on 11 April 2008. Those grounds raised for the first time issue 1 (and 2) notwithstanding that M had on three occasions asked Lambeth to reassess M's age through its social workers, whom M now say were not "an independent and impartial tribunal established by law" in accordance with Article 6(1) of the European Convention on Human Rights. It obviously goes without saying that had Lambeth reassessed M as being under 18 in response to M's requests these proceedings would have ended with no point being taken that the social workers were/could not be an independent and impartial tribunal. It does rather stick in this judicial throat that M's solicitors, having specifically requested Lambeth to reassess his age, should then, when the decisions are unfavourable, seek to invoke Article 6(1) i.e. to have declared invalid the determinations of the very persons from whom M sought the determinations not just once but three times.

9. On 13 November 2007 A arrived in the UK from Afghanistan and maintained that his date of birth was 8 April 1992 i.e. 15 years old. On 14 November A applied for asylum and was interviewed on behalf of the SSHD who assessed his age at over 18 years. On 22 November Croydon social workers interviewed A and assessed him as over 18 years. A was referred to the Home Office for NASS support. On 7 December the Home Office confirmed that A was over 18 and that they would provide NASS support until his asylum claim was confirmed. On 13 December A's solicitors wrote a letter before claim alleging three grounds, one of which was that Croydon's determination of A's age was contrary to Article 6(1).

10. On 16 January 2008 Dr. Birch, a consultant paediatrician, assessed A's age to be between 15 and 17 years old, yet calculated to be 15 years 10 months consistent with

his stated age of 15 years 9 months. On 18 January the report was served on Croydon.

11. On 7 March A issued judicial review proceedings. On 17 March Dobbs J ordered a "rolled up" hearing. On 26 March an addendum report of Dr. Birch was served.

12. So far as I know these are the first cases to come before the Administrative Court by way of judicial proceedings in which it is primarily asserted that Article 6 (and Article 8 which Mr. Wise, A's counsel, contended was applicable in this case) of the ECHR is applicable to Part III of the Children Act, 1989, in particular to section 20 and that judicial review cannot cure a breach of Article 6(1). Hitherto this Court has been invited to approach an age assessment by local authorities upon classic judicial review bases. Perhaps the best example is a decision of Stanley Burnton J, as he then was, in R(B) v. Merton LBC [2003] EWHC 1689 (Admin), [2003] 4 All ER 280 (to which I shall refer hereafter as "*Merton*"). In that case the claimant sought judicial review of the decision of the Merton London Borough Council that, whilst he was in need, he was well over the age of 18 years. He claimed that he was under 18, and hence a child, and thus was owed a duty under Part III, in particular section 20. The claimant contended that Merton's enquiries were inadequate, there was procedural unfairness and that Merton simply adopted the conclusions of the Home Secretary. Merton contended that the assessment process was rational, adequate and lawful and could not be impugned. The claimant further contended that Merton's assessment of the claimant's age was a determination of a civil right within Article 6(1) but it was expressly accepted that judicial review of the decision would render the process as complying with the ECHR. The judge thus approached the matter not under the Convention but on traditional, common law grounds.

13. In the course of giving judgment the judge made, with respect, some important observations, between paragraphs 20 and 30 inclusive, as follows:-

> "20. In a case such as the present, the applicant does not produce any reliable documentary evidence of his date of birth or age. In such circumstances, the determination of the age of the applicant will depend on the history he gives, on his physical appearance and on his behaviour.
>
> 21. There is no statutory procedure or guidance issued to local authorities as to how to conduct an assessment of the age of a person claiming to be under 18 for the purpose of deciding on the applicability of Part III of the Children Act 1989.
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> 22. The determination of an applicant's age is rendered difficult by the absence of any reliable anthropometric test: for someone who is close to the age of 18, there is no reliable medical or other scientific test to determine whether he or she is over or under 18. The Guidelines for Paediatricians published in November 1999 by the Royal College of Paediatrics and Child Health states:
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> "In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on.

Moreover, for young people aged 15-18, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be a much as 5 years either side…… Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical, family and social history."

23. Different people living in the same country, with the same culture and diet, mature physically and psychologically at different rates. It is difficult for a layman to determine the age of someone born in this country with any accuracy. A general practitioner is very unlikely to have the knowledge or experience to improve on the accuracy of an intelligent layman. To obtain any reliable medical opinion, one has to go to one of the few paediatricians who have experience in this area. Even they can be of limited help, as in the instant case and is referred to below.

24. The difficulties are compounded when the young person in question is of an ethnicity, culture, education and background that are foreign, and unfamiliar, to the decision maker.

25. Shelter obtained a report on the Claimant from Dr Colin Michie, a consultant paediatrician with a particular interest in investigating physiological changes with age who had conducted over 300 examinations in order to estimate age in the last year alone. He stated:

"It is possible that (B) has provided a correct birthdate. His social history supports this year of birth with some accuracy. Further his height and weight, skin fold thickness, the skin signs seen in young adults and his dental examination were consistent with a chronological age of 18 ±2 years when compared with published charts of these measures (see references). This observation is supported by non-objective assessment of the psychological maturity of the client during the interview. A more narrow error margin is not possible using these methods. The birthdate given to me today by (B) falls within these wide error limits."

26. Mr Latham relied on Dr Michie's report as supporting the Claimant's case. But it equally supports the Defendant's: his range of 18 plus or minus 2 years is also consistent with Ms Rodney's assessment. Indeed, it is more supportive of Ms Rodney's assessment than the Claimant's case, since the median age given by Dr Michie is 18.

27. Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.

28. Given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other.

29. In this context, as in others, it would be naïve to assume that the applicant is unaware of the advantages of being thought to be a child. Draft Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers state:

"Assessment of age is a complex task, which is a process and not an exact science. This is further complicated by many of the young people attempting to portray a different age from their true age."

It advises the decision maker/interviewer:

"It is also important to be mindful of the "coaching" that the asylum seeker may have had prior to arrival, in how to behave and what to say …"

30. The lack of a passport or other travel document may itself justify suspicion, as it did in the present case, particularly if the applicant claims to have entered this country overtly, for example through an airport, in circumstances in which a passport must be produced. "

14. Having referred to “other guidance as to the appropriate procedure” (see paragraphs 33 and 34) and to the Home Office Policy (see paragraph 35), he continued between paragraphs 36 and 40 inclusive as follows:-

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

37. It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.

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

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

taken the stance of the Home Office, its decision would have been unlawful.

40. In fact, however, the evidence satisfies me that the Defendant did make its own assessment. That it did so, and the reasons given for its decision, are inconsistent with the letter of 13 February 2003. The issue is raised by Mr Latham whether in these circumstances the court should permit the Defendant to justify its decision by reference to matters that were not referred to in that letter. ”

15. At paragraph 44 the judge then posed the question whether the information available to Merton was adequate and the decision procedurally fair. The judge accepted that Merton had to give adequate reasons (paragraph 45), that the availability of an informal review procedure did not obviate the need for reasons (paragraph 46), and that a brief statement of the decision is not a statement giving reasons (paragraph 47).

16. At paragraph 48 he said:-

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

17. He then turned to consider the adequacy of the information available to Merton. At paragraphs 50 and 51, he said:-

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

51. Ms Rodney did not make her decision on the basis of the appearance and demeanour of the Claimant alone. It is not suggested that the Claimant was unaware of the purpose of his interview. She took a full family and personal history,

> including the Claimant's educational history. It was not necessary to obtain a medical report, which for reasons stated above would not have been helpful and was unlikely to have been so. It was not necessary for the local authority to provide support for a period of some days or weeks to give the opportunity for others to observe the Claimant, and for him to be observed and assessed over that period, if the information available was sufficient for a decision to be made, which it was."

18. He then continued and found that the procedure was unfair (see paragraph 56) and the decision of Merton was therefore set aside.

19. In the instant cases both claimants seek to go a step further. Each contends that the "domestic" rights under section 20 are also "civil rights" within Article 6(1) ECHR, thus that each claimant was entitled to a determination of their age "by an independent and impartial tribunal established by law", that a determination by social workers employed by a local authority, which has a vested interest in whether (scarce) accommodation has to be provided to the claimant, cannot be either independent or impartial, that judicial review cannot cure such a defective process, and accordingly that the age assessment decision is invalid. The relief sought is a declaration that Article 6(1) has been breached and cannot be remedied by ordinary grounds of judicial review. Each local authority must secure an Article 6 compliant procedure for determining each claimant's age.

20. During his submissions I asked Mr. Straker QC, for M, to elucidate what Article 6(1) compliant regime ought to be set up. The rather tentative answers he gave me were as follows:

    a) The setting up of a tribunal system. Hale LJ, as she then was, adverted to such a course of action in respect of homelessness cases, based on the existence of tribunals in cases involving social security benefits, and housing and council tax benefits and other examples set out in paragraph 82 of her judgment in Adan v. Newham LBC [2002] 1 WLR 2120.

    b) The establishment of referral centres for the purpose of assessing age – see paragraph 8 5.2 – 5.3 of "Better Outcomes: The Way Forward – Improving the Care of Unaccompanied Asylum Seeking Children" (January 2008) – see exhibit 4 of Mr. Bentley's statement of 21 May 2008.

    c) Local authorities instructing an officer of another local authority or a barrister or solicitor as was suggested by Stanley Burnton J in R (Gilboy) v. Liverpool City Council and SSCLG [2001] EWHC 2335 (Admin), which concerned a review by housing officers of the local authority's decision to terminate a demoted tenancy.

21. During his submissions Mr. Béar produced Statutory Instrument 2006 No. 1681, The Local Authority Social Services Complaints (England) Regulations 2006, which came into effect on 1 September 2006 (to which I shall refer hereafter as "the Regulations

of 2006"). The Regulations set out the procedure for the handling of complaints about local authority social services made on or after 1 September 2006.

22. The Regulations apply (see Regulation 2) to a "relevant function" which means, so far as this case is concerned, to a "social services function" within the meaning of section 1A of the Local Authority Social Services Act 1970, which, by virtue of section 1A and schedule 1 of the 1970 Act, includes the whole of the Children Act in so far as it confers functions on a local authority and more particularly to:

> "Functions under Part III of the Act (local authority support for children and families)."

23. Regulation 3 imposes a duty upon local authorities to deal with complaints in accordance with the Regulations. M is undoubtedly a person who is able to make a complaint within Regulation 4. Regulation 7 requires local authorities to resolve complaints informally within 20 working days from the date of receipt of the complaint. Regulation 8 permits the complainant to require an investigation under Regulation 9 if he does not want his complaint to be investigated informally or if he disputes what the local authority say informally. Regulation 8 must be investigated and must keep the complainant informed of the progress of the investigation.

24. Regulation 10 provides that the local authority must send a report of its investigation to the complainant and if well-founded what action it proposes to take. After the complaint has been formally investigated or the period for such investigation has expired without a report on the result of the complaint, Regulations 11 to 13 enable the complainant to require his case to be referred to a 3 person review panel, which must include at least two members independent of the local authority including the tribunal's chairman. The review panel, within 5 days of the date when it was convened must decide whether the local authority dealt adequately with the complaint and notify the complainant and the local authority of its decision. Regulation 13 provides that where the decision of the review panel is adverse to the local authority the local authority must, within 15 days of notification of the decision to it by the review panel, notify the complainant of what action it proposes to take and also provide to the complainant such guidance as to the power of the local commissioner to investigate a complaint under section 26(1) of the Local Government Act 1974 as appears to the local authority to be relevant to the complainant.

Issue 1

25. To resolve this issue I consider I must answer the following questions:-

a) What is the character of the right owed by a local authority under section 20 of the Children Act 1989? This will depend upon its proper construction.

b) Is the character of the right given by section 20 a civil right within Article 6(1) of the ECHR? If the answer is no, then the claimants fail at this stage.

c) If it is a civil right, have the complainants been accorded a hearing by an independent and impartial tribunal established in law? This involves consideration of what has been called "full jurisdiction".

26. I shall now set out section 20 of the Children Act 1989:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned; or
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> (2) Where a local authority provide accommodation under sub-section (1) for a child who is ordinarily resident in the area of another local authority, that other local authority may take over the provision of accommodation for the child within—
>
> (a) three months of being notified in writing that the child is being provided with accommodation; or
>
> (b) such other longer period as may be prescribed.
>
> (3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.
>
> (4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.
>
> (5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.
>
> (6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare—

(a) ascertain the child's wishes regarding the provision of accommodation; and

(b) give due consideration (having regard to his age and understanding) to such wishes of the child as they have been able to ascertain.

(7) A local authority may not provide accommodation under this section for any child if any person who—

(a) has parental responsibility for him; and

(b) is willing and able to—

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him,

objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Sub-sections (7) and (8) do not apply while any person—

(a) in whose favour a residence order is in force with respect to the child; or

(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,

agrees to the child being looked after in accommodation provided by or on behalf of the local authority.

(10) Where there is more than one such person as is mentioned in sub-section (9), all of them must agree.

(11) Sub-sections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section."

27. The foundation of Mr. Straker's (and Mr. Wise's) submissions on the proper construction of section 20 is that a local authority is under an absolute duty, having determined that a person is a child in need in its area, to provide that person with accommodation. A child by virtue of section 105 of the Children Act means a person under the age of 18. A child in need is, by virtue of section 105, to be construed in accordance with section 17(10), which provides:-

"For the purposes of this Part a child shall be taken to be in need if—

> (a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;
>
> (b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or
>
> (c) he is disabled,
>
> and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living."

28. Mr. Straker took me to the decision of the Court of Appeal in R(M) v. Gateshead MBC [2006] EWCA (Civ) 221, [2006] QB 650 (to which I shall refer hereafter as "*Gateshead*"). In that case the claimant, aged 16, was arrested in Sunderland which is outside Gateshead's area. Gateshead, upon enquiry by the police, said it could offer a bail hostel overnight for the claimant before her appearance next day in court. The police were of the view that only secure accommodation for the claimant was appropriate. Gateshead had no secure accommodation. Two secure units in Northumberland and County Durham were not available because they were not appropriately licensed for the reception of PACE children. The nearest unit, appropriately licensed, was in Hull.

29. There were two issues in the case, of which only the second is relevant in the instant cases, namely (I quote from paragraph 15 of the judgment of Dyson LJ):-

> "… whether there is any duty under section 21(2)
>
> (b) on a local authority to provide *secure* accommodation if such accommodation is requested by a custody officer when discharging his or her duty under section 38(6) of PACE, and if so, what is the nature of that duty."

30. The Court of Appeal answered that specific question in the negative – see paragraph 41 of the judgment of Dyson LJ, with which Thorpe and Moore-Bick LJJ agreed.

31. However, in analysing that specific issue Dyson LJ made, in Mr. Straker's submission, compelling observations upon section 20 from paragraphs 32 onwards. Before I set them out it is worth recording the apparently rather unusual positions adopted by counsel for M and for Gateshead. The claimant's counsel primarily contended that section 21(2)(b) did not impose an absolute duty upon the local authority to provide secure accommodation but only one to use its best or reasonable endeavors – see paragraphs 27 to 30 inclusive. On behalf of Gateshead counsel submitted that section 21 (like section 20) did impose an absolute duty but it was a duty limited to the provision of non-secure accommodation. Section 21 had nothing to do with secure accommodation which is dealt with in section 25. Section 17 provided the general duty to which the local authority had some discretion which was to be contrasted with more specific and precise duties such as those contained in

sections 20 and 21 (see paragraph 31). Thus, as Mr. Béar pointed out, it suited Gateshead to contrast sections 17 and 25 with sections 20 and 21 which counsel for Gateshead might have described or portrayed as hard edged duties. Furthermore, as will be seen, both counsel agreed that section 20(1) imposed on every local authority an absolute duty to provide accommodation for any child in need; it was a precise and specific duty.

32. At paragraphs 32 and 33 Dyson LJ said:-

> "32. I find it helpful to start with section 20. Section 20(1) provides:
>
> > "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of –
> >
> > (a) there being no person who has parental responsibility for him;
> >
> > (b) his being lost or having been abandoned; or
> >
> > (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care."
>
> 33. It is common ground that this imposes on every local authority an absolute duty to provide accommodation for any child in need where one of the specified circumstances exists. It is a precise and specific duty. There is no scope for discretion as to whether or not to provide accommodation at all. Thus where it appears to the local authority that there is a child in need, for example, as a result of there being no person who has parental responsibility, the local authority has an absolute obligation to provide some accommodation for that child. Section 20 says nothing about the *type* of accommodation that must be provided: that is left to the discretion of the local authority. But the exercise of that discretion is subject to at least one important restriction. A child who is being looked after by a local authority may not be placed or kept in secure accommodation (as defined in section 25) unless it appears to the authority that the conditions in section 25(1)(a) or (b) are satisfied. These are
>
> > "(a) that (i) he has a history of absconding and is likely to abscond from any description of accommodation; and (ii) if he absconds, he is likely to suffer significant harm; or
> >
> > (b) that if he is kept in any other description of accommodation he is likely to injure himself or other persons." "

33. At paragraphs 36 and 37 Dyson LJ continued:-

> "36. Section 21(1) requires every local authority to make provision for the reception and accommodation of children who are removed or kept away from home under Part V. Part V contains elaborate provisions for the protection of children by means inter alia of emergency protection orders in respect of children who are likely to suffer significant harm if not removed from their homes (section 44) and recovery orders in respect of abducted children (section 50). In my view, what I have just said in relation to section 20 applies with equal force to section 21(1). There is an absolute duty to make provision for the reception and accommodation of children who are removed or kept away from home under Part V, but the local authority has a discretion as to the type of accommodation that it will provide and, in particular, subject to section 25, as to whether to provide secure accommodation.
>
> 37. Section 21(2)(a) imposes a duty on local authorities to receive and provide accommodation for children in police protection whom they are requested to receive under section 46(3)(f). In my view, section 21(2)(a) too imposes an absolute duty on the local authority to provide accommodation, and, in discharging that obligation, it has a discretion, subject to section 25, whether or not to provide secure accommodation. "

34. Mr. Wise submitted, basing himself very much on the facts of his particular case, that A was in Croydon's area, that being an unaccompanied immigrant from Afghanistan section 20(1)(a)(b) and/or (c) were satisfied, and that he required accommodation. He implicitly submitted that section 17(10) was satisfied in A's case. The only real area of dispute was whether A was a child i.e. under the age of 18. Thus if A was under 18, Croydon's duty to accommodate A immediately arose. Croydon's duty, per *Gateshead,* was specific. The only possible area of discretion might be what type of accommodation should be provided to A.

35. However, during the hearing before me the detailed analysis of section 20 was undertaken by Mr. Béar, Mr. McGuire, Ms. Rhee and thereafter by Mr. Straker in his reply. Mr Béar submitted that the true construction of section 20 posed a single composite question which had significant judgmental components. Section 20 is aimed to provide support for all children, whether unaccompanied asylum seekers, teenage tearaways, children who are subject to abuse and/or violence by their carers, and children generally who came within the ambit of the section. It is not therefore appropriate to adopt the factual matrix urged by Mr. Wise as in some way aiding or influencing the interpretation of section 20. The court must look at the scheme laid down by section 20 as a whole and not in the context of a particular set of facts.

36. Mr Béar submitted that the purpose of section 20(1) is to provide accommodation for a group of children who are in need and who require accommodation as a result of coming within one of the sub-sections (a), (b) or (c). The purpose of sub-section (3) is to provide accommodation for children in need who are over 16 and whose welfare the local authority consider is likely to be prejudiced if they do not provide him with

accommodation. Sub-section (4) is aimed at any child in the local authority's area (who is not in need – the sub-section specifically makes no mention of "child in need") if they consider that that would promote the child's welfare, even though a person with parental responsibility for him is able to provide him with accommodation. Sub-section (5) is directed towards providing accommodation in a community home for any person between 16 and 21 if the local authority considers it would promote his welfare. So, Mr. Béar submitted that it can be seen that section 20 is directed at children, of whom some must, to qualify for support, be "in need" whilst some do not, depending upon which sub-section applies.

37. Mr. Béar submitted that section 20 involved significant professional judgment. He prayed in aid the observations in *Merton* of Stanley Burnton J. Section 20(1) is directed at "any child in need". Section 17(10), which defines a "child in need", involves considerable professional evaluation. The structure of section 20(1) involves defining a group who may or may not require accommodation. A "child in need" is not necessarily synonymous with a child in need who requires accommodation. Moreover, sub-subsection (c) requires the local authority to assess whether the person who has been caring for the child in need is prevented from providing him with suitable accommodation or care.

38. Sub-section (3) also provides for an evaluative judgment as to whether the child is in need and whether his welfare will be seriously prejudiced if no accommodation is provided. Similar evaluative judgments have to be made under sections (4) and (5) in respect of children (who are not in need).

39. Mr. Béar also submitted that sub-section (6) is an intrinsic part of the local authority's evaluative judgment which must be made before any duty to provide accommodation under section 20 can arise at all. Not only do the child's wishes and feelings have to be ascertained but also due consideration must be given to his wishes and feelings (having regard to his age and understanding) as they have been able to ascertain. All that is subject to the phrase "so far as is practicable and consistent with the child's welfare".

40. Sub-section (7), he submitted, is mandatory. Thus, to take an example I gave during submissions, if a child breaks off relations with a family relative, for instance an uncle or aunt, who has been caring for him, and goes to a local authority seeking accommodation, and if in the course of the investigation of the local authority it is discovered that one of his parents (whom he may not have seen or been in touch with for, perhaps, most of his childhood) has parental responsibility and is willing and able to provide accommodation or arrange accommodation for him, objects, then the local authority cannot provide accommodation for that child under section 20 even if the local authority consider that it would safeguard or promote his welfare to do so.

41. Sub-section (7) does not apply, by virtue of sub-section (9)(a) if (to adopt my example) the aunt or uncle had a residence order in her or his favour, and agreed to the child being accommodated by the local authority. Absent such agreement, sub-section (7) does apply and the local authority could not accommodate the child.

42. Mr. Béar took me to a very significant authority namely R(G) v. Barnet London Borough Council, R(W) v Lambeth Borough Council, R(A) v. Lambeth Borough Council [2003] UKHL 57, [2004] 2 AC 208 (to which I will refer hereafter as

"*Barnet*"). The facts are set out in the headnote, which I will not repeat. The first two claimants claimed that the local authorities were obliged not only to provide accommodation for the children but for them (as mothers) as well, pursuant to section 17(6) or section 23(6) of the Children Act 1989. In the third case the claimant claimed mandamus against the local authority compelling it to provide suitable accommodation pursuant to section 17(1).

43. The House of Lords were divided as to the construction of section 17(1). Lord Hope of Graighead gave the leading speech for the majority with which Lord Millett was in full agreement and gave a short speech. Lord Scott of Foscote gave a speech concurring with the majority in dismissing the claimants' appeals. Lord Nicholls of Birkenhead dissented in dismissing the appeal of A. Lord Steyn agreed with Lord Nicholls.

44. Lord Hope subjected section 17 and other sections in Part III of the Children Act 1989 to a detailed analysis between paragraphs 66 to 104 of his speech. In my judgment it provides very considerable assistance in the instant cases. I shall only refer to those passages in the speech of Lord Hope to which counsel directed me, save for a passage at paragraphs 75 and 76:-

> "75. The defendants in each of these three cases are London boroughs, so they are the local housing authority as well as the local social services authority for their areas. It is in their capacity as the local social services authority that they are charged with the responsibility of performing functions under Part III of the 1989 Act. The cost of providing accommodation for children in need under Part III must be met out of the funds which are set aside in their accounts for the provision of social services. As I have mentioned, the provision of accommodation is only one of the many services which may be provided in the performance of the general duty which is owed by the local social services authority under section 17(1). It is an inescapable fact of life that the funds and other resources available for the performance of the functions of a local social services authority are not unlimited. It is impossible therefore for the authority to fulfil every conceivable need. A judgment has to be exercised as to how needs may best be met, given the available resources. Parliament must be taken to have been aware of this fact when the legislation was enacted.
>
> 76. That is the background to the question of law which lies at the heart of all three appeals. Does section 17(1) require a local social services authority to meet every need which has been identified by an assessment of the needs of each individual child in need within their area? For the appellants it is maintained that, once there has been an assessment of the needs of an individual child in need, there is a specific duty on the local social services authority under this subsection to provide services to meet the child's assessed needs. It follows that the child has an absolute right to the provision of residential accommodation, if this is the need which has been

identified by the assessment. If this approach is right, neither the cost of providing these services nor the availability of resources can play any part in the assessment of the child's need by the local social services authority or in its decision as to whether, and if so how, it should meet that need. ”

45. I shall now set out paragraphs 79 to 82 inclusive, and 85-90 inclusive of Lord Hope’s speech:-

> “79. The duty which has been placed on the local social services authority by section 17(1) to provide a range and level of services appropriate to the children's needs is described by the subsection as a "general duty". This duty is said by the opening words of the subsection to be in addition to the other duties imposed on them by Part III of the Act. And section 17(2) provides that, for the purpose principally of facilitating the discharge of their general duties under that section, every local authority shall have the specific duties and powers set out in Part I of Schedule 2. The duty on which the appellant seeks to rely in this case is not one of the other duties imposed on the respondents by Part III of the Act, nor is it one of the specific duties set out in Part I of Schedule 2. Her case rests therefore fairly and squarely on the propositions that the general duties described in section 17(1) are owed to each and every child in need individually, and that they are enforceable against them by or on behalf of each individual child accordingly. The contrary view is that section 17(1) is designed to set out the general principles which the local services authority must apply when providing services to children in need in their area.
>
> 80. An examination of the range of duties mentioned elsewhere in Part III of the Act and Part I of Schedule 2 tends to support the view that section 17 (1) is concerned with general principles and is not designed to confer absolute rights on individuals. These other duties appear to have been carefully framed so as to confer a discretion on the local services authority as to how it should meet the needs of each individual child in need.
>
> 81. Section 18(1), which imposes a duty to provide day care for pre-school children, provides that the local authority shall provide such day care "as is appropriate". Section 20(1), which imposes a duty to provide accommodation for a child for whom no person has parental responsibility, who is lost or abandoned or whose carer has been prevented from providing him with suitable accommodation or care, and section 20(3), which imposes a duty to provide accommodation for children over sixteen, leave important matters to the judgment of the local authority: "appears to them to require accommodation" in section 20(1); "whose welfare the authority consider is likely to be seriously prejudiced" in section 20(3). So too does section

22, which imposes a duty on the local authority (described in the side-note, but not in the section itself, as a "general" duty) before making a decision with respect to a child whom they are looking after to ascertain the wishes and feelings of the child and various other people "so far as is reasonably practicable" and to give "due consideration" to such wishes and feelings as they have been able to ascertain. So too does section 23, which imposes a duty on the local authority to provide accommodation for children whom they are looking after, as section 23(2) sets out a range of options which includes in subsection 2(f)(i) such other arrangements as "seems appropriate to them". The duties in Schedule 2 follow the same pattern. The duties in paragraphs 6 and 7 also leave important matters to the judgment of the local authority: "designed" to "minimise" the effect in paragraph 6; "designed" to "reduce", to "encourage" and to "avoid" in paragraph 7. Those in paragraphs 8 and 9(1) are qualified by the expression "as they consider appropriate", and the duty in paragraph 10 is qualified by the words "take such steps as are reasonably practicable".

82. The discretion which is given by these provisions to the local authority is framed in various ways, but the result is the same in each case. Where a discretion is given, the child in need does not have an absolute right to the provision of any of these services.

85. This legislative background serves to reinforce the impression which the structure and language of the legislation itself gives, that the so-called "general duty" in section 17(1) is owed to all the children who are in need within their area and not to each child in need individually. It is an overriding duty, a statement of general principle. It provides the broad aims which the local authority is to bear in mind when it is performing the "other duties" set out in Part III (see the words in parenthesis in section 17(1)) and the "specific duties" for facilitating the discharge of those general duties which are set out in Part I of Schedule 2 (see section 17(2)). A child in need within the meaning of section 17(10) is eligible for the provision of those services, but he has no absolute right to them.

86. The appellants submit that the correct analysis of section 17(1) is that the general duty which it sets out is made "concrete and real" for a specific person when that person is assessed as being in need of the services which are available by way of the general duty. In other words, the process of assessment "crystallises" the general duty so that it becomes a specific duty which the local social services authority now owes to the individual whose needs have been assessed.

87. This argument is based on the approach which was taken by the Court of Appeal in *R v Kensington and Chelsea*

Royal London Borough Council, Ex p Kujtim [1999] 4 All ER 161 to the case of a person who had been assessed by the local authority under section 47 of the National Health Service and Community Care Act 1990 as being a person in urgent need of care and attention which was not otherwise available to him, so that he satisfied the criteria laid down in section 21(1)(a) of the National Assistance Act 1948. It was submitted in that case that, in consequence of that assessment, the local authority were under a continuing duty to meet these needs by providing him with residential accommodation until, upon a reassessment, it was decided that his needs had changed. That argument was accepted by the Court of Appeal. The contrary argument, that this was no more than a "target" duty in the sense of the label used by Woolf LJ in *R v Inner London Education Authority, Ex p Ali* (1990) 2 Admin L R 822, 828 in relation to section 8 of the Education Act 1944, was rejected. Potter LJ said in *Ex p Kujtim,* at p 175c-d, para 30, that the position was as follows:

> "Once a local authority has assessed an applicant's needs as satisfying the criteria laid down in section 21(1)(a), the local authority is under a duty to provide accommodation on a continuing basis so long as the need of the applicant remains as originally assessed, and if, for whatever reason, the accommodation, once provided, is withdrawn or otherwise becomes unavailable to the applicant, then (subject to any negative assessment of the applicant's needs) the local authority has a continuing duty to provide further accommodation."

88. In the Court of Appeal in the *A* case [2006] LGR 163 para 26 Laws LJ, with whose opinion on this point Chadwick LJ and Sir Phillip Otton agreed, said that he was willing to accept that the approach taken by Potter LJ in *Ex p Kujtim* might be characterised or described as demonstrating that the operation in practice of section 21 of the National Assistance Act 1948 involves the notion of a "target" duty which becomes "crystallised" and thus enforceable upon the happening of an event, namely a needs assessment. But he went on to say that this analysis of section 21 of the 1948 Act could not conclude the question whether a like result could be got out of section 17 of the 1989 Act. Having examined the differences of language between these two provisions, he concluded, at p 502, para 29, that neither the terms of section 21 of the 1948 Act nor the reasoning of the Court in *Kujtim* could support a construction of section 17 of the 1989 Act which would in practice produce an analogous result.

89. It is necessary to pay close attention to the differences between the wording and structure of these two provisions and

the context in which they are placed by the respective statutes. Section 21 of the 1948 Act (as amended by section 195 of and Schedule 23 to the Local Government Act 1972, section 108(5) of and Schedule 13 to the Children Act 1989 and section 42 of the National Health Service and Community Care Act 1990) provides:

> "Subject to and in accordance with the provisions of this Part of this Act, a local authority may with the approval of the Secretary of State, and to such extent as he may direct shall, make arrangements for providing -
>
> > (a) residential accommodation for persons aged eighteen or over who by reason of age, illness, disability or any other circumstances are in need of care and attention which is not otherwise available to them."

90. I respectfully agree with Laws LJ's comment, at p 501, para 27, that, where (as in *Ex p Kujtim*) the Secretary of State has given mandatory directions under section 21(1), it is difficult to see how this provision can be read otherwise than as imposing a concrete duty on the authority to see to it that accommodation is provided for persons assessed as falling within one or other of the classes specified. But the contrast between the wide and general language of section 17(1) of the 1989 Act and the way in which the various other duties in Part III and the specific duties set out in Part I of Schedule 2 which I have discussed above are qualified so as to leave matters to the discretion of the local authority is very marked. ”

46. In particular Mr. Béar highlighted in Lord Hope’s speech the second sentence of paragraph 80, the phrase in paragraph 81 “leave important matters to the judgment of the local authority”, most importantly paragraph 82, and finally paragraphs 89 and 90.

47. At paragraph 106 Lord Millett expressed himself as being in “full agreement” with Lord Hope. For the purposes of Mr. Béar’s submission I need not refer to the rest of his speech.

48. Lord Scott was in full agreement with Lord Hope that section 17(1) did not impose a mandatory duty on a local authority to take specific steps to satisfy the needs of a child in need – see paragraph 135. I also draw attention to paragraph 137 where Lord Scott spoke of an:-

> “undoubted duty, imposed by section 20 of the 1989 Act on local authorities, to provide accommodation for homeless children. A situation in which children may be sleeping rough in the streets or in cars or in garden sheds cannot be tolerated.”

49. Lord Nicholls considered Part III of the 1989 Act in his speech. At paragraph 23 Lord Nicholls speaks of section 20 being “focussed more narrowly” than section 17.

At paragraph 30 Lord Nicholls said that section 17(1) did not impose an absolute duty. He spoke of the "needs" of a child for services is itself "an inherently imprecise concept" (Paragraph 30). I accept, of course, that these words were spoken of in the context of section 17(1) but one only has to look at section 17(10) to see there how difficult it may be in any specific factual context for a local authority to have to form a view as to whether the child is "in need".

50. Thus Mr. Bear submitted that it is an overall, positive assessment of the child which creates the duty under section 20. It is not solely the assessment of the local authority that a young person is under 18 years of age and thus a child. The duty to "provide accommodation" under section 20(1) arises when, and only when, the statutory decision maker (i.e. the local authority) arrives at a decision that the young person is (i) a child in need, (ii) in the area, (iii) who requires accommodation, (iv) as a result of one of the triggers in sub-sub-sections (a)(b)(c), and (v) having considered the matters set out at sub-sections (6), (7), (8) and (9).

51. Mr Béar's submissions in respect of *Gateshead* were as follows. There is nothing incompatible between what the House of Lords, particularly Lords Hope and Millett, said in *Barnet* with what Dyson LJ said in *Gateshead*. But if there is then I must (or ought to) prefer the approach of the House of Lords.

52. In his submission *Gateshead* was not an occasion for a general survey of Part III and the Court of Appeal did not embark on one, given the highly focused issues, namely whether section 21 (2)(b) imposed on a local authority an absolute duty to provide secure accommodation which it decided it did not. Lord Hope's analysis in *Barnet* of Part III was not, as Mr. Béar put it, "flagged up" in any of the judgments in *Gateshead*. In any event counsel agreed (see paragraph 33 of *Gateshead*) that section 20 was a precise and specific duty. Nothing was decided in *Gateshead* about the character of the right under section 20(1).

53. Mr. McGuire and Ms Rhee adopted Mr. Béar's submissions. Mr. McGuire emphasised that an age assessment called for an evaluative judgment in that the young person's physical appearance, his demeanour, his personal history and his credibility all have to be considered and evaluated before a decision could be taken as to his age. That age assessment was only part of a process under section 20 which involves further evaluative judgments. He drew attention to what Stanley Burnton J said at paragraph 20 of *Merton*. He referred me to R(M) v. Hammersmith and Fulham LBC [2008] UKHL 535, [2008] 1 WLR 535 and to paragraph 43 in the speech of Baroness Hale of Richmond where she said:-

> "43. For what it is worth, it will be obvious from what has gone before that I agree with the broad approach to the interpretation of when a parent is 'prevented' from providing suitable accommodation or care under section 20(1)(c), which was favoured by Michael Burton J in the *Nottinghamshire* case and by Stanley Burnton J at first instance in the *Sutton London Borough Council* case, [2007] 2 FLR 849, rather than with the narrow approach favoured by Lloyd LJ in this case. This mother may not have been prevented from providing her daughter with any accommodation or care but she was surely prevented from providing her with suitable accommodation or

> care. On the other hand, as will also be obvious from what has gone before, I have reservations about the narrow approach of Stanley Burnton J in the *Sutton* case to the significance of the child's wishes under section 20(6), on which the Court of Appeal declined to express a concluded view. It seems to me that there may well be cases in which there is a choice between section 17 and section 20, where the wishes of the child, at least of an older child who is fully informed of the consequences of the choices before her, may determine the matter. It is most unlikely that section 20 was intended to operate compulsorily against a child who is competent to decide for herself. The whole object of the 1989 Act was to draw a clear distinction between voluntary and compulsory powers and to require that compulsion could only be used after due process of law."

54. From that he sought to persuade me that the duties imposed upon the local authority under section 20(6) was an important part of deciding whether the duty to provide accommodation under section 20(1) arose.

55. Faced with these submissions Mr. Straker (whose submissions Mr. Wise adopted) argued in reply that section 20(1) is a self-contained sub-section. It is not made subject to any of the other sub-sections, in particular to sub-section (6). He referred me to a passage in Volume 44(1) of the 4th Edition (re-issue) of Halsbury's Laws of England at paragraph 1259 to the effect that in interpreting statutes "each [sub-section] is drafted to stand independently as a separate sentence" (but significantly in my view those words are preceded by "sub-sections are related to the theme of the section".) So Mr. Straker submitted that the duty arises under section 20(1) because there are no words in it such as "subject to sub-section (6)…". Mr. Wise put it this way – the duty to take account of the child's wishes and feelings cannot affect the duty under section 20(1).

56. In my judgment, section 20 is, as the short title indicates, directed at "provision of accommodation for children". Section 20(1) says "shall provide accommodation". Section 20(3) says "shall provide accommodation". Sections 20(4) and (5) say "may provide accommodation". Sections 20(6) and (7) speak of "before providing accommodation … a local authority shall …" and "may not provide accommodation", respectively. In the latter words, I interpret the word "may" as "shall" i.e. the local authority comes under a prohibition if sub-section (7) is satisfied. As I understand it, neither Mr. Straker nor Mr. Wise dissented from such an interpretation.

57. It seems to me that neither sub-section (6) nor sub-section (7) can be isolated from deciding the proper construction of section 20(1) i.e. what is the character of the duty under section 20(1). If, for instance, the requirements of sub-section (7) are satisfied whether the young person is a child in need etc, etc. under section 20(1) simply does not arise. If a local authority were to find out, say at the very beginning of its investigation after a young person walks into its offices, that the requirements of sub-section (7) are satisfied it would be a complete waste of time and of valuable resources of the local authority for it to undertake any of the assessments under section 20(1) i.e. age, in need under section 17(10) and requiring accommodation. Likewise, if a young person, say of 17, or a person of 20 (see sub-section (5)) vehemently disputes the provision of proposed accommodation or community home

respectively and will not accept it, then I see no practical sense in saying that the local authority is nevertheless under a (self-contained) duty arising under section 20(1).

58. Furthermore, in my judgment the submissions of Mr. Béar upon the statutory construction of section 20 and of section 20(1) are persuasive. I accept them. In my judgment, the analysis of Lord Hope in *Barnet* is, with respect, compelling, and *Gateshead* is not in conflict with it. Within section 20 and section 20(1) are a number of matters (in which I would include age) which require skilled, evaluative assessment or judgment. Mr. Béar highlighted them and I will not repeat them.

59. Once all of these assessments are completed and the requirements of section 20(1) and the other relevant sub-sections are fulfilled then an absolute duty does indeed arise.

60. I now turn to consider whether the character of the right given by section 20 is a civil right within Article 6(1) of the ECHR.

61. Mr. Straker's central submission is that a determination by a local authority that a young person is not a child does determine a civil right. He points to passages in the statement of the Children's Commissioner for England, Sir Albert Aynsley-Green, of 28 May 2008 where he says that the assessment of age by a local authority involves:-

> "as its basic premise the determination of a key personal status namely whether the applicant is an unaccompanied child."

62. The assessment of age is an important adjudication of rights because it provides for a responsible entity to look after and safeguard the welfare of such unaccompanied children in need. At paragraph 32 Sir Albert says:-

> "Age assessment is a process that concerns far more than a scheme for administering welfare benefits. It is a determination that has profound effects for the individual and their relationship with the state and the community. It impacts upon them in a fundamental and far readhing way. It cannot be sensibly and airly characterised simply as a determination about whether the applicant is entitled to support and assistance under the Children Act if assessed as a child or other support if assessed as an adult. The assessment provides for applicants assessed as children to be accorded a particular status, for their rights and interests to be safeguarded, for those under 16 to be entitled to education and for those over 16 to have access to education as well as to be provided with accommodation and economic and social support. As the text below makes clear within generic age assessment the additional and highly relevant question for an assessed child concerns whether he or she is under 16, as younger children are to be provided additional support."

63. Mr. Straker took me helpfully to a number of authorities. Mr. Wise broadly adopted and amplified Mr. Straker's submissions. In Runa Begum v. Tower Hamlets London Borough Council (First Secretary of State Intervening) [2003] UKHL 5, [2003] 2 AC

430 (to which I shall refer hereafter as "*Begum*") the House of Lords assumed without deciding that the appellant's "civil right" was engaged. The local authority accepted that the appellant was homeless. She was offered accommodation but rejected it. After an internal review under section 202 of the Housing Act 1996, a local authority officer concluded that the accommodation was reasonable. The appellant asserted that the review should have been conducted by an independent body. The House of Lords held that the council officer was not an independent tribunal for the purposed of Article 6(1) of the ECHR but dismissed the appeal for the reasons set out in the headnote.

64. I shall set out specific passages in the speeches of their Lordships which touch upon a civil right. But, first, it is necessary to refer to the argument of the intervener which is to be found at pages 435 to 438. The critical part is at page 436 where Mr. Sales and Ms. Moore submitted that the decisions taken by the reviewing officer under section 202:-

> "were discretionary and lay within the field of public law and, accordingly, could not be regarded as determining R's "civil right" and Article 6 was not therefore engaged."

The provision of temporary accommodation by way of a non-secure tenancy was a mechanism by which the authority fulfilled one of its functions under the scheme; but no "civil right" thereby existed for the purposes of article 6(1).

65. Lord Bingham of Cornhill between paragraphs 4 and 6 inclusive said:-

> "4. One other question, inherent in the first question, also lends itself to a summary answer: whether for purposes of domestic law Runa Begum enjoyed anything properly recognised as a right. It was suggested on behalf of the authority that, because of the broad discretionary area of judgment entrusted to it under the statutory scheme, she enjoyed no right. I cannot accept this. Section 193(2) imposed a duty on the authority to secure that accommodation was available for occupation by Runa Begum. This was a duty owed to and enforceable by her. It related to a matter of acute concern to her. Although section 206(1) permitted the authority to perform its duty in one of several ways, and although performance called for the exercise of judgment by the authority, I think it plain that the authority's duty gave rise to a correlative right in Runa Begum, even though this was not a private law right enforceable by injunction and damages. Thus the first question, differently expressed, is whether Runa Begum's right recognised in domestic law was also a "civil right" within the autonomous meaning given to that expression for purposes of article 6(1) of the Convention.
>
> 5. The importance of this case is that it exposes, more clearly than any earlier case has done, the interrelation between the article 6(1) concept of "civil rights" on the one hand and the article 6(1) requirement of "an independent and impartial

tribunal" on the other. The narrower the interpretation given to "civil rights", the greater the need to insist on review by a judicial tribunal exercising full powers. Conversely, the more elastic the interpretation given to "civil rights", the more flexible must be the approach to the requirement of independent and impartial review if the emasculation (by over-judicialisation) of administrative welfare schemes is to be avoided. Once it is accepted that "full jurisdiction" means "full jurisdiction to deal with the case as the nature of the decision requires" (per Lord Hoffmann, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 WLR 1389 at 1416, [2001] UKHL 23 , paragraph 87), it must also be accepted that the decisions whether a right recognised in domestic law is also a "civil right" and whether the procedure provided to determine that right meets the requirements of article 6 are very closely bound up with each other. It is not entirely easy, in a case such as the present, to apply clear rules derived from the Strasbourg case law since, in a way that any common lawyer would recognise and respect, the case law has developed and evolved as new cases have fallen for decision, testing the bounds set by those already decided.

6. The European Court's approach to rights deriving from social welfare schemes has been complicated by differences of legal tradition in various member states, as Lord Hoffmann explains. But comparison of *Feldbrugge v The Netherlands* (1986) 8 EHRR 425 and *Deumeland v Germany* (1986) 8 EHRR 448 with *Salesi v Italy* (1993) 26 EHRR 187 and *Mennitto v Italy* (2000) 34 EHRR 1122 shows movement from a narrower towards a broader interpretation of "civil rights". Further cases may no doubt continue that trend. To hold that the right enjoyed by Runa Begum is a "civil right" for purposes of article 6 would however be to go further than the Strasbourg court has yet gone, and I am satisfied, in the light of a compelling argument on this point by Mr Sales, that the decision of that court would not, by any means necessarily, be favourable to Runa Begum. So I would prefer to assume, without deciding, that Runa Begum's domestic law right is also a "civil right", and to consider whether, on that assumption, but having regard to the nature of the right, the statutory provision of an appeal to the county court on a point of law satisfies the requirements of article 6."

66. Lord Hoffmann reviewed the European authorities in his analysis of what constituted a civil right between paragraph 60 and 70 inclusive. At paragraphs 68 and 69 he said:-

" 68. The existence of a fair amount of discretion was one of the matters taken into account by the House when it decided in

> *O'Rourke v Camden London Borough Council* [1998] AC 188 that Part VII (or rather, its predecessor in the Housing Act 1985) did not give rise to rights in private law, whether for damages or an injunction. But I think it is fair to say that the main ground of decision was that a scheme of social welfare which creates a statutory duty to provide benefits in kind will not ordinarily be taken to confer upon the beneficiaries private law rights in addition to their rights in public law to secure compliance with the duty: see p 193. *O'Rourke* is certainly authority for the proposition that the rights created by Part VII are not actionable in English private law, but that is very different from the question of whether they are civil rights within the autonomous meaning of that expression in article 6. It is one thing to say that the Parliament did not intend a breach by the council of its statutory duty under Part VII to be actionable in damages; it is quite another to say that the actions of the local authority should be immune from any form of judicial review.
>
> 69. For my part I must say that I find the reasoning of Hale LJ in *Adan's* case persuasive. But then, as Laws LJ has said, both in the present case [2002] 1 WLR 2491, 2500, and in *Beeson's* case [2002] EWCA Civ 1812, at paras 17-19, an English lawyer tends to see all claims against the state which are not wholly discretionary as civil rights and to look with indifference upon the casuistry that finds the need to detect analogies with rights in private law. On the other hand, I think that to apply the *Salesi* doctrine to the provision of benefits in kind, involving the amount of discretion which is inevitably needed in such cases, is to go further than the Strasbourg court has so far gone. This would not matter - domestic courts are perfectly entitled to accord greater rights than those guaranteed by the Convention - provided that it was acceptable that the scope of judicial review should be limited in the way it is by section 204. If, however, it should be decided in Strasbourg that the administration of social welfare benefits falling within the *Salesi* principle requires a more intrusive form of judicial review, I would not wish to place any obstacle in the way of the UK government arguing that, in a case such as this, the principle does not apply at all."

67. The critical part of that citation is the third sentence in paragraph 69. Lord Hope agreed with Lord Bingham and Lord Hoffmann. Lord Millett covered this matter from paragraphs 78 and onwards. At paragraph 78 he said, inter alia:-

> "The dispute must be genuine and serious; it may relate not only to the actual existence of a right but also to its scope and the manner of its exercise; and the outcome of the proceedings must be directly decisive of the right in question: see, for

example, *Mennitto v Italy* (2000) 34 EHRR 1122, 1129, para 23."

68. From paragraph 82 and onwards he, too, reviewed the European jurisprudence. At paragraph 83 he stated that although the concept of "civil rights" is autonomous, the content of the right in question under domestic law is "highly relevant".

69. At paragraph 90 Lord Millett, having referred to two European cases in paragraph 89 said:-

> " 90. This is not a principled basis on which to draw the distinction between "civil rights" which are within the protection of article 6(1) and other rights which are not, and it is not surprising that the line could not be held. The meaning of "civil rights" and hence the scope of article 6(1) was extended further in *Salesi v Italy* (1993) 26 EHRR 187 and most recently in *Mennitto* (2000) 34 EHRR 1122. Both cases were concerned with non-contributory disability allowances. In *Salesi* the court referred to "the development in the law initiated by" the judgments in *Feldbrugge* and *Deumeland* and commented that the differences between social insurance and welfare assistance could not be regarded as fundamental "at the present stage of development of social security law". In these passages the Strasbourg court recognised that its jurisprudence was still developing. The decisions had the effect of extending article 6(1) to disputes in connection with non-contributory welfare schemes. In each case the critical feature which brought it within article 6(1) was that the claimant
>
> > "suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution" "

70. At paragraph 92 he said:-

> "…. Runa Begum cannot be said to be claiming "an individual, economic right flowing from specific rules laid down in a statute."

71. At paragraph 94 he referred to an "unsettled state of jurisprudence of the Strasbourg court."

72. Lord Walker of Gestingthorpe, having referred the authorities in paragraphs 109 and 112, said at paragraphs 113-115 inclusive:-

> "113. In the present case the applicant's rights (arising from her unintentional homelessness and her priority need) were personal and economic (at least in the sense of meeting her need for the necessities of life). Superficially they did not involve any large measure of discretion: once it was established

that she satisfied the statutory conditions, the local housing authority owed her the full statutory duty under section 193(2) of the Housing Act 1996 ("the Act") and she had a correlative right to the performance of that duty. On that basis it was argued that the applicant had not only a right under national law, but also a civil right in the autonomous Convention sense, a right (as it was put in *Feldbrugge*, p 434, para 37 "flowing from specific rules laid down by the legislation in force").

114. However it is necessary to take a closer look, both at the process by which a homeless person becomes entitled to the performance of the full housing duty, and to the content of that duty. It is apparent that the process involves some important elements of official discretion, and also issues which (although not properly described as involving the exercise of discretion) do call for the exercise of evaluative judgment. The following points seem to me particularly significant, though the list is by no means exhaustive.

(1) Establishing priority need may call for the exercise, and sometimes for a very difficult exercise, of evaluative judgment. There was no problem in the applicant's case because of her family circumstances, but the identification of a "vulnerable" person may present real problems (see section 189(1)(c) of the Act and *R v Camden London Borough Council, Ex p Pereira* (1998) 31 HLR 317).

(2) A local housing authority may at its discretion perform its full housing duty in any of the three ways specified in section 206 of the Act, which include (section 206(1)(c)) giving such advice and assistance as will secure that suitable accommodation is available to the applicant from some other person. Moreover under section 206(2) the authority has quite a wide discretion as to making charges to a successful applicant.

(3) The period for which the accommodation is to be secured is a minimum period of two years; after that the authority has a discretion (see section 193(3) and (4) and section 194 of the Act, embodying changes made after the decision of your Lordships' House in *R v Brent London Borough Council, Ex p Awua* [1996] AC 55).

(4) The local housing authority's duty comes to an end if an applicant refuses an offer of accommodation which the authority are satisfied is suitable (see section 193(5) and (7) of the Act). Here again there are potentially difficult exercises of judgment to be made.

115. These points, taken together, amount to a considerable qualification of the notion that a successful applicant is enjoying a quantifiable right derived from specific statutory

rules. If the local housing authority's duty does create a civil right within the autonomous Convention meaning, it must in my view lie close to the boundary of that aggregation of rights. I do not think it is necessary, in order to dispose of this appeal to express a definite view. On this point I am in full agreement with the observations in paragraphs 69 and 70 of Lord Hoffmann's speech. I would dismiss this appeal."

73. The next authority in point of time is the decision of the ECtHR in Tsfayo v. United Kingdom Application No. 60860/00, [2007] HLR 19. In that case the Government of the UK accepted that the applicant's civil rights were determined in the domestic proceedings, so that Article 6 was applicable. At paragraph 38 and 39 the court said:-

> "38. The applicant argued that the present case was distinguishable from *Bryan* and *Alconbury* (see paragraphs 28-29 above) because, unlike a planning inspector or even the Secretary of State in a planning matter, the HBRB could not be said to be independent of the parties to the dispute or thus impartial. Judicial review could not correct any error or bias in the assessment of primary facts, particularly where the witnesses had been heard in person by the HBRB but not by the Administrative Court. Moreover, the councillors who sat on HBRBs were not specialist administrators. The decisions that they used to make were now routinely made by independent tribunals. The problems with the HBRB system had been recognised domestically, by the Council on Tribunals and by the High Court in *Bewry* and had, eventually, led to the abolition of HBRBs (see paragraphs 22, 33 and 34 above). The present case was also distinguishable from *Runa Begum* (paragraphs 30-32 above), where the fact-finding had formed part of a broad judgment about the claimant's entitlement and the availability of suitable housing in the area. Fundamental to the House of Lords' judgment was the view that the issues were appropriate for a specialised form of adjudication by an experienced administrator. This reasoning did not apply to housing benefit disputes, and the councillors in the HBRBs were not experienced administrators.
>
> **B. The Court's assessment**
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> 39. The Court recalls that disputes over entitlement to social security and welfare benefits generally fall within the scope of Article 6 § 1 (see *Salesi v. Italy*, judgment of 26 February 1993, Series A no. 257-E, § 19; *Schuler-Zgraggen v. Switzerland,* judgment of 24 June 1993, Series A no. 263, § 46; *Mennitto v. Italy* [GC], no. 33804/96, § 28, ECHR 2000-X). It agrees with the parties that the applicant's claim for housing benefit concerned the determination of her civil rights and that Article 6 § 1 applied. The applicant therefore had a right to a fair hearing before an independent and impartial tribunal."

74. Mr. Straker referred to a passage in the judgment of Hale LJ, as she then was, in Adan v. Newham London Borough Council [2001] EWCA Civ 1916; [2002] 1 WLR 2120 which is conveniently set out at paragraph 66 of the speech of Lord Hoffmann in *Begum*, which he found persuasive (see paragraph 69). Paragraph 66 of *Begum* reads as follows:-

> "66. That was the view taken by Hale LJ in *Adan's* case [2002] 1 WLR 2120, 2137, para 55. Although, as I have said, the point was conceded, she said:
>
> > "Once the local authority are satisfied that the statutory criteria for providing accommodation exist, they have no discretion. They have to provide it, irrespective of local conditions of demand and supply. Hence this is more akin to a claim for social security benefits than it is a claim for social or other services, where the authorities have a greater degree of discretion and resource considerations may also be relevant." "

75. Finally, Mr Straker referred to a decision of Stanley Burnton J in R (Husain) v. Asylum Support Adjudicator and the SSHD [2001] EWHC (Admin) 852 and in particular to paragraphs 54 and 55:-

> "54. The above considerations fortify my view that the Secretary of State may only terminate support to destitute asylum-seekers in the circumstances specified in regulation 20; and lead me to conclude that a destitute asylum-seeker who is receiving support under Part VI of the Act has a right, which is a civil right within the meaning of Article 6, to the continuation of support subject to regulation 20. In my judgment, regulation 20, in creating this right, may be said to be supplementing the Act, and it is therefore within the power conferred by section 95(12).
>
> 55. It follows that the Claimant had a right to have his appeal against the decision of the Secretary of State to discontinue support heard by an independent and impartial tribunal established by law."

76. Mr. Straker concluded that it would be a strange outcome if children in need having an absolute right under section 20 of the 1989 Act did not have a civil right within Article 6(1). Although accommodation is a benefit in kind it is a personal and economic and results from specific statutory rules. Although the local authority has a discretion as to the nature of the accommodation an individual satisfying the criteria is entitled to the provision of accommodation. In such circumstances the determination of an unaccompanied asylum seeker's right to accommodation constitutes a civil right within Article 6(1).

77. Mr. Béar strongly disputed these submissions. He submitted that the ECtHR has recognised that some, but not all, welfare entitlements fall within Article 6(1) as being civil rights. He submitted that, judged as a whole, the scheme of section 20 of the

1989 Act, including by reference to the judgmental bases of the scheme, did not constitute a civil right. If the result was otherwise it would create unacceptable difficulties in principle and in practice, and an alteration in the substantive legal nature of the duties and rights under section 20.

78. He submitted that neither domestic nor European jurisprudence has gone as far as to declare as a civil right a domestic right such as arises in the instant cases. He relied on those passages in *Begum* which I have set out. In the instant case the right under section 20 involves too much discretion to qualify as arising under specific statutory rules. There were large measures of discretion in section 20(1) and section 20(6) and 20(7). The measure of discretion in the instant cases was greater than those in *Begum*. If a civil right were to arise in the instant cases any welfare entitlement in domestic law would generate a civil right under Article 6(1). If section 20(1), or at the very least the age assessment therein, generated a civil right then all aspects of section 20(1) and section 20 as a whole would generate civil rights even where there is a measure of discretion.

79. It will be remembered that Mr. Straker in his opening submissions tentatively put forward that the age assessment by local authorities, to comply with Article 6(1), might be subject to challenge before either tribunals or by contracting out their fact finding determination to barristers or solicitors. Mr Béar submitted that this did not address the question of the matters of discretion under section 20. Further the submission fell foul of the dicta of Lord Bingham in *Begum* at paragraph 10:-

> "10. In the course of his excellent argument, Mr Paul Morgan QC submitted that where, as in the present case, factual questions rise they should be referred for decision by an independent fact-finder. This solution received some support from the Court of Appeal in *Adan v Newham London Borough Council* [2002] 1 WLR 2120, [2001] EWCA Civ 1916 . I have very considerable doubt whether the resolution of applications for review, or any part of such process, is a function of the authority within the scope of article 3 of The Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996/3205), from which authority to refer was said to derive. But even if that question were resolved in Runa Begum's favour, the proposed procedure would, in cases where it was adopted, (a) pervert the scheme which Parliament established, and (b) open the door to considerable debate and litigation, with consequent delay and expense, as to whether a factual issue, central to the decision the reviewer had to make, had arisen. I fear there would be a temptation to avoid making such explicit factual findings as Mrs Hayes, very properly, did."

80. Reference was also made to Lord Hoffmann in *Begum* at paragraphs 43, 44, 45 and 46 of his speech:-

> "43. But utilitarian considerations have their place when it comes to setting up, for example, schemes of regulation or social welfare. I said earlier that in determining the appropriate

scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament. This case raises no question of democratic accountability. As Hale LJ said in *Adan's* case [2002] 1 WLR 2120, 2138, para 57:

> "The policy decisions were taken by Parliament when it enacted the 1996 Act. Individual eligibility decisions are taken in the first instance by local housing authorities but policy questions of the availability of resources or equity between the homeless and those on the waiting list for social housing are irrelevant to individual eligibility."

44. On the other hand, efficient administration and the sovereignty of Parliament are very relevant. Parliament is entitled to take the view that it is not in the public interest that an excessive proportion of the funds available for a welfare scheme should be consumed in administration and legal disputes. The following passage from the joint dissenting opinion in *Feldbrugge v The Netherlands* (1986) 8 EHRR 425, 443 did not persuade the majority to restrict the application of article 6 but nevertheless seems to me highly material when one comes to consider the procedures which will comply with it:

> "The judicialisation of dispute procedures, as guaranteed by article 6(1), is eminently appropriate in the realm of relations between individuals but not necessarily so in the administrative sphere, where organisational, social and economic considerations may legitimately warrant dispute procedures of a less judicial and formal kind. The present case is concerned with the operation of a collective statutory scheme for the allocation of public welfare. As examples of the special characteristics of such schemes, material to the issue of procedural safeguards, one might cite the large numbers of decisions to be taken, the medical aspects, the lack of resources or expertise of the persons affected, the need to balance the public interest for efficient administration against the private interest. Judicialisation of procedures for allocation of public welfare benefits would in many cases necessitate recourse by claimants to lawyers and medical experts and hence lead to an increase in expense and the length of the proceedings."

45. In similar vein, Justice Powell, delivering the opinion of the United States Supreme Court in *Matthews v Eldridge* (1976) 424 US 319, 347 commented on the requirements of "due process" in the administration of a disability benefit scheme:

> > "In striking the appropriate due process balance the final factor to be assessed is the public interest. This includes the administrative burden and other societal

> costs that would be associated with requiring, as a matter of constitutional right, an evidentiary hearing upon demand in all cases prior to the termination of disability benefits. The most visible burden would be the incremental cost resulting from the increased number of hearings and the expense of providing benefits to ineligible recipients pending decision...We only need say that experience with the constitutionalizing of government procedures suggests that the ultimate additional cost in terms of money and administrative burden would not be insubstantial."

In *Adan's* case, counsel for Newham London Borough Council told the Court of Appeal that the housing department received 3,000 applications a year under Part VII, of which 500 went on to a review: [2002] 1 WLR 2120, 2126, para 10. This is of course only a part of the duties of the housing department and, by contrast with this experience of a single London borough, the number of appeals received by the Planning Inspectorate for the whole of England in the year 2001-2002 was 16,776 (www.planning-inspectorate.gov.uk/forms/report_statistical_2001_2002 .pdf). In most cases there will probably also be more urgency about a decision on homelessness than a planning appeal.

46. It therefore seems to me that it would be inappropriate to require that findings of fact for the purposes of administering the homelessness scheme in Part VII should be made by a person or body independent of the authority which has been entrusted with its administration. I certainly see nothing to recommend the recourse to contracting out which was suggested by the majority in *Adan's* case. Some of the arguments against it are well made by Hale LJ at p 2144, paras 77-78 of her judgment. Four points seem to me important. First, if contracting out is not adopted across the board, it would be bound to generate disputes about whether the factual questions which had to be decided by the housing officer were sufficiently material to require contracting out. Secondly, if it were adopted in every case, it would add significantly to the cost and delay. Thirdly, it would mean that the housing officer, instead of being able to exercise his discretionary powers, such as whether he considered accommodation suitable for the applicant, on a first-hand assessment of the situation, would be bound by a written report from the independent fact finder. Fourthly, I am by no means confident that Strasbourg would regard a contracted fact finder, whose services could be dispensed with, as more independent than an established local government employee. In *Adan's* case, at pp 2134-2135, para 44, Brooke LJ declined to become involved in "the practical difficulties that may arise when trying to ensure that the third

> party has the requisite independence" but they are worth thinking about."

81. Thus Mr. Béar submitted that over-judicialisation is a feature which must be considered in deciding whether a civil right is created. It is a strong pointer to Article 6(1) not being engaged.

82. Finally on this point Mr. Béar submitted that if Article 6(1) is engaged necessitating a merits review then section 20 ceases to be a benefit conferred by the assessment of the local authority; instead it becomes a benefit conferred by a third party i.e. a court, tribunal or a contracted out person.

83. Next Mr. Béar submitted that, in any event, there must be a determination of the civil right for Article 6(1) to be engaged. A determination must be decisive of the right i.e. an affirmative or negative answer. In the instant cases an age assessment is either "no" (the young person is not under 18) or "maybe" (i.e. the young person is under 18 and the local authority will continue its assessment to see if he should be accommodated). He referred to paragraph 149 on the speech of Lord Clyde in R (Alconbury Ltd) v. Environment Secretary [2001] UKHC 23; [2003] AC 295, who, basing himself generally on European case law there set out said:-

> "[the result of the proceedings] must have a direct effect of deciding rights or obligations."

84. Stanley Burnton J in R (Gilboy) v. Liverpool City Council [2007] EWHC 2335 (Admin) at paragraph 26 said that:-

> "Article 6 applies only to a *determination* of civil rights and obligations."

85. Mr. McGuire adopted Mr. Béar's submissions. He again stressed the general evaluative assessments that have to be made under section 20. I need not repeat them. Neither an age assessment nor a completed assessment under section 20(1) founds a civil right. There is no decisive determination. Ms. Rhee made similar submissions – see her careful and well crafted submissions at paragraphs 2(a) and (b) of her skeleton argument. In her oral submissions she referred me to a decision of the ECtHR in Maaouia v. France (2001) 33 EHRR 42. The facts are set out in the headnote. She referred me in particular to paragraph 34 ("civil rights" are autonomous), and to paragraph 38 where the court said:-

> "38. In the light of the foregoing, the Court considers that the proceedings for the rescission of the exclusion order, which form the subject-matter of the present case, do not concern the determination of a "civil right" for the purposes of Article 6(1). The fact that the exclusion order incidentally had major repercussions on the applicant's private and family life or on his prospects of employment cannot suffice to bring those proceedings within the scope of civil rights protected by Article 6(1) of the Convention."

Thus she submitted that the fact that an age assessment that a young person is over 18 may have deprived him of the consequences of being treated as a child outlined in paragraph 37 of Sir Albert's statement is not a basis on which a claimant can contend that the age assessment determines a civil right.

86. In my judgment no civil right arises or, if it does, then there has been no determination of it. First, there is no European or domestic authority which has extended the concept of a civil right to a benefit such as that conferred by section 20. The considerable hesitation of the House of Lords in *Begum* concerning whether the appellant had a civil right is both instructive and compelling. The dicta of the ECtHR in *Tsfayo* on this point, to which I have referred, in my judgment does not advance the arguments of Mr. Straker and Mr. Wise. Second, in my judgment there is indeed within section 20, or within section 20(1) itself if it must be considered on its own, considerable discretion vested in a local authority or to put it another way, evaluative judgments. I would hold that the decision as to whether a person is under 18 and particularly in respect of those who come from countries where there may be no developed and/or verifiable system of birth registration, who have endured great privation on their journey and who, because they are desperate to enter the UK, in some but not all cases may come with dishonest stories, in whole or in part, as to their age, history and background, calls for mature, careful, evaluative consideration. If I am wrong on that particular point, I would hold that the other matters under section 20(1) i.e. "in need", "to require accommodation" and subsection (c) all require similar evaluative judgments, which when section 20(1) is considered as a whole is sufficient not to create a civil right.

87. Third, the determination about age adverse to M and A is not a determination of a civil right because the civil right must, in my judgment, encompass all the matters in section 20(1), and indeed in section 20, and not just a staging post, important though that undoubtedly is.

88. Fourth, if the age assessment is a civil right either the remainder of the assessments under section 20 must also constitute a civil right, or if they do not, then one has the rather absurd situation of part of section 20(1) being subject to Article 6(1) and other parts not. Both alternatives are, in my judgment, an open invitation to over-judicialisation and to intrusion into decisions, which may have to be taken rapidly. What I would term as oppressive legalism should be avoided.

89. My decision is therefore that Article 6(1) is not engaged. That would be sufficient to dispose of Issue 1. But I am conscious that counsel have addressed me on further issues that could arise under Issue 1 and it would be discourteous and unhelpful of me to ignore them.

90. Thus the next issue is whether, on the premise that there has been a determination of a civil right, determinations by social workers and/or with the court's powers of judicial review constitutes, under Article 6(1):-

> "a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

91. Mr. Straker, in his opening submissions, asserted that social workers cannot be an independent and impartial tribunal. M (and A's) interest conflict with Lambeth's (and

Croydon's). There are no formal, procedural safeguards which regulate the age assessment process. Unaccompanied child asylum seekers have no right to be represented at age assessments. Judicial review was not adequate to cure such defects.

92. He took me, so far as the authorities are concerned, to a decision of Moses J, as he then was, in R (Bewry) v. Norwich City Council [2001] EWCH Admin 657. The claimant went before a housing benefit review board which was chaired by a Norwich City councillor. The other 2 members of the board were also Norwich City councillors. The claimant sought to impugn the decision of the board upon, inter alia, the lack of appearance of an independent and impartial tribunal. The Secretary of State conceded that Article 6(1) was engaged – see paragraph 22.

93. At paragraph 62 Moses J said:-

> "62. In my judgment, the connection of the councillors to the party resisting entitlement to housing benefit does constitute a real distinction between the position of an inspector and a Review Board. The lack of independence may infect the independence of judgment in relation to the finding of primary fact in a manner which cannot be adequately scrutinised or rectified by this court. One of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute, is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary fact and the inferences drawn from those facts. But the decision does not, and indeed should not, set out all the evidence."

94. Moses J continued that it was no answer to say that no actual bias occurred and at paragraph 65 said:-

> "65. Accordingly, I conclude that there has been no determination of the claimant's entitlement to housing benefit by an independent and impartial tribunal. The level of review which this court can exercise does not replenish the want of independence in the Review Board, caused by its connection to a party to the dispute."

95. It is noticeable that Moses J said that he reached the decision with great reluctance for the reasons he set out in paragraph 66.

96. The next authority to which I was cited was *Tsfayo* (to which I have already referred). The ECtHR held that in that case the review board had to determine "a simple question of fact" that did not require a measure of professional knowledge or specialist expertise, that the review board not only lacked independence from the executive but was directly connected to one of the parties as it included councillors from the local authority which might infect the independence of judgment as to primary fact, which could not be adequately scrutinised or rectified by judicial review

as the court did not have the jurisdiction to rehear the evidence or substitute its own views on the facts.

97. The "simple issue of fact" concerned whether the claimant had "good cause" for failing to claim housing benefit in time in accordance with the statutory rules.

98. It is to be noted, in passing, that it is common ground between counsel that the European Court may have fallen into error in paragraph 30 where it said that in *Begum* it was accepted that the case involved the determination of civil rights. But in my judgment nothing turns on that misapprehension.

99. In paragraph 44 the court drew attention, inter alia, to *Begum* and to the dicta of Lord Bingham that although the housing officer had been called upon to resolve some disputed factual issues, these findings of fact were "only staging posts on the way to the much broader judgments" concerning local conditions and the availability of accommodation, which were specialist matters. There were substantial safeguards that the review would be independent and impartial.

100. In paragraphs 45 and 46 the ECtHR went on to say:-

> "45. The Court considers that the decision-making process in the present case was significantly different. In *Bryan*, *Runa Begum* and the other cases cited in paragraph 43 above, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the HBRB was deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim. On this question, the applicant had given evidence to the HBRB that the first that she knew that anything was amiss with her claim for housing benefit was the receipt of a notice from her landlord – the housing association – seeking to repossess her flat because her rent was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal (see paragraph 21 above). Nor, unlike the cases referred to, can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take.
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> 46. Secondly, in contrast to the previous domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded. As Mr Justice Moses observed in *Bewry* (paragraph 32 above), this connection of the

> councillors to the party resisting entitlement to housing benefit might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review. The safeguards built into the HBRB procedure (paragraphs 22-23 above) were not adequate to overcome this fundamental lack of objective impartiality."

101. Mr Straker also relied upon the Court of Appeal decision in R (Wright) v. Secretary of State for Health [2007] EWCA Civ 999, [2008] 2 WLR 536. At paragraphs 102 to 105 Dyson LJ referred to *Tsfayo*, *Begum* and other authorities and said:-

> "102. It is clear from the Strasbourg jurisprudence that, in deciding whether a breach of article 6 at the first stage of the process can be cured by a later stage of the process, it is necessary to have regard to the nature of the first stage breach. A good illustration of this is to be found in *Tsfayo v United Kingdom* (application no 60860/00), decision 14 November 2006). The applicant for housing and council tax benefit failed to submit her benefit renewal form in time. Her claim was rejected by the Council because she had failed to show "good cause" why she had not claimed benefits earlier. Her appeal to the Review Board was dismissed. She sought judicial review inter alia on the grounds that the Board was not an independent and impartial tribunal within the meaning of article 6(1).
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> 103. The ECtHR reviewed the authorities. The court gave two reasons for deciding that there had been a violation of article 6(1) despite the availability of judicial review. First, the decision-making process was significantly different from that considered in cases such as *X, Stefan, Kingsley, Bryan* and *Runa Begum*. In those cases, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In the instant case, the Board was deciding a simple question of fact, namely whether there was "good cause" for the applicant's delay in making a claim. Unlike in the other cases, the factual finding could not be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take.
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> 104. The second reason was that the Board was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if it was awarded. The safeguards built into the Board's procedure were "not adequate to overcome this fundamental lack of objective impartiality" (para 46). The court contrasted the case with that of the Department's decision-making process in *Alconbury* which "offered a number

of safeguards, such as an inspector's inquiry with the opportunity for interested parties to be heard and these safeguards, together with the availability of judicial review……..was sufficient to comply with the requirement for "an independent and impartial tribunal" in Article 6(1)".

105. The second reason is important because it shows that, in deciding whether the court has full jurisdiction on a judicial review, it is relevant to have regard to the nature of the breach in the first stage of the process. The more serious the failure to accord a hearing by an independent and impartial tribunal, the more likely it is that a breach in the first stage of the process cannot be cured at the second stage. Thus, in *Runa Begum* Lord Bingham said at para 9 that, although the reviewer was not independent of his or her employing authority, the statutory scheme provided safeguards that the review would be fairly conducted. These included that the reviewer had to be senior to the original decision-maker and must not have been involved in the making of the original decision. In *Alconbury*, it was accepted that the planning inspector was not independent of the Secretary of State. But it was considered by the House of Lords to be relevant that the inspector was an experienced professional whose report provided "an important filter before the Secretary of State takes his decision" (Lord Slynn para 46). Lord Hoffmann said (para 110) that "in deciding the questions of primary fact or fact and degree which arose in enforcement notice appeals, the inspector was no mere bureaucrat. He was an expert tribunal acting in a quasi-judicial manner and therefore sufficiently independent to make it unnecessary that the High Court should have a broad jurisdiction to review his decisions on questions of fact". Thus, where the lack of impartiality at the first stage was of a somewhat formal and technical nature, the breach of article 6 was taken to be cured by the availability of judicial review. But if the lack of impartiality at the first stage had real practical content, then it infected the whole process and could not be cured by judicial review. ”

102. At paragraph 106 he said:-

“106. In my view, there are two reasons why the failure to afford the worker the opportunity to make representations before being included in the POVA list is a breach of article 6 which cannot be cured by any of the three means suggested by Mr Sales. First, the denial of the right to make representations is not a mere formal or technical breach. It is a denial of one of the fundamental elements of the right to a fair determination of a person's civil rights, namely the right to be heard. And the denial is total. The worker is not given an opportunity even to make the briefest of comments. Judicial review does not afford

> full jurisdiction, since it cannot make good the consequences of the denial of the opportunity to make representations at the earlier stage."

103. Mr. Wise adopted Mr. Straker's submissions. Age was a matter of fact, he submitted, and not an exercise of judgment. He also took me through the critical passages in the authorities to which Mr. Straker had drawn my attention.

104. Mr. Béar, Mr. McGuire and Ms. Rhee submitted that the availability of judicial review was sufficient to provide what has been termed "full jurisdiction". If the High Court has full jurisdiction Article 6(1) will not have been breached – see Lord Hoffmann in *Begum* at paragraph 33 where he said:-

> "33. The Strasbourg court, however, has preferred to approach the matter in a different way. It has said, first, that an administrative decision within the extended scope of article 6 is a determination of civil rights and obligations and therefore prima facie has to be made by an independent tribunal. But, secondly, if the administrator is not independent (as will virtually by definition be the case) it is permissible to consider whether the composite procedure of administrative decision together with a right of appeal to a court is sufficient. Thirdly, it will be sufficient if the appellate (or reviewing) court has "full jurisdiction" over the administrative decision. And fourthly, as established in the landmark case of *Bryan v United Kingdom* (1995) 21 EHRR 342, "full jurisdiction" does not necessarily mean jurisdiction to re-examine the merits of the case but, as I said in *Alconbury,* at p 1416, para 87, "jurisdiction to deal with the case as the nature of the decision requires.""

105. Mr McGuire submitted that social workers charged with making assessments under section 20 are professional officers. They are experienced and trained decision makers who, in the vivid words of Ward LJ at paragraph 44 of Feld v. Barnet LBC [2005] EWCA Civ 1307; [2005] HLR 9 (with whose judgment Mance LJ, as he then was, and Jackson J agreed) are:-

> "…. To be taken by the will of Parliament to be competent and conscientious."

and:-

> "Trained decision-makers should not be treated as inferior beings intellectually unable to approach the task with an open mind. The fair-minded and informed observer would have that in mind."

106. In *Begum* at paragraphs 58 and 59 Lord Hoffmann approved dicta of Laws LJ in R (Beeson's Personal Representatives) v. Dorset County Council [2002] EWCA Civ 1812 at paragraph 15:-

> "There is some danger, we think, of undermining the imperative of legal certainty by excessive debates over how many angels can stand on the head of the article 6 pin."

107. At paragraph 59 of *Begum* Lord Hoffmann said:-

> "59. Amen to that, I say. In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. The schemes for the provision of accommodation under Part III of the National Assistance Act 1948, considered in *Beeson's* case; for introductory tenancies under Part V of the Housing Act 1996, considered in *R (McLellan) v Bracknell Forest Borough Council* [2002] 2 WLR 1448; and for granting planning permission, considered in *R (Adlard) v Secretary of State for the Environment, Transport and the Regions* [2002] 1 WLR 2515 all fall within recognised categories of administrative decision making. Finally, I entirely endorse what Laws LJ said in *Beeson's* case, at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles."

108. Mr Béar referred me to paragraphs 7, 8, 9 and 10 of the speech of Lord Bingham in *Begum*, in support of his proposition that in the instant cases judicial review would satisfy Article 6(1):-

> "7. Although the county court's jurisdiction is appellate, it is in substance the same as that of the High Court in judicial review: *Nipa Begum v Tower Hamlets London Borough Council* [2000] 1 WLR 306 . Thus the court may not only quash the authority's decision under section 204(3) if it is held to be vitiated by legal misdirection or procedural impropriety or unfairness or bias or irrationality or bad faith but also if there is no evidence to support factual findings made or they are plainly untenable or (*Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 at 1030, per Scarman LJ) if the decision-maker is shown to have misunderstood or been ignorant of an established and relevant fact. In the present context I would expect the county court judge to be alert to any indication that an applicant's case might not have been resolved by the authority in a fair, objective and even-handed way, conscious of the authority's role as decision-maker and of the immense importance of its decision to an applicant. But I can see no warrant for applying in this context notions of "anxious scrutiny" (*R v Secretary of State for the Home Department Ex p Bugdaycay* [1987] AC 514 at 531G, per Lord Bridge of Harwich) or the enhanced approach to judicial review described by Lord Steyn in *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 546-548.

I would also demur at the suggestion of Laws LJ in the Court of Appeal in the present case ([2002] 1 WLR 2491 at 2513, [2002] EWCA Civ 239 , paragraph 44) that the judge may subject the decision to "a close and rigorous analysis" if by that is meant an analysis closer or more rigorous that would ordinarily and properly be conducted by a careful and competent judge determining an application for judicial review.

8. Is this quality of review sufficient to meet the requirements of article 6(1) on the assumption that a "civil right" is in issue? It is plain that the county court judge may not make fresh findings of fact and must accept apparently tenable conclusions on credibility made on behalf of the authority. The question is whether this limitation on the county court judge's role deprives him of the jurisdiction necessary to satisfy the requirement of article 6(1) in the present context.

9. In approaching this question I regard three matters as particularly pertinent:

(1) Part VII of the 1996 Act is only part of a far-reaching statutory scheme regulating the important social field of housing. The administration of that scheme is very largely entrusted to local housing authorities. While the homelessness provisions are of course intended to assist those individuals who are or may become homeless, there is a wider public dimension to the problem of homelessness, to which attention was drawn in *O'Rourke v Camden London Borough Council* [1988] AC 188 at 193 C-E.

(2) Although, as in the present case, an authority may have to resolve disputed factual issues, its factual findings will only be staging posts on the way to the much broader judgments which the authority has to make. In deciding whether it owes the full housing duty to an applicant under section 193(1) the authority has to be "satisfied" of three matters and "not satisfied" of another. Under section 193(7)(b) the authority ceases to be subject to the full housing duty if it is "satisfied that the accommodation [offered to the applicant] was suitable for [the applicant] and that it was reasonable for him to accept it." Thus it is the authority's judgment which matters, and it is unlikely to be a simple factual decision. This is exemplified by the letter of 27 July 2001 written to Runa Begum by Mrs Hayes following the review, which included this passage:

"I consider that the property offered is both suitable for you and your children in that the physical attributes are in accordance with the Council's Allocation Criteria, and I further consider that it is reasonable to expect yourself and your household to occupy the property offered as I consider that the area in which

Balfron Towers is located is no different to any other area within the London Borough of Tower Hamlets . . ."

(3) Although it seems to me obvious, as I have said, that the reviewer is not independent of the authority which employs him or her, section 203 of the 1996 Act and The Allocation of Housing and Homelessness (Review Procedures) Regulations 1999 (S1 1999/71) do provide safeguards that the review will be fairly conducted. Thus the reviewer must be senior to the original decision-maker (section 203(2)(a), regulation 2), plainly to avoid the risk that a subordinate may feel under pressure to rubber-stamp the decision of a superior. The reviewer must not have been involved in making the original decision (*ibid*), to try to ensure that the problem is addressed with a genuinely open mind. The applicant has a right to make representations, and must be told of that right (regulation 6(2)). Such representations must be considered (regulation 8(1)). The applicant is entitled to be represented (regulation 6(2)). If the reviewer finds a deficiency or irregularity in the original decision, or in the manner in which it was made, but is nonetheless inclined to make a decision adverse to the applicant, the applicant must be informed and given an opportunity to make representations (regulation 8(2)). The reviewer must give reasons for a decision adverse to the applicant (section 203(4)). The applicant must be told of his right to appeal to the county court on a point of law (section 203(5)). These rules do not establish the reviewer as an independent and impartial tribunal, but they preclude unreasoned decision-making by an unknown and unaccountable bureaucrat whom the applicant never has a chance to seek to influence, and any significant departure from these procedural rules prejudicial to the applicant would afford a ground of appeal.

10. In the course of his excellent argument, Mr Paul Morgan QC submitted that where, as in the present case, factual questions rise they should be referred for decision by an independent fact-finder. This solution received some support from the Court of Appeal in *Adan v Newham London Borough Council* [2002] 1 WLR 2120, [2001] EWCA Civ 1916 . I have very considerable doubt whether the resolution of applications for review, or any part of such process, is a function of the authority within the scope of article 3 of The Local Authorities (Contracting Out of Allocation of Housing and Homelessness Functions) Order 1996 (SI 1996/3205), from which authority to refer was said to derive. But even if that question were resolved in Runa Begum's favour, the proposed procedure would, in cases where it was adopted, (a) pervert the scheme which Parliament established, and (b) open the door to considerable debate and litigation, with consequent delay and expense, as to

> whether a factual issue, central to the decision the reviewer had to make, had arisen. I fear there would be a temptation to avoid making such explicit factual findings as Mrs Hayes, very properly, did."

109. Mr. Béar further submitted that, although the social workers were not independent of the local authorities who employed them, the Regulations of 2006 do provide safeguards in that the young persons may seek an independent review of the local authority's function under section 20. He thereupon produced the Regulations of 2006, to which I have referred in paragraphs 21 to 24 inclusive above.

110. Further in relation to the High Court's jurisdiction and powers on judicial review Mr. Béar relied upon what Lord Bingham said in *Begum* at paragraph 11:-

> "11. In relation to the requirements of article 6(1) as applied to the review by a court of an administrative decision made by a body not clothed with the independence and impartiality required of a judicial tribunal, the Strasbourg jurisprudence (as in relation to "civil rights") has shown a degree of flexibility in its search for just and workmanlike solutions. Certain recent authorities are of particular importance: *Zumtobel v Austria* (1993) 17 EHRR 116 at 132-133, para 32; *ISKCON v United Kingdom* (1994) 18 EHRR CD 133 at 144-145, para 4; *Bryan v United Kingdom* (1995) 21 EHRR 342 at 354 (concurring opinion of Mr Bratza) and 361, para 47; *Stefan v United Kingdom* (1997) 25 EHRR CD 130 at 135; *X v United Kingdom* (1998) 25 EHRR CD 88 at 97; *Kingsley v United Kingdom* (2000) 33 EHRR 288 at 302-303, paras 52-54; (2002) 35 EHRR 177 at 186-188, paras 32-34. None of these cases is indistinguishable from the present, but taken together they provide compelling support for the conclusion that, in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of article 6(1). This is a conclusion which I accept the more readily because it gives effect to a procedure laid down by Parliament which should, properly operated, ensure fair treatment of applicants such as Runa Begum."

111. Mr. Béar also drew my attention to paragraphs 49 and 50 in *Begum*, where at paragraph 50 Lord Hoffmann said:-

> " 50. All that we are concerned with in this appeal is the requirements of article 6, which I do not think mandates a more intensive approach to judicial review of questions of fact. These nuances are well within the margin of appreciation which the Convention allows to contracting states and which, in a case like this, the courts should concede to Parliament. So I do not propose to say anything about whether a review of fact going beyond conventional principles of judicial review would be either permissible or appropriate. It seems to me sufficient to

> say that in the case of the normal Part VII decision, engaging no human rights other than article 6, conventional judicial review such as the Strasbourg court considered in the *Bryan* case (1995) 21 EHRR 342 is sufficient."

112. Mr Béar distinguished *Tsfayo* – there is a clear distinction between situations where on the one hand all matters require professional determination and on the other where there is a simple issue of fact. In *Wright* the breach was different from the instant cases in that there was no hearing was given at all.

113. Ms. Rhee adopted the submissions of Mr. Béar and Mr. McGuire. She noted that in *Alconbury* the financial interests of the Ministry of Defence did not automatically preclude a decision on planning grounds by the Secretary of State (paragraph 55 per Lord Slynn of Hadley and paragraph 64 per Lord Nolan).

114. In so far as Mr. Béar relied upon the Regulations of 2006, Mr Straker produced, in reply, Statutory Instrument No. 1738, Children Act 1989 Representation Procedure (England) Regulations 2006 which came into effect upon 1 September 2006 (to which I shall refer hereafter as "the Children Act regulations"). There was a short debate thereafter whether the Children Act regulations or the Regulations of 2006 applied. Mr. Straker submitted the Children Act regulations applied, as did Mr. McGuire. Mr Holbrook, for Lambeth, submitted the Regulations of 2006 applied.

115. I decline to decide this sub-issue, for, as Mr. Straker rightly conceded, it makes no practical difference. Both regulations are in very similar terms. His real point was that if the procedure under either Regulations were fully invoked the maximum time from the making of the complaint for the consideration of the local authority as to what has to be done in the light of the review panel's conclusion was 135 days which in the instant cases was too long. Under both Regulations, if the complainant has stated in writing to the local authority that he is taking, or intends to take, proceedings in any court or tribunal then the local authority shall not consider any representation in relation to the subject-matter of such proceedings.

116. In my judgment the safest course is to put both Regulations to one side in considering the issue of "full jurisdiction". Mr. Béar introduced the Regulations of 2006 in his oral submissions. They were not mentioned in his skeleton argument. They are not central to his submission. Mr. Straker, having considered this matter over the weekend, introduced the Children Act regulations in reply. Thus the introduction of both Regulations seem to me to be more of an afterthought, and in any event, were not, or could not be, the subject of mature consideration by counsel. There is also force in Mr. Straker's point about the time lag being unreasonably long.

117. In my judgment, the submissions of Mr. Béar, Mr. McGuire and Ms. Rhee on this point above are compelling. The reasoning of the House of Lords in *Begum,* far from persuading me to accept Mr. Straker's and Mr. Wise's submissions, convince me to reject them. Even on the assumption that the social workers were not independent I decline to rule that they are incapable of being seen to be impartial. It really must be understood that Parliament has plainly laid upon the local authorities, and hence upon their experienced and professional social workers, the obligations inherent in section 20, and in 20(1) if considered on its own, one of which is to make an assessment of a young person's age. Further, that assessment, whether or not taken with the other

necessary assessments, is not a simple issue of fact for the reasons I have already given. The instant cases are far removed from *Bewry*, *Tsfayo* and *Wright*. In my judgment this court will be well able in judicial review proceedings covering section 20 to safeguard a young person's interest and no doubt will look with a careful eye for any signs of partiality and /or unfairness on the part of the local authority.

118. The logical consequence of Mr. Straker's and Mr. Wise's arguments seem to me to be that in every case where social workers assess, contrary to the young person's contention, that his age is over 18, Article 6(1) must be infringed. In my judgment, that way lies chaos. For the young person it means that the social workers are hamstrung in trying to carry out the duty under section 20 and could seriously prejudice the young person's welfare. For local authorities, paralysis may set in; what are they to do? Mr. Straker submitted that if there is no "full jurisdiction" then I must remit the matter to Lambeth for it "to secure an Article 6 compliant procedure for determining M's age." (see paragraph 55 of the skeleton argument). That, to my mind, leaves what Lambeth is meant to do hanging in the air, with no doubt M and A and their advisers ready to attack any (unspecified) future procedure as yet another procedure not complying with Article 6(1).

119. Mr. Wise sought to persuade me that Article 8 of the ECHR was engaged and was broken procedurally in respect of A. Mr. Straker did not adopt those submissions in respect of M, or even refer to Article 8. Mr. Wise accepted that if Article 6(1) was engaged and breached, Article 8 added nothing. He did not accept the converse.

120. Mr. Wise submitted that Article 8 was engaged and was procedurally broken in that:-

a) A's interview by Croydon social workers was one-sided in that the local authority had an interest in making the decision it did;

b) A was on his own and had no support – he referred me in particular to paragraphs 9, 10, 15, 48, 49 and 50 of Sir Albert's statement;

c) A could not speak English;

d) He did not know what he was being asked about; and

e) After the assessment there was no opportunity for him to dispute Croydon's conclusions.

121. Mr. Wise referred me to W v. United Kingdom (1987) 10 EHRR 29, a decision of the European Court, and in particular to a passage in its judgment at page 49:-

> "61…..Debate centred on the question whether the procedures followed had respected the applicant's family life or constituted an interference with the exercise of the right to respect for family life which could not be justified as "necessary in a democratic society." The applicant and the Commission took the view that the procedures applicable to the determination of issues relating to family life had to be such as to show respect for family life; in particular, according to the Commission, parents normally had a right to be heard and to be fully

> informed in this connection, although restrictions on these rights could, in certain circumstances, find justification under Article 8(2). The Government, as their principal plea, did not accept that such procedural matters were relevant to Article 8 or that the right to know or to be heard were elements in the protection afforded thereby.
>
> 62. The Court recognises that, in reaching decisions in so sensitive an area, local authorities are faced with a task that is extremely difficult. To require them to follow on each occasion an inflexible procedure would only add to their problems. They must therefore be allowed a measure of discretion in this respect.
>
> On the other hand, predominant in any consideration of this aspect of the present case must be the fact that the decisions may well prove to be irreversible: thus, where a child has been taken away from his parents and placed with alternative carers, he may in the course of time establish with them new bonds which it might not be in his interests to disturb or interrupt by reversing a previous decision to restrict or terminate parental access to him. This is accordingly a domain in which there is an even greater call than usual for protection against arbitrary interferences.
>
> It is true that Article 8 contains no explicit procedural requirements, but this is not conclusive of the matter. The local authority's decision-making process clearly cannot be devoid of influence on the substance of the decision, notably by ensuring that it is based on the relevant considerations and is not one-sided and, hence, neither is nor appears to be arbitrary. Accordingly, the Court is entitled to have regard to that process to determine whether it has been conducted in a manner that, in all the circumstances, is fair and affords due respect to the interests protected by Article 8. Moreover, the Court observes that the English courts can examine, on an application for judicial review of a decision of a local authority, the question whether it has acted fairly in the exercise of a legal power."

122. Mr McGuire accepted – see paragraph 11 of his supplementary skeleton argument – that if Article 8 is engaged then it affords procedural protection.

123. The essential issue in this preliminary hearing arising under Article 8 is whether it is engaged at all. Nevertheless, Mr. Wise sought to persuade me that if Article 8 is engaged then it was breached. But as Mr. McGuire pointed out whether it was breached on the facts of A's case is not a preliminary issue. It goes to the substance of the case at the final hearing; and in any event the Article 8 challenge is no different from a challenge of procedural unfairness on normal, public law grounds. Mr. McGuire also complained, with some justification, that no evidence had been filed on Croydon's behalf dealing with the facts of the interview with A because it was understood that what was to be dealt with at this preliminary hearing were legal issues

and not the specific detail of A's case. Further, as he pointed out, Ms. Janet Patrick's statement of 13 May 2008 refers more to principles and does not address the substance of A's interview. Paragraph 24 of the claimant's grounds refer to breaches of common law and Article 6 principles; nothing was said about Article 8. It is true that the grounds mention Article 8 at paragraphs 47 to 51. But the breach alleged is as a result of "the current age assessment regime".

124. Although I permitted Mr. Wise to advance his argument that on the facts of A's case Article 8 was breached I think, upon reflection, that it would be fairer if this issue was deferred to the final hearing where it can be advanced alongside normal, common law principles and when Croydon has had an opportunity to file further evidence dealing with the specifics, if so advised. Contrary to Mr. Wise's submission in reply, I hold that the court will have full jurisdiction to deal with any alleged breaches of procedure under Article 8.

125. Is Article 8 engaged? Article 8 provides as follows:-

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

126. Mr. Wise's fundamental submission is that whether a young person is a child engages "the right to respect for his private …. life". In reply to Mr. McGuire Mr. Wise took me to paragraphs 43 to 46 of the judgment of Munby J in CF v. SSHD [2004] EWHC 111 (Fam); [2004] 2 FLR 517. This case concerned the separation of a young person of 24 years old who was separated from her baby as she was in prison. The judge quashed the SSHD's decision on the grounds that it was procedurally flawed. At paragraphs 43 to 46 Munby J referred to the European authorities that private life involves at least two elements, the notion of an "inner circle" in which the individual may live his own personal life as he chooses and the right to establish develop relations with other human beings. Article 8 protects a right to personal development. Mr. Wise particularly highlighted paragraph 45 which reads:-

> "so, as I pointed out in R (A, B, S, and Y) v. East Sussex CC …., included in the respect for private life which is guaranteed by Article 8, and embraced in the "physical and psychological integrity" which is guaranteed by Article 8, is the right to participate in the life of the community and to have access to an appropriate range of social, recreational and cultural activities."

127. Mr. McGuire and Ms. Rhee submitted that the decision as to whether A is a child does not engage an Article 8 substantive right. Unless it does so Article 8 cannot be involved procedurally. Further, a decision as to age is but the first step in the needs assessment process under section 20 and it is that entire assessment process that

would have to engage Article 8 as a substantive right. It is to be noted that the claimant's grounds speak only of Article 8 engaging the age dispute assessment process.

128. In my judgment whilst I accept that the age dispute assessment is an important stage along the road to a section 20 assessment it cannot by itself be said to engage a right to private life under Article 8. What may affect the young person's private life is whether he is provided with accommodation and that can only be determined if all the requirements of section 20 are met. As I have said the whole thrust of section 20 is the "provision of accommodation" for children. If Article 8 is to be engaged, in my judgment, it has to be engaged looking at section 20 as a whole and not just at one part of the process. I therefore hold that the age determination process in the instant cases does not engage a right to private life under Article 8. I specifically make no finding whether or not the entire assessment process under section 20 can engage a right to private life under Article 8 because this point was not canvassed in argument.

Issue 2

129. Mr. Straker submitted that the doctrine of precedent fact will apply where, on the true construction of the statutory provision:-

i) the fact is objective in nature, i.e. where there is an objectively correct answer, rather than a subjective i.e. where there would be a range of correct answers,

ii) it is not a matter for the public authority to determine because it cannot determine its own boundary, and

iii) the fact is precedent to the public authority's jurisdiction arising.

130. Mr. Béar submitted that, on a true construction of section 20, all the criteria within it are for decision by a local authority and not the court, and therefore there is no precedent fact. He also specifically submitted that on a true construction the determination of the young person's age by a local authority is not precedent to its jurisdiction arising. As, in connection with issue 1, I have accepted Mr. Béar's and Mr. McGuire's arguments on the statutory construction of section 20, Mr. Straker's submission on issue 2 seems to me to fail at this point.

131. However, I should nevertheless address, as briefly as I can, the matters raised by counsel under issue 2.

132. Mr. Straker submitted that jurisdictional/procedural fact is not reviewable on judicial review grounds but if challenged is required to be proved by the executive to the court on the balance of probabilities. To support that proposition he took me to a number of authorities.

133. The first is Khawaja v. SSHD [1984] 1 AC 74, a decision of the House of Lords (to which I shall refer hereafter as "*Khawaja*"). The House held that on an application for judicial review of an immigration officer's order detaining any person in the

United Kingdom as an illegal immigrant it was the court's duty to inquire whether there had been sufficient evidence to justify the officer's belief that the entry had been illegal and that the duty of the court was not limited to inquiring merely whether he was some evidence on which the officer had been entitled to decide as he had. It is further held that it was for the executive to prove to the satisfaction of the court upon the balance of probabilities the facts relied on by the officer justifying his conclusion that the applicant was an illegal immigrant.

134. In the speech of Lord Scarman, to which all counsel primarily took me, he examined the House's previous decision in R v. SSHD, ex parte Zamir [1980] AC 930. At page 107 Lord Scarman set out the three propositions of law enunciated by the House in *Zamir* – see letters A to C. At page 108 B Lord Scarman made it clear that in his opinion real difficulties rose in respect of the third proposition in *Zamir* namely that if the immigration authority had reasonable grounds for believing that a person is an illegal immigrant, the decision to remove him and to detain him until removed was for the authority and that it was not subject to review by the courts save for the limited extend recognised by "the *Wednesbury* principle".

135. In construing the relevant statutory provision Lord Scarman rejected the notion that a gloss could be put on the words "where a person is an illegal immigrant" so that there should be read in the words "where the immigration officer has reasonable grounds for believing a person to be an illegal immigrant" – see page 108 E and pages 109 et seq. It is plain that Lord Scarman rejected any such gloss because the relevant statutory provision entailed the loss of liberty – see page 109 G, and at page 111 F where he said:-

> "If Parliament intends to exclude effective judicial review of the exercise of a power in restraint of liberty, it must make its meaning crystal clear."

136. Lord Fraser of Tullybelton, in agreeing with Lord Scarman and Lord Bridge of Harwich, expressed himself at page 97 E in this way:-

> "…. An immigration is only entitled to order the detention and removal of a person who has entered the country by virtue of an ex facie valid permission if the person *is* an illegal entrant. That is a "precedent fact" which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the court must go beyond inquiring only whether he had reasonable grounds for his belief."

137. So, Mr. Straker extrapolated from the House's decision in *Khawaja* the submission for the instant cases that the local authorities' determination as to age was a decision that they were not within a group of young persons to whom they owed any duty. They were not under 18 and hence not children. Whether they are children must be a precedent fact.

138. Mr. Straker also referred me to the decision of Andrew Collins J in R (Maiden Outdoor Advertising Ltd) v. Lambeth Borough Council [2003] EWHC 1224 (Admin) – a decision arising under section 11 of the London Local Authorities Act 1995, the

decision of Sullivan J in R v. Secretary of State for the Environment ex parte Alliance against the Birmingham Northern Relief Road [1999] JPL 231 – a decision under the applicable regulations, and in particular the passage in his judgment at the foot of page 247, and the decision of Munby J in (R (Sarah Casey) v. Restormel Borough Council [2007] EWHC 2554 (Admin), which concerned section 202 of the Housing Act 1996. These decisions are examples of the court applying the doctrine of precedent fact in various different situations.

139. Mr. Straker also cited a decision of the Court of Appeal in the London Borough of Lambeth v. TK and KK [2008] EWCA Civ 103, where Wilson LJ gave the first judgment with which Lady Justice Smith and Dyson LJ agreed. (I shall refer to it hereafter as "*TK*").

140. In that case the short facts are that a judge of the Family Division of the High Court had ordered Lambeth to carry out an investigation of a child's circumstances under section 37 of the Children Act 1989. As Wilson LJ made clear in his judgment at paragraph 17 it was the continuing existence of "family proceedings" before the court which enabled the judge to make the direction under section 37. In its report Lambeth concluded that *TK* was over 18 and hence was not a child and that therefore it did not propose to take further action.

141. Thereafter another judge of the Family Division directed that a hearing should take place to resolve the issue of whether *TK* was a child. It was from that decision that Lambeth appealed, in the result unsuccessfully.

142. Lambeth's argument, in a nutshell, was that it had determined that *TK* was not a child and hence its obligations were at an end under section 37 and that there was no facility under section 37 or otherwise under the Children Act 1989 to challenge its determination. However it could be challenged in the Administrative Court under well known common law principles. As *TK* had taken judicial review proceedings she should not be allowed to forsake such a remedy and obtain in the Family Division a factual determination that she was a child.

143. As I read the judgment of Wilson LJ the nub of his reasoning why he rejected Lambeth's appeal was because section 37 did not confer upon the local authority the right to determine that *TK* was not a child; that lay within the court's province (paragraph 28). At paragraph 34 he said:

> "The bottom line, however, is that the local authorities cannot be the arbiters of whether courts have jurisdiction to make directions to them …."

144. During his judgment Wilson LJ referred to *Khawaja* but in my judgment his reasoning was not based on "precedent fact". His reasoning was that, where the court had given directions to a local authority to carry out an investigation into a child's circumstances and report back to the court, the local authority could not determine the age of the "child", shut out the court from determining the child's age, and thereby depriving the court of its jurisdiction.

145. Mr. Wise adopted Mr. Straker's submissions.

146. In my judgment, these submissions fail. As I have already found under issue 1, I accept Mr. Béar's construction of section 20. Thus the age assessment is not a precedent fact. *Khawaja* was a case dealing with the liberty of the subject. A case closer to the instant cases is R v. Oldham Metropolitan Borough Council ex parte Garlick [1993] AC 509 (to which I shall refer as *"Garlick"*) in which the House of Lords allowed the appeal in the third case by the housing authority. The applicant suffered mental impairment. The housing authority concluded that the applicant did not have sufficient capacity to make an application or for consent to its being made on her behalf and in consequence no application had been made under section 62 of the Housing Act 1985.

147. At page 520 Lord Griffiths with whose speech Lord Bridge of Harwich, Lord Ackner and Lord Woolf agreed, said:-

> "In the present appeal the authority regarded the applicant as so disabled that she lacked the capacity to be regarded as an applicant and that they thus owed her no duty under the Act. At the hearing before the Court of Appeal further evidence of the mental capacity of the applicant was admitted. The authority wish to evaluate this evidence and have undertaken to reconsider their decision that the applicant lacks capacity to make an application. But if they decide that the applicant does lack capacity to make an application the question arises whether that decision is one which Parliament entrusted to the authority and so can only be reviewed on *Wednesbury* grounds (see Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223) or whether it is to be regarded as a question of precedent fact going to the jurisdiction and so to be decided by the court.
>
> If, as the Court of Appeal decided, an application can be made on behalf of a totally mentally incapacitated person because a duty is owed to him or her under the Act it is understandable to regard the question of whether or not an application has been made to be a question of fact to be decided by the court. But if, on the true construction of the Act, Parliament only imposes the duty in respect of applicants of sufficient mental capacity to act upon the offer of accommodation then it seems to me it must have intended the local housing authority to evaluate the capacity of the applicant. In this field of social welfare all those concerned with the welfare of the victims must necessarily work closely together. When an application is made by or on behalf of a homeless person an immediate investigation must be started and if it is decided that the homeless person is so disabled as to be incapable of looking after himself and there is no one to care for him then the social services must be alerted immediately so that they may look after him. All these very immediate investigations and decisions are necessary to make the system work and they can only be carried out by the authorities concerned. I therefore conclude that a decision by a

> local housing authority that a particular applicant lacks the capacity to make an application because he cannot understand or act upon an offer of accommodation can only be challenged on judicial review if it can be shown to be *Wednesbury* unreasonable. As the local housing authority is in any event going to review its decision there is no purpose in entering upon a *Wednesbury* review at this stage. But on the material before the judge he was in my view right to dismiss the application and I would allow this appeal."

148. In the instant cases Parliament intended the local authorities to evaluate the age of M and A. It is not appropriate therefore for the doctrine of precedent fact to be applied in respect of an assessment, part of which necessitated determining their ages.

149. So far as *TK* is concerned that authority is not in my judgment an authority on precedent fact. As I have said, it decided that where the Family Division of the High Court was seized of a case in which it had ordered a section 37 investigation it was not for the local authority to frustrate its order.

Issue 3

150. This issue only concerns M and Lambeth, not A and Croydon.

151. Mr Straker's submissions were as follows. The departure of Lambeth from the decisions of the AIT and the SSHD (see paragraph 4 above), i.e. in essence that M was a child, was unlawful. At the forefront of his submissions he cited to me paragraph 22 of the judgment of the Court of Appeal in R(Iran) and others v. SSHD [2005] EWCA Civ 982:-

> "The principle that like cases should be treated in a like manner is another way of describing what Lord Hoffmann described in *Arthur J S Hall & Co v Simons* [2002] 1 AC 615, 688H as "the fundamental principle of justice which requires that people should be treated equally and like cases treated alike." See also Sedley LJ in *Shirazi v SSHD* [2003] EWCA Civ 1562 at [29] and [31]; [2004] INLR 92 when he described as "inimical to justice" the inconsistency that was evident when different decisions were taken by different panels of the same appeal tribunal on very similar facts."

152. He emphasised the importance of consistency of decision between tribunals and/or between tribunals and other bodies, including local authorities. The function of the AIT and Lambeth in assessing M's age were linked. The joint working protocol between Immigration and Nationality Directorate of the Home Office ("IND") and the Association of Directors of Social Services ("ADSS") of 22 November 2005, which is exhibit 3 to Mr. Bentley's statement of 21 May 2008, was not taken into account by Lambeth. Broadly, if the SSHD and a local authority disagree about the age of a young person any differences will be dealt with in accordance with the procedures under the protocol, see paragraph 10g and 14a. Finally, Lambeth, when in August 2007 it was appraised of the AIT's decision it had to deal with it which it did not.

153. Mr Straker then took me to a decision of the Court of Appeal in North Wiltshire Borough Council v. Secretary of State for the Environment and Clover 65 P. and C.R. 137. The Court of Appeal there held that a previous appeal decision which is materially indistinguishable from the present case is a material consideration within the meaning of section 29 of the Town and Country Planning Act 1971 which an inspector should take into account in determining whether or not to grant planning permission on appeal. An inspector is free to depart from an earlier decision but before doing so he ought to have regard to the importance of ensuring consistent decisions and must give his reasons for departing from the earlier decision. At page 145 Mann LJ said:-

> "In this case the asserted material consideration is a previous appeal decision. It was not disputed in argument that a previous appeal decision is capable of being a material consideration. The proposition is in my judgment indisputable. One important reason why previous decisions are capable of being material is that like cases should be decided in a like manner so that there is consistency in the appellate process. Consistency is self-evidently important to both developers and development control authorities. But it is also important for the purpose of securing public confidence in the operation of the development control system. I do not suggest and it would be wrong to do so, that like cases *must* be decided alike. An inspector must always exercise his own judgment. He is therefore free upon consideration to disagree with the judgment of another but before doing so he ought to have regard to the importance of consistency and to give his reasons for departure from the previous decision.
>
> To state that like cases should be decided alike presupposes that the earlier case is alike and is not distinguishable in some relevant respect. If it is distinguishable then it usually will lack materiality by reference to consistency although it may be material in some other way. Where it is indistinguishable then ordinarily it must be a material consideration. A practical test for the inspector is to ask himself whether, if I decide this case in a particular way am I necessarily agreeing or disagreeing with some critical aspect of the decision in the previous case? The areas for possible agreement or disagreement cannot be defined but they would include interpretation of policies, aesthetic judgments and assessment of need. Where there is disagreement then the inspector must weigh the previous decision and give his reasons for departure from it. These can on occasion be short, for example in the case of disagreement on aesthetics. On other occasions they may have to be elaborate. "

154. Mr. Straker also referred me to the decision of the Court of Appeal in R (Carlton-Conway) v. London Borough of Harrow[2002] J.P.L. 1216.

155. A critical point, submitted Mr. Straker, was that the decision of the AIT was a judicial decision, was lawful and had not been set aside. Lambeth did not address it but just cast it aside.

156. In my judgment it is necessary, first, to look at the decision of the AIT and the decision of Lambeth of 12 September 2007. The AIT decision was in relation to the SSHD's refusal to treat M as a minor. Dr. Michie's report, favourable to M, was before the Immigration Judge, who found that the SSHD had no sound basis for challenging the conclusion of Dr. Michie (paragraph 21), that no social services assessment had been conducted in respect of M's age (paragraph 24), that Dr. Michie was correct in his assessment of M's age (paragraph 26), that as a lay person he (the Immigration Judge) had no regard to M's physical appearance and that he was not qualified to assess a person's age simply in his experience (paragraph 26).

157. Thus it is apparent that the AIT was kept in ignorance of the two hour assessment of M by Lambeth social workers in which they, well versed in assessing the ages of young persons, came to an opposite conclusion. I find this omission concerning. The SSHD may well not have known of Lambeth's assessment done on 14 December 2006. But M did, and so must his solicitors acting for him in the judicial review proceedings begun on 13 March 2007. Whether M's solicitors acting for him in his immigration appeal knew of Lambeth's age assessment is unknown. But M knew. Whether he told his immigration solicitors is unknown. I have no doubt that if Mr. Adler, M's counsel before the Immigration Judge, had known of it, he would have so informed the AIT. However, the fact remains that the Immigration Judge put some, possibly critical, reliance upon the absence of a social services assessment.

158. The further age assessment of M, referred to as "2nd Supplementary Age Assessment in relation to [M]", was performed by Ms. Pat Dyer on 12 September. Paragraph 2 thereof shows that she had, inter alia, the decision of the AIT in front of her. Paragraph 3 notes the conclusion and reasoning of the AIT. Paragraph 4 sets out why she felt confident in differing from the AIT's conclusion, as follows:-

a) She had considered many of Dr. Michie's reports and was very doubtful of their value.

b) She had spent two hours (on 22 December 2006) observing and interviewing M.

c) She is a qualified social worker and has worked with young people from many different cultural, ethnic and general backgrounds including from North Africa (M is a Libyan national). For the last seven years she had regularly carried out age assessments on young persons, including from North Africa.

159. At paragraph 6 she set out, in extenso, her reasons for concluding that M had not turned 17. I shall not set them out. Mr. Béar referred in particular to paragraph 6(e) and (f). Ms. Dyer referred again to the AIT at paragraph 7(b).

160. I accept Mr Béar's submission that the substratum of the decisions of the AIT and of Lambeth were different. The Immigration Judge did not have Lambeth's age assessment and no doubt, rightly felt that he could not say for himself whether from

M's appearance he was or was not a child. Ms. Dyer and her colleagues had very considerable experience of assessing the age of young persons, including from North Africa. Ms. Dyer spent two hours interviewing M (through an interpreter).

161. It is thus rather an extraordinary submission that Ms. Dyer had no, or no proper, regard for the Immigration Judge's determination. It is plain that she carefully analysed the AIT's reasoning but felt compelled to differ, and, I would state, upon entirely proper and rational grounds. As Mr. Béar submitted, if any body did not address the principle of consistency it was the AIT, who, through absolutely no fault of its own, was disabled from so doing.

162. As to the Protocol point, I do not think that this adds anything to M's case. It is not the "failure" to follow the Protocol that might be able to vitiate the decision of 12 September but the "failure" to follow the decision of the AIT.

163. Mr. Béar submitted that, in any event, the "failure" of Lambeth not to follow the AIT's determination, was not in itself a ground of judicial review. If he was so submitting as a matter of abstract principle I do not think it necessary to decide it. What I do decide is that, <u>if</u> there is a principle of consistency which can be applied where a judicial body makes a decision to which the administrative body was not a party and with which the administrative body differs, then in the instant case the administrative body considered the judicial decision and had good and sound reasons for differing from it. It would be extraordinary if Lambeth were, in some way bound to follow such a decision where the very person (i.e. M) who in effect is seeking to enforce it on Lambeth, failed to bring to the attention of the AIT pertinent facts which might have had the result of the AIT deciding the case adversely to him and thus consistently with Lambeth's decision of December 2006. Further, Mr. Straker provided no argument that Lambeth could have somehow had the decision of the AIT set aside.

164. Mr. Straker argued this issue, as with the duties, in an entirely fair way. But I have no hesitation in rejecting it. Despite Mr. Straker's skill, in my judgment his arguments on this issue in the circumstances of this particular case are very unattractive and could lead to an unjust result.

<u>Issue 4</u>

165. Both Mr. Béar and Mr. McGuire sought to persuade me to hear and determine issue 4, whether with or without oral evidence. As I have said, I declined to do so. Broadly their submissions were the same, which are as follows. Dr. Michie, and to a lesser extent Dr. Birch, have become all too familiar figures in age assessments of young persons, overwhelmingly asylum seekers, who allege they are under the age of 18 years. Dr. Michie's reports, not just in the instant cases but in many, many other cases, follow an almost identical pattern and are regularly put in front of local authorities as irrefutable evidence that the young person is indeed a child (i.e. under 18). When local authorities decide the age assessment adversely to the young persons and in so doing "reject" Dr. Michie's opinion it is then said that such "rejection" was either perverse or irrational or both and judicial review proceedings invariably follow. Put bluntly, local authorities are exasperated at having, what they believe to be, completely unscientific reports from consultant paediatricians such as Dr. Michie put in front of them and then when "rejected", judicial review proceedings inevitably

follow with all their attendant expense, delay and general interference with their day to day work.

166. Dr. Michie's evidence has been accepted by some courts and rejected by others. By way of example, Owen J in R(I and O) v SSHD [2005] EWHC 1025 (Admin) found (see paragraph 46) that had the SSHD applied its policy the only rational decision open to him was that Dr. Michie's report amounted to credible medical evidence to demonstrate the age claimed. Further it was irrational to reject Dr. Michie's report – see paragraphs 47 to 54 of his judgment. A further example is L Borough Council v, N and RN [2006] EWHC 1189 (Fam) a decision of Sumner J where he accepted the evidence of Dr. Michie, albeit that he was not called to give oral evidence.

167. On the other side, by way of example, is the decision of Davis J in R(C) v. Merton London Borough Council [2005] EWHC 1753 (Admin) where at paragraph 30 he said:-

> "30. I think it quite wrong to impose too legalistic a role on the local authorities in a context such as the present. But at the same time I do think it incumbent on the local authorities to express, in what no doubt can ordinarily be shortly-put wording, but in a clear and concise way, why it is that a claimant's case is being rejected. Here, probably the central feature of the claimant's case was the report of Dr Michie; at least that certainly was a central feature. In my view it behove this particular local authority in the circumstances to explain, albeit briefly, why it was that they did not accept Dr Michie's opinion. There is no doubt at all, to my way of thinking, that, if one reads the entirety of all the various local authority assessments and internal documents, it had amply laid the groundwork for departing from Dr Michie's opinion. As I have said, there are, self-evidently, on the face of Dr Michie's opinion, matters which cry out for explanation and examination. Self-evidently one can query how it is that Dr Michie almost plucks out of the air, if I may use that phrase, the age of 17 as opposed to, say, the age or 18 or the age of 16. But the point remains that this was a report of a highly experienced doctor who claims expertise in this area and the local authority does not explain why it disagrees with it. One can infer that the local authority might wish to say, "we disagree with it because Dr Michie has accepted her as credible but we have good reason to think she is not credible." That, as so formulated, seems to me probably in itself a valid justification for departing from Dr Michie's report. But that is not said. Equally, it might easily be said that in fact a decision that she was 18 or over was not in fact inconsistent with Dr Michie's report; if only because Dr Michie himself acknowledges a potential variation of plus or minus 2 (even assuming, and it is an assumption, that 17 is to be taken as the estimated age). But again, that is not in terms said. All of this could have been said but it is not."

168. In the instant cases M's stated age was supported by a report of Dr. Michie and that of A by Dr. Birch. In both cases a central point of M and A's cases are that it was irrational to reject their reports. In M's case, Lambeth instructed Dr. Stern, a consultant paediatrician for almost 30 years and former Dean of Postgraduate Medical Education at St. Thomas' Hospital, who has had no prior involvement in age assessment litigation.

169. Having examined the reports, particularly the methodology, of both Dr. Mitchie and Dr. Birch, and drawing upon his considerable experience and expertise, Dr. Stern concluded that their conclusions and methodology lacked any, or any real, scientific basis. Accordingly Lambeth, and thus Croydon, invited me, at this preliminary stage, to determine issue 4 as expressed in paragraph 8 of the order of Holman J.

170. Mr. Béar and Mr. McGuire sought to persuade me that I should hear issue 4 at this stage, i.e. within a preliminary hearing. Lambeth's objective, as Mr. Béar readily conceded, was to knock out, once and for all, the reports of Dr. Michie and Dr. Birch (and, by extension, similar reports of any other consultant paediatrician) as being unscientific and thus unreliable. Both, but particularly Mr. McGuire, emphasised that there are many, many cases in the pipeline, which depend, in whole or in part, upon whether the reports of Dr. Michie principally but also of Dr. Birch, which are waiting for a determination, and that now was the time for the court to grasp the nettle and declare in effect, that Dr. Michie did not "trump all".

171. Mr. Straker and Mr. Wise emphasised that this preliminary hearing was arranged to determine matters of procedure not substance. It was not their contention that Dr. Michie "trumped all". If they succeeded on issues 1 and 2, then there would be no need to go into issue 4. If, on the other hand, they failed then issue 4 should be dealt with in the final hearing within the factual matrix of the cases. They also pointed to the danger, at least at this stage, in respect of expert evidence of making rulings which, whilst criticising current methodology, might have doubtful relevance and/or confusing impact upon reports from other paediatricians who might refine and/or improve the current methodology. Mr. Wise made the point that what Lambeth and Croydon were attempting to do was to get the court to approve local authorities ignoring paediatrician's reports altogether.

172. Ms. Rhee for the intervener, told me that the intervener had difficulty in supporting the resolution of issue 4 at this stage.

173. I wish to say as little as possible about issue 4. It may be for a court at the final hearing to grapple with it. Suffice it to say, in my judgment it is not appropriate for it to be dealt with at this preliminary hearing. In my view it is much better dealt with at the final hearing when it can be seen, and if appropriate determined, within the full, factual matrix of each case.

174. I answer each of the preliminary issues set out in paragraph 1 above as follows:-

i) the age determinations of each claimant by the respective local authorities were not contrary to Article 6(1). In respect of Article 8, which A alone sought to invoke, his age determination is not a "private right" and thus Article 8 is not engaged. If it is, then whether it was breached is adjourned to the final hearing.

ii) no.

iii) yes.

175. Lastly, but with sincere gratitude, I would like to thank all counsel for their lucid, thorough and helpful submissions.