Case No: CO/1099/2011

Neutral Citation Number: [2011] EWHC 3488 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT IN BIRMINGHAM

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 21/12/2011

Before :

THE HONOURABLE MR JUSTICE BEATSON

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Between :

The Queen on the application of MWA	**Claimant**
- and -	
(1) Secretary of State for the Home Department	**Defendants**
- and -	
(2) Birmingham City Council	

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Ramby de Mello (instructed by **Sultan Lloyd**) for the **Claimant**
Jonathan Cowen (instructed by **Birmingham City Council Legal Department**) for the **Second Defendant**
The first defendant did not appear and was not represented

Hearing dates: 6 and 8 December 2011

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Judgment

Mr Justice Beatson :

1. The claimant is a national of Afghanistan. He entered the United Kingdom on 26 June 2009 and claimed asylum on 2 July 2009. He claimed to be 12 years old. This is the hearing of his application for judicial review of the decisions of Birmingham City Council, the second defendant, (the Council) on 7 July 2009 and 16 December 2010, determining him to be over 18 years old on the material dates for the purposes of the Children Act 1989. Two days after the first of these age assessments, the Home Secretary, the first defendant, refused the asylum claim.

2. As will be seen, the procedural history is complicated. There are, however, now only two questions before the court. The first is the impact on the Council and its assessments of the decisions of two Immigration Judges in the Asylum and Immigration First Tier Tribunal considering appeals from the Home Secretary's refusal of the asylum claim which determined that the claimant is a child with a date of birth of 1 January 1997 and the position taken by the Home Secretary after the second of these decisions. In *R (PM) v Hertfordshire CC* [2010] EWHC 2056 (Admin) at [83] and subsequent decisions it was held that, while the previous Tribunal proceedings are relevant and entitled to respect, the Council is not bound by them. Accordingly, in that sense the present case is a challenge to Hickinbottom J's decision in *PM's* case. It may have been for that reason that, when giving permission, Hickinbottom J ordered that the case should not be heard by a Deputy High Court judge.

3. Mr de Mello, on behalf of the claimant, invited me to consider a sub-question, not considered in *PM*'s case, not raised in the original grounds in this case, and only introduced in his skeleton argument. This point, now before the Upper Tribunal, concerns the impact of such decisions in the light *inter alia* of the UK Border Agency's guidance *Assessing Age* and a 2005 *Age Assessment Joint Working Protocol* (the "Age Assessment Protocol") between the Immigration and Nationality Directorate of the Home Office (now UK Border Agency) and the Association of Directors of Social Services. In particular, this concerns the position where the Home Secretary accepts the decision of the Immigration Judge and makes an assessment which differs and is inconsistent with the assessment by the Council. Paragraph 14(a) of the Age Assessment Protocol provides that where there are conflicting assessments the relevant part of the Home Office (the Immigration and Nationality Directorate, the functions of which are now exercised by the UK Border Agency) should discuss the case, attempt to reconcile the decisions and, in the absence of agreement, refer the case for binding adjudication to a nominated third party.

4. The second question is whether, if the Council is not bound by the decisions of the Immigration Judges, the claimant is a child. The answer to this question determines the responsibility of a local authority to the individual concerned. In *R (A) v Croydon LBC* and *R (M) v Lambeth LBC* [2009] UKSC 8, [2009] 1 WLR 2557, the Supreme Court held that whether a person is or is not a child is a question of jurisdictional or precedent fact of which the ultimate arbiter is this court, rather than the relevant local authority faced with the initial application and which has to make an initial decision.

5. In the case of a question of jurisdictional fact, it is absolutely clear that although the relevant public authority has to inquire into the facts, if its decision as to those facts is

wrong, it cannot give itself a jurisdiction which it does not have and cannot, as a result of that decision, decline a jurisdiction which it does have. That does not, however, mean that a local authority's decision that a person is or is not a child for the purposes of the Children Act 1989 is not also susceptible to challenge on ordinary judicial review principles. In *R (A) v Croydon LBC* and *R(M) v Lambeth LBC* the Supreme Court recognised that the local authority had to make its own determination in the first place (see [33] and [54]). The fact that, in certain circumstances, a court is ultimately responsible for determining a matter, does not mean that, in an appropriate case, where the court has identified a public law flaw, it cannot remit the matter to the local authority.

6. I have referred to the case before the Immigration and Asylum Chamber of the Upper Tribunal in which the role of the protocol was under consideration. On 13 December 2011, after the hearing in the present case, the Tribunal handed down its decision in *R (JS and YK) v Birmingham City Council* CO/15073/2010, CO/64/2011. It is, however, important to bear the context and two points in mind. The Upper Tribunal did not hear evidence about the claimants' ages. Moreover, I understand that an application has been to the Upper Tribunal under the Upper Tribunal Rules 2008 by the defendant for a direction suspending the effect of that decision and for the decision to be set aside or amended.

7. As to the first point, in the present case (see below) the application that the case be dealt with by legal submissions only, and not by oral evidence, was not pursued by the claimant. This case is at a far more advanced stage than *JS and YK's* case. It had been listed for a three hearing to determine the disputed question of age, witnesses had been summoned and lawyers had devoted energy to prepare a precise case based on the evidence on the disputed question. The Upper Tribunal (see [4]) accepted that it is very unlikely that at that stage the traditional processes and remedies of administrative law will provide an appropriate resolution of the case. It considered the hearing "will be directed not merely to seeing whether the local authority decision should be displaced, but, if so, to determining what the claimant's age most likely is". I respectfully agree. My task, accordingly, has been to do that on the evidence before me. While non-compliance with relevant and operational guidance may assist in forming a conclusion, it will not be dispositive in determining the disputed question of the claimant's age.

8. As to the second point, in the present case, the status of the Protocol has been disputed by the defendant. There is evidence before me suggesting that it is not operational and has been regarded as out of date in the light of the decision of the Supreme Court in *R (A) v Croydon LBC* and *R(M) v Lambeth LBC*. In those circumstances, and given that the defendant's application in *JS and YK's* case has not been determined, and the stage of these proceedings, I shall concentrate on the primary question before me, which is to determine what the claimant's age most likely is.

The evidence

9. The evidence on behalf of the claimant: Dr Diana Birch, a paediatrician with special interest in adolescence and child protection who has given evidence in many disputed age cases, has assessed the claimant's age on a number of occasions. Her first assessment is dated 17 June 2010. There is a second report by her dated 14 February

2011, and a review report dated 28 November 2011. There are also reports of Mr Iain Shearer, an archaeologist and research affiliate at the Centre for Applied Archaeology at University College London and an expert on Afghanistan, dated 7 September 2010 and 1 March 2011. There are also statements of Robina Shah, an employee of the claimant's former solicitors, the Immigration Advisory Service, dated 6 February and 5 and 11 May 2011; Kamaljit Sandhu, a solicitor at Sultan Lloyd Solicitors, the claimant's present solicitors, dated 2 December 2011; and a statement of the claimant, dated 2 December 2011. At the hearing evidence was given by the claimant and Dr Birch.

10. The evidence on behalf of the defendant: There are before me three age assessments by the Council, respectively dated 7 July 2009, 16 December 2010, and 22 November 2011. There is also a report dated 24 November 2011 on behalf of the defendant of Mr Swaren Singh, a senior social worker employed by the Council. Mr Singh interviewed the claimant on 2 and 8 December 2010 and conducted an assessment of him on 16 December 2010, and conducted interviews with him on 20 and 30 June 2011 to review his assessment. He also saw the claimant at six weekly intervals at Greenway, the home for vulnerable children and teenagers where the claimant was accommodated, and when visiting others in his care who lived at the home. He also gave oral evidence.

11. Documents concerning procedures for assessing age and dealing with unaccompanied children: Ms Sandhu exhibited a number of documents. These included a January 2008 UK Border Agency paper *Better Outcomes: The Way Forward, Improving the care of unaccompanied asylum-seeking children*; an August 2010 UK Border Agency Policy, *Processing an asylum application from a child*, and a June 2011 UK Border Agency policy, *Assessing age*. Additionally, the court had before it a document entitled *Age Assessment: Joint working protocol between Immigration and Nationality Directorate of the Home Office and Association of Directors of Social Services* dated 22 November 2005.

The procedural history

12. The claimant came to the notice of the authorities at the end of June or beginning of July 2009, when he was arrested by police in Birmingham. He claimed to be 12 years of age, and was accommodated by the Council. I set out the circumstances of the various assessments of his age by the Council and the decisions by Immigration Judges below. These proceedings were lodged on 7 February 2011 in the light of decisions by the Council and the Home Secretary not accepting the decision of an Immigration Judge that the claimant was a child and the referral of the claimant to solicitors by an organisation, the "Strong Voices Strong Lives Project". Lizzie Bell, a project worker, stated that the claimant told them he had a problem with drugs, and that he struggled to look after himself in the adult accommodation he then occupied. She felt he was aged 14. That application was refused, as was a renewed oral application at a hearing on 22 February 2011. On 4 April Wilkie J refused permission on the papers.

13. On 5 May, a further application for interim relief was made in the light of a decision by a second Immigration Judge finding the claimant to be a child. The Council was

ordered by Hickinbottom J to provide accommodation under section 20 of the Children Act 1989.

14. On 16 May, at a hearing of the claimant's renewed application for permission, permission was granted by Hickinbottom J. He directed a hearing before a High Court Judge to determine the claimant's age, at which the claimant, and Dr Birch and Mr Shearer, were to be made available by the claimant for cross-examination, and the social worker responsible for conducting the Council's age assessment of the claimant was to be made available by the Council for cross-examination. The hearing was to be listed on 19 – 21 July but, on 8 July, the claimant's then solicitors went into administration and on 13 July I adjourned the substantive hearing to enable the claimant to seek alternative representation.

15. On 18 November, shortly before the 3 day hearing listed for 6 – 8 December, the claimant's new solicitors applied for the case to be transferred to the Upper Tribunal in the light of the decision in *R (FZ) v Croydon LBC* [2011] EWCA Civ 59. Alternatively, the claimant applied for the case to be dealt with by way of legal submissions only, and not by oral evidence. I refused the first application *inter alia* because of the further delay that would be occasioned by a transfer to the Upper Tribunal in circumstances in which the Council had been accommodating the claimant for some considerable time, recently pursuant to Hickinbottom J's interim relief, although the Council had assessed him as an adult. The second application was not pursued in the light of what I stated in paragraph 3 of the reasons of my Order dated 28 November when directing this matter was to be determined at the commencement of the hearing

The approach to the evidence

16. In *R (KN) v Barnet LBC* [2011] EWHC 2019 (Admin), HHJ David Pearl reviewed the authorities on the question of who has the burden of proof in age assessment cases. His helpful summary of their effect can be further summarised as follows. In *R (MC) v Liverpool CC* [2010] EWHC 2211 (Admin), Langstaff J stated that the process is one of assessment and not in reality choosing between one of two alternatives, one or the other of which must represent the fact. In *R (N) v Croydon LBC* [2011] EWHC 862 (Admin), Neil Garnham QC agreed with Langstaff J. He stated that "what in fact the court is doing is making an assessment of what is the most likely date of birth. It is comparing the likelihood of a wide range of dates and picking the one which the evidence suggests is the more likely than the rest to be accurate". In *R (CJ) v Cardiff CC* [2011] EWHC 23 (Admin) Ouseley J agreed with Langstaff J that the approach is closer to assessment, but also said that, by contrast to the local authority's task, which is to undertake an assessment rather than deal in the burden of proof and the balance of probability, the description "assessment" is not a complete statement of the task of the court in its fact-finding role. "The fact finding role may require a stark choice and conclusion based on burden of proof, and the balance of probability".

17. In *KN's* case HHJ Pearl stated that where, for example, a local authority assessment that a person is over 18 because that person is not credible or a particular document is not reliable is challenged, the person challenging it carries the burden of proof and will be required to demonstrate on the balance of probability that he or she is credible and/or that the document is reliable: see [14]. But he also stated (at [17]) that "in age

assessment cases…the court is faced, in the first instance, with having to reach a view on the basis of all the evidence as to the age of claimant, and if possible the claimant's date of birth" and (at [18]) that "all of this evidence has to be assessed by the judge, regardless of any question of who has the burden of proof". He compared the process to assessments made by courts and tribunals of whether a person has or has not a mental disorder, whether a child has or has not a special educational need requiring education at a particular school, and whether a person is or is not suitable to work with children or vulnerable adults.

18. HHJ Pearl accepted (at [19]) that, if the court is unable to reach a decision after conducting the assessment exercise, it would have to fall back on the burden of proof which would mean that it would be for the claimant to show that he is or was under 18 at the material time he asserts a duty was owed to him as a child. He considered that this approach was particularly suitable for age assessment cases because local authorities, in making an assessment that a person is over 18, should have given that person the "benefit of the doubt". He also stated (at [24]) that the burden of proof in establishing a precedent fact upon which a decision needs to be made as to its truth remains on the person who asserts its validity. In most cases this is likely to be the claimant.

19. With that background I turn to assess the evidence in this case. The claimant was arrested by police in Birmingham on 26 June 2009. He claimed to be 12 years old and was accommodated by the Council under section 20 of the Children Act 1989. His screening interview with the UK Border Agency took place on 2 July 2009. Interrogation of the EURODAC system by the Home Secretary had revealed fingerprints matching the claimant's taken in Greece on 16 April 2009, and in Italy on 21 and 26 May 2009. The first defendant maintained that the claimant sought asylum in Italy, but the claimant denied this. Jumping forward in the chronology, a request that Italy accept responsibility for the determination of the claimant's asylum claim under the Dublin II Regulation was refused on the ground that Greece was responsible for the claimant's case. Although Greece accepted such responsibility, the claimant was not removed before the deadline and, in April 2010, the United Kingdom accepted responsibility for the substantive consideration of that claim.

20. Returning to the screening interview, the claimant stated that he was 12 years old, did not know his date of birth, and had been told he was 12 by his mother when he telephoned her when he was in Istanbul. He also stated that he had left Afghanistan about two and a half months before the interview, and travelled to Iran mostly on foot, then to Turkey in a lorry, then to Greece by lorry and boat, and then to Italy and France. He accepted that he had been fingerprinted in Greece on 16 April 2009, and in Italy in May 2009, but denied that he had claimed asylum in either country.

21. The claimant's first age assessment by the Council was conducted by Ms Sharon McCatty. Her assessment was that he is an adult of at least 18 years of age. She recorded signs of regular shaving, although the claimant denied ever shaving. She also recorded him having a mature voice tone and confident presentation. The assessment also referred to discussion with staff as to the claimant's interaction with other young people of a similar age, revealing that he presented with far more maturity than his peers, and appeared to interact with staff in a way which suggested he may be more comfortable around adults than children. It referred to the gender, age, cultural and

religious differences between the assessor and the claimant, and to the traumatic life events he had experienced.

22. In the section on social history and family composition, it is recorded that the assesser "challenged" the claimant as to his previous account in relation to differences between what he said and what he had said in his screening interview, and in relation to his claim that his journey from Afghanistan to England took two and a half months in the light of his presence in Italy on 21 May 2009. She also challenged him as to when it was that his mother told him that he was 12, because he had told her that he had telephoned her when he arrived in Greece.

23. The assessment also referred to a dental appointment at which it was observed that the claimant had his wisdom teeth, and that they have "a lot of wear", and the dentist's conclusion that the claimant "is not 12 as he states, probably 18 years". I interpose that there is a dentist's report dated 24 February 2010 based on a dental check-up on 28 July 2009, which refers to 8 (which at the hearing was accepted to be the third molar) being partially erupted, and gives the opinion that, in view of that, he was much older than age 12 as he stated, and around age 18.

24. Following the acceptance by the United Kingdom of responsibility for the claimant's asylum claim, on 17 June 2010 the claimant was assessed by Dr Diana Birch. Her first assessment of the claimant stated (section 12) that he "presented as a very young boy in his early teens. He was very co-operative and polite…" and "is rather a reserved, shy boy and seemed very lost and immature".

25. Dr Birch measured the claimant's height as 155cm. She stated that, on the basis that he had said his parents were very tall, he "is very likely to have some further growth in height, and if that were the case, he would be more likely to be under the age of 16/17 years than over that age". She estimated his dental age at approximately 15 and a half years. One of the third molars had emerged. She stated that "it may have emerged earlier than it would otherwise have done due to the absence of the first molar, which has been removed some time ago". Dr Birch's conclusion was that, "taking all parameters into consideration, it is likely that [the claimant] is aged 12.89 – 14.89 years of age", a calculation of 13 years 11 months which was consistent with his stated age of 13 and a half years.

26. The asylum claim was refused on 9 July 2010. The claimant appealed to the Tribunal. In a decision promulgated on 28 September 2010, Immigration Judge Cheales determined as a preliminary issue that the claimant was a child aged 13. She did so on the basis of the reports of Dr Birch and Mr Shearer, and a statement by the claimant (who, however, did not give oral evidence). She considered the age assessments and observed that the Home Secretary had not produced evidence to support her claim that the claimant had given dates of birth of 1/1/91 or 1/6/89 to the Italian authorities, the authenticity of the Tazkera, which stated that in 2007 he was 10, was not challenged, and that evidence that a dentist and a doctor had found him to be over 18 had not been produced. In the light of this, the Home Secretary withdrew her decision and the Council revisited its age assessment in the light of the findings of the Immigration Judge.

27. On 9 November 2010 the claimant was convicted at Birmingham Magistrates Court of racial harassment and fined. He was convicted in the name of Jan Wali with a date of birth of 1 January 1991, and had been on remand at Brinsford YOI. An attendance note by his then solicitor states that the magistrates found him to be an adult based on what the police had said, having in turn spoken to social services. The attendance note states that the solicitor advised social services that he had a reasoned decision that the claimant was 13, but they refused to attend and re-assess the claimant's age.

28. The claimant completed an SEF interview on 25 November 2010, accompanied by a responsible adult from the Refugee Council Children's Panel. On 2 December that year, the claimant was interviewed by Mr Singh and assessed. This assessment recorded that it was being conducted to take into consideration Dr Birch's report, the Tazkera, and the decision of the Immigration Judge. The assessment stated that the claimant showed signs of regular shaving. It also referred to and attached a report from a dentist dated 24 February 2010 stating that the claimant had a wisdom tooth present, and that those erupt at 18.

29. At a further interview on 8 December Mr Singh informed the claimant that he had gained no height in almost a year. His assessment took account of this. Mr Singh's conclusion was that "the evidence strongly indicates [the claimant] to be well over 18 years". The assessment based on the interviews on 2 and 8 December was completed on 16 December 2010.

30. A letter dated 28 January 2011 from the UK Border Agency maintained the Home Secretary's position in relation to asylum and the claimant's age. It stated that, in the light of the age assessment conducted after the IJ's determination, the Home Secretary was satisfied that the recent age assessment was a proper assessment with satisfactory observations, and had "sound and rational reasons to depart from the findings of the Immigration Judge". It referred to the absence of growth, the EURODAC evidence and fingerprints taken in Italy from an asylum seeker using the name Wali Jan and a date of birth of 1 June 1989. As to the Tazkera, it is stated that there is little evidence that it was produced in a way that meant the information in it was accurate, to the absence of an original document, only a copy, and to the reply at the screening interview where the claimant is recorded as having given a negative reply to a question asking whether he ever had his own national identity card/military card or driving licence. The report stated that the claimant offered confusing and conflicting details of when the Tazkera was issued and why it lacked integral personal information that would make the document unique to him. For example, he stated that he was present when the Tazkera was issued to his mother, but also that he was not there, and also that the document was not actually issued, but the details just recorded at the Ministry of the Interior.

31. Dr Birch's second report, dated 14 February 2011, comments on the Council's December 2010 age assessment. As to the claimant's physical appearance and demeanour, she stated that it was not unusual for a young boy to look older than his actual age when he comes off the "lorry route" because it is very gruelling. As to the erupted wisdom tooth, she stated that the timing of this developmental feature varies enormously, and "it is very common to find early eruption of the wisdom teeth, and my own study of Afghan children conducted in Afghanistan found that 20% of 14 year olds had at least one erupted third molar tooth". She referred to studies that

concluded that correlation between dental age and chronological age was poor. As to his complexion and facial lines, she stated that these do not determine age and that "Afghan children are often exposed to extremes of weather" and the claimant's "complexion was quite compatible with an Afghan young boy of 13 – 14 years of age".

32. As to the comments about shaving, she stated that the claimant's hair distribution was compatible with a Pashtun boy of 13 – 14 years of age, and that hair on the cheeks and upper lip are often evident in a Pashtun boy much earlier than an English boy, and that it is common for boys of 13 to have moustaches. She maintained her conclusion that the claimant was aged about 13 years 11 months when she saw him in June 2010. Her conclusions also state that it would be advisable for her to review the findings which "could document any further development or growth and improve the accuracy of [her] estimate", and referred to the results of her research studies of children and adolescence of different backgrounds, and age assessment in Afghan children.

33. Mr Shearer's second report about the Tazkera is dated 11 March 2011. He stated that the paper and printing of the document is of a better quality than typical government forms utilised by Afghan authorities other than for Tazkera certificates. He stated that the three different handwriting styles on the document lent credence to it, having been formerly submitted to the administration of Logar Province in a standard process of registration, and the blue stamp at the top of the front page of the document is faint, blurred, and typical of the receipt document stamp used in administrative offices in Afghanistan. He considered the clearer blue stamp on the bottom of the document, the most important mark on it, and to be the official Interior Ministry stamp confirming its authenticity. He also stated that the presence of a signature on the reverse of the photograph was an indication that the document was authentic. He also concluded that the second document, an air mail envelope, was authentic.

34. The claimant's appeal against the Home Secretary's fresh decision dated 28 January came before Immigration Judge Ford, and was heard on 10 March 2011. The determination, promulgated on 18 March, summarised Immigration Judge Cheales' conclusion. Immigration Judge Ford stated that determination "must form my starting point for any findings of fact, in particular as to the appellant's age. I will not interfere with the findings made by Immigration Judge Cheales unless I am satisfied that there is new reliable evidence that leads me to a different conclusion". She also stated that he had to be satisfied that the evidence could not have been made available to Immigration Judge Cheales at the date of the hearing before her. The fresh evidence he considered was the December 2010 age assessment by the Council. The decision states (paragraph 5) that the social workers were not very clear as to the exact sources of information they used in compiling their report, but that they relied heavily on historical information. The judge commented that it was unclear why the social workers, having concluded that the appellant was not of the age that he claimed, was therefore over 18 years of age, and did not explain why he could not have equally been 16 or 17 years, rather than the 12 years that he claimed to be. As to the dental assessment and a medical assessment relied on by the Council, the judge said that both those took place well before the appeal hearing before Immigration Judge Cheales, and there was no explanation as to why she had not been provided with that evidence.

35. At paragraph 11 the judge stated that the Home Office, the respondent, relied on the fact that the claimant had not grown over the 12 months before the hearing, but observed that no medical evidence was provided by the respondent to lead to a conclusion that this was not to be expected for a boy of 13/14, or a boy of 16/17. It is stated that although the respondent concluded that the lack of growth indicated the claimant had stopped growing and was therefore an adult "without any up-to-date medical evidence I cannot exclude other possible causes for his lack of growth".

36. The decision referred to the addendum reports from Dr Birch and Mr Shearer, and to the UK Border Agency's letter dated 28 January. The judge stated that the dental evidence relied on by the Home Secretary was not before the earlier Tribunal, although it existed, and the period during which it was stated that the claimant had not grown was a period prior to that determination. As to the Tazkera, the judge observed that there was no challenge to the document at the earlier hearing, but there is one in the decision letter.

37. The conclusion section, paragraphs 27 onwards, states "I have some concerns about the reliability of [the December 2010] age assessment, and in particular I cannot see why logically, given the evidence before them, the social workers concluded that the appellant was over 18 rather than concluding that he was perhaps 2 – 3 years older than he claimed to be". She referred to the absence of a challenge to the reliability of the Tazkera and the absence of growth, which could have been made at the time of the earlier hearing, and stated that it was not accepted that the decision should be altered based on those submissions made at a later time (paragraph 28). At paragraph 30, the judge stated that "having considered the age assessment dated December 2010, and having also taken into account the addendum report from Dr Birch, I can see no basis on which to interfere with the findings of Immigration Judge Cheales. She was perfectly entitled to make the findings that she made on the evidence before her as to the appellant's age. Her findings have not been further challenged in an appeal. The only fresh evidence I have involves the age assessment from December 2010 and the addendum reports filed from Dr Birch and Mr Shearer. Recognising that there is always a margin of error in age assessments, I am not satisfied that I should depart from Immigration Judge Cheales' conclusion that the appellant was, as at September 2010, 13.89 years of age".

38. Following the second Tribunal decision, in a letter dated 7 April 2011 the UK Border Agency asked the Council to reconsider the claimant's age in the light of the findings. There is no document containing a response by the Council. The Council did send a letter dated 4 April 2011 to the claimant's previous solicitors stating that it was not bound by the judgment or by the Home Secretary's failure to raise important matters before the Tribunal, and complaining that the claimant had not shown documentation from Afghanistan relied on at the Tribunal to the Council, despite requests for it for nearly a year.

39. In a letter dated 12 May 2011, the UK Border Agency informed the claimant's solicitors that it had asked the Council to reconsider the claimant's age in the light of the findings, and stated that as there were no sound reasons to depart from the judge's finding, the Home Secretary accepted that, based on the information, the claimant's date of birth is 1 January 1997 as claimed. The letter also stated that, in view of the claimant's circumstances as found by the Tribunal, in particular that he could access

and rely on the support of his uncle and mother in Afghanistan, he did not qualify for discretionary leave under the policy concerning unaccompanied minors, and did not qualify for leave on any other basis.

40. The next material development was that, after Hickinbottom J granted permission on 16 May, Mr Singh interviewed the claimant on 20 and 24 June in order to review his assessment in the light of the Tribunal's determination. He completed his age assessment for the Council in the light of the determination, his interviews and the other material he considered on 22 November 2011. As well as the interviews, he took into account the claimant's height as recorded in a statutory health assessment on 2 June 2011 (which was 155.1cm), a report from Urgency Housing Organisation highlighting concerns about the claimant's behaviour, and the views of Ms Iommi, its Managing Director, and an email from Michael Henry, an ESOL tutor at TBG Learning, which the claimant had attended for some weeks.

41. Ms Iommi considered that the claimant had "displayed a personality which is strong, assertive, aggressive, and both physically and verbally threatening" throughout his stay at Greenway, the home at which he lived. She referred to him as constantly racially aggressive and derogatory, displaying an open resentment towards authority, and an inappropriate attitude and behaviour towards women with behaviour which was both intimidating and extremely sexually inappropriate. She stated that the claimant is self-sufficient, and demonstrated quite clearly that he had adult maturity and confidence. She stated that the staff unanimously believed the claimant to be in excess of 18 years.

42. Michael Henry's email states that the claimant's behaviour was unpredictable and that he could have been dismissed from the programme following an incident in which he made some racist comments towards a girl and spat at her. The email stated that in the light of the writer's experience for 11 years with ESOL learners, and the claimant's demeanour and physical appearance, that he is "at least 18 years old and may even be older". The email stated that he was immature and had a bad attitude to authority, but this did not disguise his age.

43. Mr Singh records that the claimant walked out of the first meeting after complaining that he was too young to learn life skills such as cooking, and before Mr Singh had the opportunity to discuss his failure to provide a urine test for drugs. In the light of the second meeting and the other material, Mr Singh concluded that, throughout the Council's involvement with the claimant, he had given vague and conflicting information about his history and background, and the age of his mother and siblings.

44. As to the Tazkera, Mr Singh stated that, while Mr Shearer was an expert on Afghan culture, he did not consider him to be an expert on the authenticity of Afghan documentation. The Council had not seen the original of the document, and Mr Singh records a number of matters raising doubts. First, the claimant's father is recorded as "nomad", which was not consistent with the claimant's account that he was a high-ranking police officer and that no explanation had been given for the inconsistency. Secondly, the address on the Tazkera differed from the address the claimant gave during initial assessment. Thirdly, the claimant originally stated that his mother obtained the Tazkera for the purposes of his enrolment in school in March 2009, but this was inconsistent with the claimant's previous account of having received 6 – 7

years of formal education. Fourthly, the claimant stated that the Tazkera was posted to him by his uncle who lives in Logar Province, but the envelope in which the Tazkera was posted was sent from Kabul.

45. As to physical features, Mr Singh recorded his conclusion that the claimant's facial skin, the lines on his forehead, the signs of regular shaving, and mature voice are not simply the result of him having come off the lorry route, but are consistent with him being well in excess of 18 years. He also referred to the fact that the claimant has not grown in height since July 2009, and to Dr Birch's original report which stated that the claimant "is very likely to have some further growth in height", but that he had not. In the absence of development concerns, the Council considered the claimant's lack of growth for over two years was further evidence that he is an adult. The report also referred to the dental evidence, the EURODAC recording of fingerprints, the conviction for racial harassment, and the other reports to which I have referred.

46. As to what the second Tribunal judge stated about the absence of documents at the first Tribunal, Mr Singh stated that the Council had the documents, and they could not ignore those documents for the purpose of the review.

47. In assessing the impact of the decisions of the Immigration Judges in this case, it is important to bear in mind that in neither case did the claimant give evidence before the Immigration Judge. It is also relevant that the first Immigration Judge did not have the dental evidence before her, and relied on the absence of challenge to the Tazkera, and that the second Immigration Judge stated he would not interfere with the findings made by the first judge unless he was satisfied that there was new reliable evidence leading to a different conclusion which could not have been available to the first Immigration Judge.

48. This approach is understandable within the Tribunal, albeit subject to what Judge LJ (as he then was) in *LD (Algeria)* [2004] EWCA Civ 804 at [40] described as the necessary degree of sensible flexibility and desirable consistency of approach which the guidance in *Devaseelan* [2002] UK AIT 00702 provided. But, even within the Tribunal system, applied too rigidly, it has similarities to the "judgment in *rem*" submission which was rejected in *PN*'s case. In Hickinbottom J's summary (at [88]) he stated that the authority had to re-assess the age, taking into account any new evidence, including evidence before the Tribunal that was not previously before it, and given due respect to the basis and reasoning of the Tribunal's finding while taking account of the fact that it may have had different evidence available to it. What he did not say is that Council (or, by analogy, the High Court) could discount evidence which could have been, but was not, before the earlier Tribunal.

49. In this context, it is also important to note the importance attached by Keith J in *R (YA) v Hillingdon LBC* [2011] EWHC 744 (Admin) to the need for the cross-examination of a person if the court is to be able to make informed findings about that person's real age: see [18] – [20] and the very useful summary of the authorities by HHJ Robert Owen QC in *R(K) v Birmingham CC* [2011]EWHC 1559 (Admin). He referred *inter alia* (see [72] – [73]) to the fact that the Council had been unable to make representations to the Immigration Judge. That was also the position in the present case. In *JS and YK's* case the Tribunal referred (see [8]) to the unsatisfactory position of a claimant who is faced with different answers by different public

authorities to the question of how old he is. Notwithstanding the undoubted advantages in having a single answer to the question, in relation to what the Immigration Judge considered to be failings in the presentation of the evidence on the part of the Home Secretary, the position of a body, such as the Council, which was not a party to the appeal, differs from that of the Home Secretary.

50. The last document to which I must refer is Dr Birch's review report dated 28 November, very shortly before the hearing. In the introduction to this report, Dr Birch stated that, in the light of the criticism of her use of statistical data and population norms in, for example, *R (R) v Croydon LBC* [2011] EWHC 1473 (Admin), she had not used a statistical method in preparing this report, but had applied her clinical judgment to the claimant's developmental progress, and came to an opinion as to his likely age. Paragraph 7 of her report stated that "[the claimant] presented as a very young boy in his early teens. He was very co-operative and polite and answered all my questions to the best of his ability. He was rather a reserved, shy boy and seemed very lost and immature". When giving evidence, Dr Birch stated this was a reference to his presentation at the initial interview. In paragraph 10, Dr Birch stated that in her first assessment she had considered that the claimant was probably functioning at about a 14 year level, and that on review she considered that he was, at the time of the review, functioning at a 15 – 16 year level, and his psychosocial development was in the upper middle adolescent stage – 15 – 16.

51. As to emotions and stress, paragraph 11 stated "[the claimant] continues to have emotional problems. At first examination, I mentioned that [the claimant] has some problems with concentration when he is anxious. He misses his family and is somewhat depressed. He has had no education since he came and is listless and directionless. He presents as very scared, and this is interfering with his sleeping. He is alone and lost and has nightmares when he does get to sleep. He has to keep a light on and is afraid of the dark. He is very much in need of foster care". In her evidence, Dr Birch stated this referred to her initial assessment, notwithstanding the contrast between the first and third sentence. Paragraph 12 stated that the claimant's situation remains unchanged, and paragraph 13 stated that he is "very emotionally deprived and this factor may have affected his growth and development".

52. In the report of the examination and testing, in paragraph 12 it is said of his facial hair that "it is usual to see some chest and abdominal hair by the age of 16 and often earlier in a Pashtun boy", and in paragraph 19 that in assessing the significance of facial hair, it is important to take into consideration its distribution and nature, and not the presence or frequency of shaving, which is more influenced by culture and ethnicity. In paragraph 23 she considered that the facial hair was soft, which the claimant did not shave, and was consistent with a boy of 14 – 15. As to teeth, she stated in paragraph 39 that the third molar that had emerged at the upper right "may have emerged earlier than it would otherwise have done due to the absence of the first molar, which had been removed some time before" and (paragraph 41) taking into account the claimant's ethnic origin, "it is likely that his dental age could be about 16 – 17 years of age".

53. Physical growth is dealt with in paragraphs 42 – 59. Dr Birch recorded the claimant's height at 155.5cm on review, as compared with 155cm on initial examination. In paragraph 44 she stated that the height must be placed "in context" and (paragraph 49)

mid-parental height is not accurately estimable, and the reason that it was thought that the claimant would be likely to have some further growth was that he had said his parents were very tall. Of his growth of half a centimetre in a period of 7 months, Dr Birch states it is probable that most of this occurred in the earlier part of the period, that in view of his family history she would have expected him to have grown more, but she was concerned that he had been subject to some stunting "occasioned both by nutritional factors associated with the hardship he has suffered, and also psycho-genetic failure to thrive".

54. Her conclusions are that it is likely that the claimant is aged between 13 and 15. She stated that her judgment had been strengthened by the history and measurements that she made, which supported her clinical judgment.

55. I turn to the claimant's evidence. Although these proceedings were instituted in February, the claimant did not provide a witness statement until 2 December, very shortly before the hearing.

56. Asked about shaving, he said he had never shaved and had no razors. When it was put to him that Marcia, who worked at the place he lived, said that there were two "bic" razors in his room, he replied that a friend had come to his room because it did not have a mirror, and shaved in the claimant's room. The claimant said that his friend came in the night and forgot to take the razors, and "I forgot to take them", which he then corrected to say "I forgot to ask him to take them". Asked about the assessment in 2009 by the social worker that he had signs of regular shaving, the claimant that if he had started shaving then he would have a lot more hair by now. He denied that he had shaved before court on the day of the hearing, and did not mind anyone feeling his face later to see whether he had stubble.

57. The claimant said that he got on with the people at Greenway. He denied that he was aggressive and physically threatening to others, as the Managing Director, Teresa Iomme, had said. He also denied inappropriate behaviour with women, as reported by her, and Michael Henry's statement that he and his friends were constantly calling to girls who complained about this. The claimant said that he did not do anything to anybody, and what Mr Henry was referring to related to friends. He also denied spitting at a girl after making racially aggressive remarks to her, and denied that the girl had slapped his face and that he had been escorted from the building by security. He agreed that Michael Henry had nothing against him, and said that the reason Mr Henry thought the claimant was over 18 is that all the others there were 18 or over and he had been classified that way.

58. Asked about smoking cannabis and other drugs, he stated that he had not. When it was put to him that he worked with a man called Khan who worked with people with drug problems, the claimant said he had no problems with drugs. He explained a urine test which tested positive for heroin and cannabis by saying that Mr Singh had placed him with adults who forced to eat something which made him ill. Asked when that was, he said that this was in 2011. An older person who he did not know but may have been Iranian or Afghanistani forced him to drink and take drugs, which were pills.

59. Asked about being fingerprinted in Greece and Italy, he said that he was not fingerprinted anywhere and had not said otherwise at his screening interview. The note at the screening interview on 2 July 2009, however, recorded him also saying that he had not claimed asylum in Italy. He agreed that he had said that. In re-examination, asked about an immigration interview in November 2009, the claimant said the interviewer did not produce fingerprint samples obtained from the authorities in other countries.

60. Asked a series of questions about identity cards and the Tazkera, which was later produced, he first said that he did not have a national identity card, a military card, or a driving licence, but when shown the Tazkera, he said that in Afghanistan that was like an identity card. Asked why he said he did not have a card, the claimant responded that Mr Cowen had asked him about this like car insurance, but not about a Tazkera, and that in the screening they had asked him if he had any documents from Afghanistan, but did not mention a Tazkera. He denied that it was a fake document, and said that the reason that details such as height, eye colour, skin and hair colour were not filled in was because in Afghanistan, when there was a picture on a document, the authorities often did not fill out the details in the spaces. Asked whether there was a signature or a fingerprint on it, the claimant said his picture was on it, and his signature may be there, but after looking at the Pashtu photocopy, he said that the signature was his mother's, and next to it is a marking inserted when the government issued the document. His mother signed because he was quite young and she was the only person who could sign on his behalf.

61. Asked why, at the screening interview when they asked about documents, he did not mention this, he said that they had not asked about a Tazkera document. The interpreter referred to an identity document, and he should have explained that this was the Tazkera. The claimant also stated that he has always said that he was 14 or 14 and a half. He was not aware of how tall he was. He had been asked his age by Michael Henry, and had told him he was 14.

62. In assessing the claimant's evidence, I have taken account of his relative youth, his different cultural background, and the experiences he went through on his journey from Afghanistan. But making all allowance for those factors, I did not find him a credible witness. His absolute denial of all that others have said about his behaviour and attitude to women at Greenway and at the college he attended, his drug-taking (cf Lizzie Bell's report when the project first encountered him), and his fingerprinting by the Italian authorities, is not credible.

63. He was also inconsistent. So, whereas in his statement he accepted that he took drugs, but said it was because of the influence of the older people he was with, in evidence he said he was "forced to eat something which made him ill". As to the Tazkera, at his screening interview he said he never had a national identity card. His explanations that he thought he was being asked about motor insurance, and also that he did not realise that what was meant by "national identity card" was a Tazkera are not credible explanations. His explanation of the presence of the two disposable "bic" razors in his room is also utterly incredible. He at first said that his friend had forgotten the razors and that "I forgot to take them", but then corrected himself in the way I have described. Also, why would his friend, if visiting his room on a single occasion to shave, bring two razors? As to the fingerprints, at the screening interview he had not

denied that he had been fingerprinted although, as the Council was not able to produce evidence of the EURODAC match, this is a matter to which I do not give much weight, it is noteworthy that the name of the person from whom the fingerprints are said to have been is Wali Jan, the name the claimant gave when he was tried at the Birmingham Magistrates Court.

64. While all this is not in itself conclusive as to his age, the claimant's credibility is relevant in relation to my assessment in the way set out by Ouseley J and HHJ Pearl in *CJ and KN's* cases to which I have referred in [14] – [16]. My findings as to his demeanour and behaviour are also relevant to the consideration of Dr Birch's evidence and reports. A significant component in her assessment of the claimant's age was his demeanour, shyness and immaturity when she saw him. The evidence as to his behaviour at Greenway and the college, in particular, suggests that he either presented himself differently to Dr Birch (the most probable explanation) or that her assessment of this matter, particularly in the more recent meetings, is flawed.

65. I turn to Dr Birch's evidence. Mr Cowen placed considerable weight on the criticisms of Dr Birch in a number of cases, in particular *R (A) v Croydon LBC* and *R(WK) v Kent CC* [2009] EWHC 939 (Admin); *R (R) v Croydon LBC* [2011] EWHC 1473 (Admin); and *R (KN) v Barnet LBC* [2011] EWHC 2019 (Admin).

66. In the cases of *A and WK*, Collins J stated (at [75] and [80]) that the local authority in *WK's* case, Kent, was entitled to look with considerable scepticism at Dr Birch's findings, which contradicted their own, because "her judgment may be faulty and…the accuracy of her measurements cannot be assumed", although he accepted that "flawed though they may be, and in my judgment are, they should be considered since there is always a possibility that they may identify something which could and occasionally should lead to a different conclusion".

67. In *R's* case, Kenneth Parker J, after hearing oral evidence from Dr Birch and Dr Stern, a consultant paediatrician, and cross-examination of both witnesses, stated (at [52]) that Dr Birch, on the basis of the evidence she gave, had:-

> "… an erroneous confidence in the accuracy and reliability of the statistical methods that she has employed. That misplaced confidence undermines the other evidence that she has given. It appears to me that that confidence leads her to rely primarily on her statistical methods. Therefore she is very likely to be biased in her assessment of age by reason of that misplaced confidence. Therefore, it seems to me that I must approach with very great caution the conclusions which she has reached. In short, I do not believe that Dr Birch's assessment of the age of the claimant is any more reliable than that of a social worker. Indeed, her assessment in my judgment is likely to be less reliable because she places such considerable confidence in her statistical methods that I conclude, on the basis of Dr Stern's essentially unchallenged evidence, to be not scientifically established and unreliable".

68. In *KN's* case, HHJ Pearl stated that he had not relied on Dr Birch's evidence because he had not needed to. The judge associated himself with the concerns expressed by Kenneth Parker J, and agreed with a submission by Miss Davis, on behalf of the defendant, that Dr Birch "should not be regarded as an expert witness" (see [71]) and also stated (at [73]) that he was far from certain that the curriculum vitae she submitted to the court was entirely accurate, and more importantly (at [74]) that she has not subjected her methodology to any academic peer review.

69. I note HHJ Pearl's statement about Dr Birch's qualifications. But in the present case there was no evidence before me that raised a concern about them. In her answers to Mr Cowen's cross-examination, Dr Birch stated that the issue arose in that case and in a previous case in a Scottish court because her association with a hospital in California had been checked by someone on behalf of a defendant with the hospital's webmaster, and that as she had no forewarning of this challenge, she had not brought the proof of her qualifications to the hearing. As to peer review, she said it depended on what was meant by "peer review". She had not submitted her research to a peer review journal, but she had subjected her method to review by the Society of Adolescent Medicine, a United States based body whose members were the top people from many countries, and she had some positive responses. Since I must decide this case on the evidence before me, I set aside questions about Dr Birch's CV and the issue of peer review.

70. I did not find Dr Birch's evidence satisfactory. She stated that she accepted that, in the light of *R's* case, until she had completed more statistical work she had to rely only on her clinical assessments and not on her statistical methodology. But she maintained that her method was sound and claimed she had been given no opportunity in *R's* case to explain the basis of her statistical methodology as a result of the instructions of the solicitors for the claimants in those cases, and this was unfair. Moreover, she stated that Dr Stern's evidence was unchallenged and he was not experienced in adolescent work. I accept Mr Cowen's submission that, if one reads Kenneth Parker J's judgment, there was considerable consideration of the process in Dr Birch's reports and her methodology. It is also clear that she was cross-examined on her method, and stood by the findings in her report: see [38]. Had she not been cross-examined on this, it would have been possible for the claimants to say that she was unchallenged. Indeed they had not significantly challenged Dr Sterns's evidence. His Lordship's conclusion, which I have set out, was reached in the light of that.

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

72. Thirdly, Dr Birch's approach to a number of the factors in the assessment was unsatisfactory. So, in relation to height, her explanation of why, contrary to her first report, the fact the claimant had not grown did not affect her original assessment, was unsatisfactory. She, in effect, assessed him as being older than he had said he was in order to explain the absence of growth. Secondly, in relation to facial hair, apart from the contradiction between her evidence and Mr Singh's, and the claimant's incredible explanation of the presence of the two "bic" razors in his room undermines her evidence. her statement that the presence and frequency of shaving is less important than the distribution and nature of the hair differs from her earlier reports and gives no explanation for the difference. I have dealt with the evidence of his behaviour in the home and at college and to women, and the impact of that on Dr Birch's reliance on his demeanour as part of his age assessment.

73. Since the assessment of Ms McCatty, who conducted the first age assessment, was not tested by cross-examination, I am not able to place substantial weight on that assessment: see a similar approach by Kenneth Parker J in *R*'s case at [53] to the first age assessment in that case. But, notwithstanding the criticisms of Mr Singh's approach, and in particular the absence of an appropriate adult, he reliance on a medical health assessment, his decision to challenge Mr Shearer's expertise when he did not at an earlier stage do so, and his failure to obtain the fingerprints tests and verify whether the claimant's fingerprints matched those given in Greece and Italy, as well as the matters concerning the Protocol, I have concluded that her had sufficient experience and expertise to make the assessment.

74. I also consider that a number of the matters for which Mr Singh has been criticised do not affect that assessment. It is difficult to see how the Council could have followed the Protocol in circumstances when the UK Border Agency did not consider it operational. But, assuming for present purposes that the Protocol is operative and that the Council fell into public law error in not following it, it is difficult to see how that procedural failing impacted upon Mr Singh's professional assessment of the claimant's age, because that depended on his professional expertise and approach. The Home Secretary's decision to accept the decision of the second Immigration Judge was not one based on an independent assessment and, for the reasons I have given, the second Immigration Judge had significantly less material before him than Mr Singh. He had not heard evidence from the claimant, and had declined to take into account the dental evidence and the concerns about the authenticity of the Tazkera. The central matters upon which Mr Singh relied were the dental evidence, the facial hair, the evidence about demeanour and attitude, and the inconsistencies in the claimant's account. The reliance on the health assessment does involve the paediatrician's statement that he did not believe the claimant is 12 years old, but also his height and weight, about which there is no dispute. The assessment appears to me to be one upon which I can properly rely.

75. If I am wrong on this and these failings mean that little weight can be placed on Mr Singh's assessment, I would have to fall back on the burden of proof which I have discussed at [16] to [18]. This would mean that it is for the claimant to show that he is or was under 18 at the material time he asserts a duty was owed to him as a child. In view of my findings as to his credibility and as to Dr Birch's evidence, I do not consider that he has done so.

76. I note that Kenneth Parker J stated that he was not an expert in age assessment, and was not in a position to hazard any "guesstimate" of R's true age after observing him give evidence over several hours, apart from saying that the way R struck him as a witness would be consistent with the age assessment made by the defendant in that case. I am in the same position, and I also conclude that the way the claimant presented as a witness is consistent with Mr Singh's age assessment, and that I have difficulty in accepting that the claimant remains, as he asserts, a child under the age of 18. In these circumstances, and for the reasons I have given, the only conclusion that I can reach in assessing the most likely date of birth is that, at the date of the second assessment made by Mr Singh on behalf of the Council on 16 December 2010, the claimant had reached the age of 18. On that hypothesis, his date of birth would be 16 December 1992, and at the date of this judgment, he is now 19 years and 5 days old. For these reasons, this application is dismissed.