Case No: CO/5901/2010

Neutral Citation Number: [2010] EWHC 2056 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 4 August 2010

Before :

THE HON MR JUSTICE HICKINBOTTOM

- -

Between :

THE QUEEN on the application of
PM

Claimant

- and -

HERTFORDSHIRE COUNTY COUNCIL

Defendant

- -
- -

Christopher Buttler (instructed by **Steel & Shamash**) for the **Claimant**
Holly Stout (instructed by **Kathryn Pettitt, Chief Legal Officer, Hertfordshire County Council**) for the **Defendant**

Hearing date: 20 July 2010

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Judgment

MR JUSTICE HICKINBOTTOM :

Introduction

1. On 14 April 2010, following a finding of the First-tier Tribunal (Immigration & Asylum Chamber) ("the FTT") in the course of an asylum appeal that the Defendant was over 18 years old, the Defendant local authority ("the Council") withdrew the accommodation and other support it had made available to the Claimant, PM, as a child, since November 2008. In this claim, with the permission of Michael Supperstone QC, sitting then as a Deputy High Court Judge, the Claimant challenges that decision.

2. The claim raises the important issue of how local authorities should properly address an age finding of the FTT (or its predecessor, the Asylum & Immigration Tribunal, "the AIT"), and in particular whether authorities are bound by such findings.

The Relevance of Age to Asylum Seekers

3. To many people, age matters. As birthdays are passed, one becomes entitled or disentitled to particular benefits, and subject to or relieved from particular burdens.

4. Age certainly matters to young people who seek refuge in this country, often in a state of confusion, and often traumatised by the events that have caused them to flee their own land and the tortuous journey they have made from their land to this. It matters because, although their confusion and trauma may not be significantly different if they are just under or just over 18 years of age, in the United Kingdom, the entitlements of a child are very different from those of an adult. This case focuses upon two particular differences.

5. First, there is a significant difference in the accommodation and other benefits to which an adult and a child asylum seeker are respectively entitled.

6. Adult asylum seekers are entitled to support from central government. Under section 4 and Part 6 of the Immigration & Asylum Act 1999, the Secretary of State may provide an adult asylum seeker with support, including accommodation and essential living needs. In terms of accommodation, in practice asylum seekers are dispersed throughout the United Kingdom, to accommodation which has been described as "often… less than adequate" (Macdonald's Immigration Law & Practice, 7th Edition (2008), paragraph 13.99). Asylum support is provided to those who are destitute or likely to become destitute within a limited time under a scheme administered by the National Asylum Support Service ("NASS"), at rates set out in the Asylum Support Regulations 2000 (SI 2000 No 704) as amended by the Asylum Support (Amendment) Regulations 2010 (SI 2010 No 784). The current rate for a single person aged 18-24 is £35.52 per week.

7. Support is provided to child asylum seekers through local authorities, under statutory provisions imposing duties on those authorities in respect of any child in their area, notably Part 3 of the Children Act 1989 ("the 1989 Act").

8. Section 17 of the 1989 Act imposes a general duty upon a local authority to safeguard and promote the welfare of children within their area who are in need. By section 20,

a local authority is required to 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; or (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; which is likely to include most if not all unaccompanied minor asylum seekers. Section 23 imposes further obligations in respect of accommodation and maintenance of children being looked after by a local authority. By section 105(1), " 'child' means… a person under the age of eighteen". "Child in need" is defined in section 17(1)) in terms of health and development needs: which, again, is likely to include most unaccompanied minor asylum seekers.

9. In addition to the 1989 Act obligations, where a child is looked after by a local authority, the parental obligation under section 7 of the Education Act 1996 to ensure a child is educated effectively falls upon that authority, that duty being enforced by Article 2 of the First Protocol of the European Convention on Human Rights.

10. The obligations of local authorities to children in their care do not cease when the young person reaches the age of 18. Section 24 of the 1989 Act always required a local authority to "advise and befriend", and a power to "give assistance" to those under 21 who that authority had, until their majority, looked after. The Children (Leaving Care) Act 2000 imposes more duties upon authorities in respect of such young people, some of the new duties extending beyond childhood to the age of 21, or even 24 if a young person is pursuing a particular planned educational course. These duties of local authorities to young people beyond the age of 18 are known as the "leaving care" obligations.

11. Second, although age in itself cannot be determinative of a person's refugee status, there is a significant difference in the way in which the Secretary of State exercises her immigration powers in relation to adult and child asylum seekers. Children being inherently more vulnerable than adults, she has historically adopted different, more favourable policies in relation to asylum seekers who are under 18; and, since 2 November 2009, she has been under a duty to ensure that her functions exercised through the United Kingdom Border Agency ("the UKBA") are discharged having regard to the need to safeguard and promote the welfare of children (section 55 of the Borders, Citizen and Immigration Act 2009). I was referred to the UKBA's published guidance to their own staff, "Processing an Asylum Claim Application from a Child", a substantial document which seeks to give practical effect to that duty.

12. By way of example of the differences in policy, currently, as I understand it, the Secretary of State will not detain a child under her administrative immigration powers, save in exceptional circumstances and then only overnight; and will not remove a failed child asylum seeker for three years or until he reaches the age of 17½ years, whichever is the sooner, unless there are adequate arrangements to receive and look after him in his country of origin on his return.

13. Therefore, the age of an asylum seeker is important both for the determination of who has an obligation to accommodate and support that person, and the level of that support; and for the exercise of the Secretary of State's immigration powers.

Facts

14. The Claimant was arrested on 24 November 2008, as part of a group of ten suspected illegal immigrants, as he was getting off the back of a lorry in Hemel Hempstead.

15. He was born in Kabul, and is an Afghan national. He left Afghanistan on 9 April 2008 on a long and hard journey that took him through various countries including Pakistan, Greece and France, to arrive in the United Kingdom the day before his arrest. He claimed asylum, on the basis that his family were involved in a feud with his cousins and, if he were to return to Afghanistan, he faced a real risk of suffering serious harm or death at their hands.

16. He was unable to give an exact date of birth, but claimed to be 14 years of age. The Council's Children's Asylum and Refugee Team gave him a brief initial assessment, from which they considered that it was more likely than not that he was a child, and he was duly placed in accommodation with support. On the basis of his assertion as to age, he was initially given a default date of birth of 15 November 1994.

17. A formal age assessment was completed by 12 December 2008, the outcome of which was that it was not accepted he was as young as 14 years old. It was thought that he was in the range of 16-19 years of age; and he was given the date of birth of 15 November 1991, meaning that he was just 17 years of age. That age assessment was not accepted by the Claimant who, at his asylum interview on 17 December, maintained that he was 14. A date of birth of 15 November 1994 was consequently recorded, but not accepted, by the UKBA.

18. In view of the continued issue about the Claimant's age, with the agreement of both the Claimant and his solicitor, a referral was made to King's College Hospital, London for a dental age assessment, which was conducted on 3 June 2009, the result being received by the Council on 1 July 2009. That assessment concluded, on the basis of the mature development of his teeth, that his age was 19 years 8 months.

19. The Claimant's asylum claim was refused on 24 July 2009. The decision letter indicated that the Secretary of State considered that the Claimant had fabricated his age in order to strengthen his claim for asylum, on this basis (paragraph 11):

> "It has been noted that you have had a dental age assessment that concludes you are 19 years and 8 months old, making your date of birth 15 November 1989. This has been accepted by social services. It is therefore not accepted that your date of birth is as claimed and it is asserted that your actual age is as assessed."

It is not clear why that letter indicated that the Council's Social Services Department had accepted that the Claimant was an adult, when this was not in fact the case. As I have said, in December 2008 they considered the Claimant's date of birth to be 15 November 1991; and, by July 2009, they had not reviewed that assessment in the light of the dental evidence. That review did not take place until September.

20. In any event, the UKBA found that the Claimant was not credible, and he disbelieved his core account. They concluded that the Claimant would not be at risk upon return to Afghanistan, and they consequently refused his asylum claim under paragraph 336 of the Immigration Rules (HC 395) as not meeting the criteria of paragraph 334.

They also concluded that his removal to Afghanistan would not breach Article 2, 3 or 8 of the European Convention on Human Rights; and that his removal would in all the circumstances be appropriate. The Claimant appealed that refusal of his claims.

21. However, in the meantime, as I have indicated, in September 2009, the Council's Team Manager (Philip Griffiths) reconsidered the Claimant's age in the light of new Afghan identification documents which had been produced, and the June 2009 dental evidence. Those documents have not played any part in any relevant decision.

22. In relation to the identification documents, he doubted their authenticity, as they appeared to him to have been recently produced; and he did not consider that they assisted in the determination of the Claimant's age.

23. In relation to the dental evidence, he understood that the age assessment based on the dental examination had a margin of error of plus or minus five years. That understanding appears to have been incorrect. It seems that he had in mind a document published by the Royal College of Paediatricians and Child Health in November 1999, "The Health of Refugee Children: Guidelines for Paediatricians", which does say that the margin of error in relation to an age assessment based on general paediatric evidence can be as much as 5 years either side (paragraph 5.6); but, in relation to dental evidence, it suggests greater precision. It says (at paragraph 5.6.3):

> "There is not an absolute correlation between dental and physical age of children but estimates of a child's physical age from his or her dental development are accurate to within + or - 2 years for 95% of the population and form the basis of most forensic estimates of age."

But it does go on to warn against relying entirely on medical evidence. In the summary to paragraph 5.6, it stresses that:

> "Assessments of age should only be made in the context of a holistic examination of the child."

24. Mr Griffiths did perform a "holistic" re-assessment of the Claimant's age, on 7 September 2009. Given the potential margin of error on the dental assessment as he understood it, the Claimant's behaviour and demeanour, and the fact that the Claimant was suffering substantial health problems (including increasing bouts of severe abdominal pain, which required hospitalisation) which might have had an impact on his physical appearance and behaviour, Mr Griffiths concluded:

> "In such circumstances there is a clear need for any assessment to consider the welfare and well-being of such young people including, where it does not compromise safety and well-being of others, to exercise the benefit of the doubt towards the benefit of the young person. Therefore on balance and to serve the interest of natural justice and welfare concerns, and to give due weight to more recent behavioural and interaction observation, it is thought that he should be viewed as being around 16 years of age."

As a consequence, the Claimant's date of birth was estimated to be 1 September 1993 (i.e. nearly two years later than 15 November 1991 as originally assessed in December 2008), which would put him in School Year 11. In fact, for that new school year, he entered the local secondary school in Year 10, to take account of the fact that he came from Afghanistan and had had restricted schooling .

25. The Claimant's appeal against the refusal of his asylum and immigration claims was heard by the FTT (Immigration Judge Lingard) on 17 March 2010, the determination being promulgated on 1 April 2010. The appeal was refused.

26. In the course of the determination, Judge Lingard found as follows (paragraphs 74 and 75):

> "[W]hile I find the [Claimant] has been telling the truth about his stated name and Afghan nationality I find he has not been truthful about his age, experiences he claims prompted him to leave Afghanistan or the reasons he has stated for fearing to return there.
>
> I do not find the appellant is a minor. I find he has reached 18 years of age and that he has entirely concocted a story upon which to try to base a successful asylum application in the UK."

As can be seen from that short extract, the judge found that the Claimant's assertion that his age was 14 years was untrue, and that that undermined his credibility. His age was also, of course, potentially relevant to his human rights appeal (particularly under Article 8), which was also dismissed.

27. That determination was sent to the Council, where it was considered by Mr Griffiths, who said (Statement 11 June 2010, paragraph 19):

> "In summary Judge Lingard found that PM was not a minor having 'reached 18 years of age', although no precise indication is given of the perceived date of birth. Judge Lingard also rejected the appeal against the rejection of his asylum claim. It was clear that this determination could not be ignored. Following a discussion with [my] Assistant Team Manager, I considered the details of the determination and, since it appeared to me that a finding of fact about PM's age had been made by a Tribunal that was dealing with that matter, I understood that that had to be respected by the authority. I was mindful in this regard of the judgment given by the Supreme Court in November 2009 in R (A and M) v LB Croydon. I understood that the Supreme Court had made it clear that the age of a person was a question of fact to be determined by the court and not one for the judgment of local authority. That said, I did also consider whether or not I agreed with the Tribunal's decision, having read the reasons given by the Judge for his conclusion. I recognised that when I had assessed PM, I had consciously given him the benefit of the

> doubt because of his health needs. Having read the Tribunal's decision, I saw no reason to disagree with it…".

The Supreme Court case to which Mr Griffiths referred was R (A) v London Borough of Croydon; R (M) v London Borough of Lambeth [2009] UKSC 8 ("A and M"), to which I shall return.

28. On 14 April 2010, the decision was taken by the Council to cease section 20 support for the Claimant, and they wrote a letter "To Whom It May Concern" (but sent to the Claimant by way of a notification of their decision to cease support), headed with the Claimant's name and address, in the following terms:

> "This is to confirm that the above named person had been supported by Hertfordshire County Council since his arrival in the UK on 24 November 2008. He was age assessed to be 16 years but this age assessment was never accepted by the Home Office. The matter went to court on 17 March 2010 and the judge held that the young person is above 18 years. This means that the above named person was not supposed to have been supported by Hertfordshire County Council as a "Child Looked After" under section 20 of the [1989 Act]. Central placement has therefore cancelled his placement and the last date for him at his current placement is Wednesday 21 April 2010. Could you please assist this young person to assess NASS services…".

29. From the finding of the FTT - that the Claimant was over 18 years old in March/April 2010 - it did not necessarily follow that he had been over 18 since the Council had received him in November 2008. However, the letter is explained by Mr Griffiths as follows (Statement 11 June 2010, paragraph 24):

> "One issue was how old PM was to be taken in the light of the Tribunal's decision. Having discussed the matter further with my Assistant Team Leader and [a supervisor] we concluded that since PM had been found to be over 18, and the Judge had placed significant weight on the dental age assessment, we should take the dental age assessment as the accurate figure and therefore the concluded approximate date of birth would be one that made him 19 years 8 months in June 2009… This meant that PM would have been an adult at the time he arrived in the UK and therefore would not have been eligible for support as a child under the terms of the [1989 Act]. It also followed that he would therefore not be eligible for ongoing support under the Care Leaving legislation. These were the key factors that led to my confirming on 14 April 2010 that, subject to appropriate transfer, PM's support would be ended…".

30. There appears to have been either difficulties in obtaining support from NASS, or a reluctance by the Claimant to make an "adult claim": but, in any event, on 27 May 2010, when giving permission, Mr Supperstone QC ordered the Council to provide the Claimant with section 20 accommodation and support, and suitable education,

pending the hearing of the substantive claim. The Claimant has consequently been in accommodation and schooling appropriate for a child in the meantime.

Grounds of Challenge and Issues

31. The Claimant's grounds contend that, in the absence of a proper and reasoned re-assessment of the Claimant's age by the Council, by their decision of 14 April 2010 to withdraw the services, the Council were in breach of their statutory obligations to provide accommodation, support and education to the Claimant, as a child.

32. The Council defend the claim on three grounds:

    (i) The 1 April 2010 determination of the FTT that the Claimant is over 18 years old is a judgment *in rem*, and as such is binding on the world at large, including the Council ("the Judgment *in Rem* Ground").

    (ii) If the determination of the FTT that he is over 18 is not binding on the Council as to the Claimant's age, nevertheless, that determination having been made by a tribunal of competent jurisdiction in a matter in which the Claimant was a party, it is an abuse of process for him to contend otherwise in other proceedings ("the Abuse of Process Ground")

    (iii) In any event, it is lawful for the Council simply to adopt the decision of the FTT as to the Claimant's age, without making a further full age assessment itself, or indeed giving any further consideration or reasons for that adoption ("the Adoption Ground")

33. Each of those alternative grounds seeks to explain how and why the Council effectively and lawfully revoked its age assessment of September 2009, which found the Claimant's date of birth to be 1 September 1993, replacing it with a date of birth in November 1989 based upon the June 2009 dental age assessment. I shall deal with each in turn.

The Judgment *in Rem* Ground

34. Ms Holly Stout for the Council submitted that the finding of Judge Lingard - that the Claimant was over 18 years old - was a determination in relation to the Claimant's status as a child, and was therefore a judgment *in rem*. It was not only binding on the parties to that asylum appeal, but on the whole world, including the Council.

35. That was inevitable, she submitted, as a result of the Supreme Court case to which Mr Griffiths referred in his statement (quoted at paragraph 27 above), A and M, which held that whether or not a person is or is not a child for the purposes of section 20 of the 1989 Act (i.e. whether he is or is not over 18 years of age) is not a matter of opinion, but one of wholly objective fact to which there is a right answer (see, especially, Baroness Hale at [27] and Lord Hope at [51] and [53]). That factual issue in that case was jurisdictional in the sense that the 1989 Act is for and about children, and therefore the definition of "child" defines the outer boundaries of local authorities and the courts under that Act (see Baroness Hale at [33]). But in any case, Ms Stout submitted, A and M makes clear that age is an objective fact: and that childhood (and, indeed, any age by which rights are informed) is a consequently a "status".

36. Ms Stout submitted that, as a general principle, where a tribunal of competent jurisdiction such as the FTT makes a finding as to a person's status then that is a judgment *in rem*, binding on all the world, so that (quoting Phipson on Evidence, 17th Edition (2010), at paragraph 43-10):

> "… [N]o person can thereafter question the existence of that state, irrespective of whether or not he was a party to the earlier decision."

In other words, a finding as to status is conclusive evidence for or against all persons.

37. Well made as those submissions were, in my judgment they are based upon a fundamental misunderstanding of the nature of judgments *in rem*, and generally of estoppels to which judgments may give rise.

38. Where a judgment of a court of competent jurisdiction is made on a particular cause of action, to promote finality and prevent wasteful duplication, the law provides that, in any future proceedings, that judgment is conclusive in relation to that cause of action. The law prevents re-litigation of that cause of action by imposing an estoppel, which "merely means that a party is not allowed in certain circumstances to prove in litigation facts and matters which, if proved, would assist him as [a party] in an action" (Thoday v Thoday [1964] P 181 at page 187, per Diplock J). This doctrine applies to tribunals as well as courts (see, e.g., Munir v Jang Publications Ltd [1989] ICR 1 at [16]). It also extends, not just to whole causes of action ("cause of action estoppel"), but to any decision on an issue forming a necessary ingredient in that cause of action ("issue estoppel"); although issue estoppel may give way where there is further relevant material in relation to that issue is available (Phipson, paragraph 43-15). "Cause of action estoppels" and "issue estoppels" are collectively sometimes referred to as "estoppels *per rem judicatam*" or "estoppels by judgment", recognising that they derive from the judgment of a court or tribunal. However, marking the well-recognised difference between a judgment and the facts upon which a judgment is based, the doctrine does not apply to mere incidental findings of fact made en route to that judgment.

39. Generally judgments to which this doctrine applies are *in personam*, i.e. they only affect and bind those privy to the original proceedings. Indeed, subject to exceptions not relevant to this claim, a judgment *in personam* is not even evidence of the truth of either the determination or any findings leading to that determination for or against strangers to the original proceedings (The Duchess of Kingston's Case (1776) 2 Sm LC 13th Edition 644; and Hollington v F Hewthorn & Co Ltd [1943] KB 587).

40. However, just as a statute conferring jurisdiction may exclude estoppels by judgment (see examples cited in Phipson, paragraph 43-24), in certain circumstances, jurisdiction is granted to a court or tribunal to enable it to make a judgment that is binding, not only on the parties to the proceedings, but the whole world, i.e. a judgment *in rem*. As, Phipson indicates (in paragraph 43-10) estoppels to which judgments *in personam* and judgments *in rem* give rise are similar in kind. In respect of a judgment *in rem*, they provide conclusive evidence of the matters determined, for or against all persons.

41. Other than the High Court (which has inherent powers, specifically retained by the section 19(2) of the Senior Courts Act 1981), every court and tribunal is dependent upon Parliament for its powers, including its jurisdiction to make judgments *in rem*. For obvious reasons, the grant of such jurisdiction is rare: it is a potentially severe jurisdiction, binding everyone without those who might be interested in the issue necessarily being given notice or an opportunity to be heard. Other than in exceptional cases, it would have the clear hallmark of injustice. However, there are exceptional cases in respect of which Parliament recognises that certainty of the status of a person or property overrides the natural repugnance of the law to considering rights and obligations without giving all those affected the chance to be heard. In those cases, it may grant a court or tribunal jurisdiction specifically to make determination of, and effectively declare, that status against all persons in all future proceedings.

42. Given the overriding nature of judgments *in rem*, the circumstances in which a court or tribunal is given such a power or jurisdiction are understandably rare, and usually granted in the clearest of terms. For example, by Part 3 of the Family Law Act 1986 specified courts are given clear specific jurisdiction to make declarations in relation to marriage, divorce, parentage, legitimacy, legitimation and adoption; but even that is reinforced, in section 58(2), by an express provision that any declaration made under that part is "binding on Her Majesty and all other persons".

43. Of course, although the jurisdiction has to be clear and unequivocal, it does not have to be expressed in terms of a jurisdiction to make a declaration of status, as in the Family Law Act 1986.

44. In Wakefield Corporation v Cooke [1904] AC 31, those who fronted a street (which, with some apparent justification, was called Sludge Lane) objected to proposals of the council to perform works under the Wakefield Corporation Act 1887 (which was in identical terms to the Private Street Works Act 1892), by which the costs of those works were apportioned between the frontagers of that street. One of the objections that the statute expressly provided could be taken before the magistrates - who the scheme assigned to deal with such matters - was that the relevant street was "repairable at the expense of inhabitants at large". The frontagers objected on that basis, and the magistrates found that the street was indeed "repairable at the expense of the inhabitants at large". The issue before the House of Lords was whether the council could assert in later proceedings that it was not such a street.

45. The House of Lords held that they could not, because the Act specifically gave the magistrates jurisdiction to determine whether a street was a private road or a road maintainable by the public, with the intention that their adjudication upon that issue bound the world at large. As Lord Robertson put it:

> "The question is whether the local Act has given the justices jurisdiction to determine whether the street in dispute is a highway repairable by the inhabitants, as a substantive issue *in rem*, or merely as a *medium concludendi* of the liability or non-liability of the objectors. If the former be the true view, then a decision on that issue, raised by one of the class interested, is good against all the rest."

Again, that draws the distinction between a judgment and the facts upon which a judgment is based.

46. The Wakefield case makes clear that the jurisdiction of a court or tribunal to make judgments binding on more than those privy to the proceedings is dependent upon the provisions that governed the jurisdiction of the court or tribunal. Those provisions may, properly construed, empower a court or tribunal to make determinations that bind more than the parties to the proceedings, e.g. determinations that bind on all persons, or all persons to whom notice of the proceedings and an opportunity to appear was given (see Pattni v Ali [2006] UKPC 51 at [22]). It all depends on the intention of Parliament, of course as expressed in the relevant statutory provisions.

47. Where the jurisdictional function of the court is limited to making a determination binding on only the parties, findings it makes on the way to such a determination cannot of course be binding on anyone other than the parties. Such findings cannot bind the world. A judgment will only be effective *in rem* if the relevant court or tribunal, on the true construction of their jurisdictional powers, has been empowered (i.e. granted jurisdiction) to decide a matter substantively *in rem*; and they have decided the matter under those powers. In Lord Davey's words in the Wakefield case, the tribunal must have a "primary jurisdiction" to decide the matter against the world.

48. In construing the jurisdictional powers of the magistrates in the Wakefield case, each of their Lordships, with refreshing succinctness, considered that the statutory scheme gave the magistrates that very primary jurisdiction to determine the issue of whether the street was private or public, *in rem*, such that their determination did bind the world at large.

49. Before leaving that old seminal authority, I should perhaps briefly mention the ancient case of R v The Inhabitants of Wye (1838) 7 A & E 761, to which Ms Stout referred me and upon which she relied. The case concerned the extent to which orders of removal under the Poor Laws were conclusive of all the facts upon which such orders were made (including matters of status, such as marriage and legitimacy). In my view, that case does not arguably lay down a principle as wide as that suggested by Ms Stout (namely that any finding in respect of such matters of status by a court or tribunal is binding on the world at large); but, in any event, to the extent that that case is inconsistent with the Wakefield case, that later case is a House of Lords authority and the Wye case does not survive it.

50. I was referred to few recent authorities concerning the nature of judgments *in rem*. I have already mentioned Pattni v Ali, a case of the Privy Council relied upon by Ms Stout, which recognised the same jurisdictional foundation for judgments *in rem* as identified in the Wakefield case. Pattni v Ali concerned the status of property not people, but the principles are the same. Lord Mance, giving the judgment of the Judicial Committee, cited the following passage from Jowitt's Dictionary of English Law, 2nd Edition (1977), with apparent approval (at [21]):

> "A judgment *in rem* is an adjudication pronounced upon the status of some particular subject matter by a tribunal having competent authority for the purpose. Such an adjudication being a solemn declaration from the proper and accredited quarter that the status of the thing adjudicated upon is as

> declared, it precludes all persons from saying that the status of a thing or person adjudicated upon was not such as declared by the adjudication...".

Lord Mance cited a number of other textbooks which, he said, are to like effect. He went on (in [23]) to make clear the importance of properly construing the provisions which empower the relevant court, to identify "the nature and terms of the court's jurisdiction to make a determination [*in rem*]", citing the Wakefield case.

51. As I have already suggested, the distinction drawn in the Wakefield case and recognised ever since - between cases in which the court or tribunal has jurisdiction to adjudicate upon a matter such that its determination will bind the world, and those where it has jurisdiction only to make incidental findings en route to a determination that will bind just the parties - has sound foundations. Claims before the courts generally involve the rights and obligations of those - and only those - privy to the proceedings. It is usually contrary to the interests of justice to determine rights and obligations of those who are not parties, and who may not have been given any notice or opportunity to make submission on the issue. It is for that reason that Parliament is only likely to have granted jurisdiction to a court or tribunal to make judgments *in rem* rarely, and in clear and unequivocal terms.

52. Ms Stout's submissions were based on the premise that any finding by a court or tribunal on any matter that would fall into the broad category of "status", including age, is binding on the world at large. As can be seen from the above analysis, that premise is false. A judgment is only *in rem* if it is made by a court or tribunal with the jurisdiction to determine proceedings where the function of those proceedings is to determine status or rights as against the world. Findings, even as to matters such as age, which are merely incidental to a determination that the court or tribunal is required to make *in personam* are not binding on the world at large.

53. Nor does A and M assist her cause. At least for the purposes of this claim, I accept that childhood and even the attainment of a particular age are capable of being a "status" characteristic of an individual, such that they are capable of being the subject of a judgment *in rem*. However, to suggest that any and all findings in relation to any characteristic that could be marked as potentially conferring or confirming rights or status are necessarily *in rem* is to get things the wrong way round. The "status cases" are so-called for the very reason that the particular court or tribunal *did* have the jurisdiction to make a determination of the status-enabling characteristic against the world at large. A mere finding in relation to such a characteristic cannot, of course, confer *in rem* jurisdiction on the court or tribunal making that finding: it is trite law that estoppel principles cannot be relied upon to confer a jurisdiction which (on the true construction of the empowering provisions) the court or tribunal does not have (see, e.g., Stone v Levett [1947] AC 209 at page 216, per Lord Thankerton).

54. In A and M, the High Court (and hence the Court of Appeal and Supreme Court in their turn) undoubtedly had jurisdiction to consider the challenges to the local authority age assessments, made in the context of claims under section 20 of the 1989 Act, those challenges having been made by way of judicial review. It may well have had the *power* to make a declaration as to age, even against the world, if it considered it appropriate so to do. But that case did not concern jurisdiction. It concerned the proper approach of the superior courts to challenges to age assessments, confirming

that age is a matter of objective fact rather than opinion. Therefore, whilst under the 1989 Act, the assessment of age is initially a matter of judgment for the local authority, it held that, if that assessment is challenged, then it is for the court to determine that objective fact, not merely to review the assessment of the local authority on unreasonableness grounds.

55. That case does not in any way bear upon the issue as to whether the finding of age by the FTT, in an immigration appeal brought under the provisions of the Nationality, Immigration and Asylum Act 2002, is binding on the world. That issue turns on the jurisdiction of the FTT, and whether the tribunal's powers enable it to make a finding of age which is binding *in rem*. At it highest, A and M perhaps supports the proposition that age is *capable* of being the subject matter of a judgment *in rem*: but it does not assist in determining the question of whether, in the circumstances of an asylum and human rights appeal, the FTT actually has jurisdiction to make such a determination.

56. As I have explained, whether it does have jurisdiction to make a determination of age *in rem*, depends upon the proper construction of the statutory provisions under which the FTT is endowed with its jurisdiction. It is to that issue I now turn.

57. Applying the principles I have set out above, in my judgment, the FTT quite clearly does not have the jurisdiction in an appeal to make a determination of age that is binding against the world.

58. The FTT's jurisdiction derives from Part 5 of the Nationality, Immigration and Asylum Act 2002. Its jurisdiction is limited to deciding appeals against immigration decisions, brought on statutory grounds. Under Part 5, an applicant may appeal to the FTT against specified decisions (including various decisions to remove an applicant from the United Kingdom) on specified grounds (including grounds that removal would be in breach of the United Kingdom's obligations under the Refugee Convention or European Convention on Human Rights, or the Immigration Rules). Although, of course, the age of an appellant may be a relevant issue which the FTT may have to decide during the course of an appeal, the FTT has no "primary jurisdiction" to determine and declare the age of an appellant, such that its finding on age is binding on all persons, *in rem*. The relevant statutory provisions are clear and unequivocal. That jurisdiction cannot be cast from any proper reading of those provisions.

59. Perhaps because that is so clear, there appears to be no direct authority on whether findings of age of the FTT are binding on a local authority. In no case to which I was referred was the issue decided as part of the ratio. Certainly, none of the authorities, such as they are, is contrary to my conclusion as to the construction of the relevant statutory provisions.

60. There were comments on the issue at both first instance and in the Court of Appeal in A and M. In R (M) v London Borough of Lambeth [2008] EWHC 1364 (Admin), Bennett J considered a finding of age by the tribunal was not binding, saying (at [163]:

> "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 against 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."

In A and M in the Court of Appeal ([2008] EWCA Civ 1445 at [88]), Ward LJ held that the determination of age by a local authority was not a judgment *in rem*:

> "It was… a staging post or a preliminary finding on the way to the consideration of the broader question of whether the applicants are entitled to be accommodated by the local authority or whether they must look to the Secretary of State to find them shelter."

Although those comments were made in the relation to an age assessment in the context of section 20 of the 1989 Act, they certainly do not support Ms Stout's submissions. For the reasons I have given, I do not consider the judgments or approach of the Supreme Court affect, one way or the other, whether the assessment of age by the FTT is a judgment *in rem*: and so those comments appear to me still to be good - limited in value as, I accept, they are in the context of the case before me.

61. Although of course the immigration judge could not in any event have clothed himself with jurisdiction which he did not have, the limitation on the jurisdiction of the FTT is in fact reflected in his determination. Indeed, the case is an example of the principle of restricted jurisdiction at work, in practice.

62. In this case, the Claimant appealed the decision of the Secretary of State to remove him to Afghanistan, on the ground that such removal would be in breach of his rights as a refugee and his human rights, and in breach of his entitlement to humanitarian protection under paragraph 339C of the Immigration Rules. The function of the FTT was to determine whether any of those grounds was good. In making that determination, the judge was bound to consider the Claimant's age, which was in dispute between the Secretary of State and the Claimant himself. The Claimant asserted he was, by then, 15 years of age. The evidence of his dental maturity suggested he was 20 years old. Age was an issue in relation to the Claimant's credibility; and at least potentially relevant to his Article 8 claim.

63. Judge Lingard found, contrary to the Claimant's assertion, that the Claimant was over 18 years old at the time of the hearing (March 2010). That had a negative impact on his credibility, and his human rights claim. Although this is mere speculation, it may possibly have tipped the balance so far as the determination went (although, on all the evidence, that seems to me to be unlikely).

64. However, in finding that the Claimant was over 18 years of age, the judge was not exercising or purporting to exercise a "primary jurisdiction"; nor was he making or purporting to make a "determination" with regard to the Claimant's age. His determination was that each of the grounds of appeal relied upon by the Claimant failed (paragraphs 81-84), in the course of which he made the incidental findings en

route in relation to the Claimant's age to which I have referred (see paragraph 26 above).

65. That point determines this first ground, against the submissions of Ms Stout: the FTT did not have the jurisdiction to make a finding as to the Claimant's age that was binding on the world at large, or binding on anyone other than those privy to the asylum and immigration appeal.

66. However, it is also to be noted that the immigration judge merely found that, as at March 2010, the Claimant was over 18 years old. That was a sufficient finding for the purposes of the appeal before him, and the issues in it. That finding may indeed have been sufficient for the Secretary of State, even though she has different enforcement policies for asylum seekers of different ages (see paragraph 12 above). However, it was not sufficient for the purposes of the Council. For the purposes of their obligations (including their duties under the leaving care provisions: see paragraph 10 above), they had to assess the Claimant's date of birth with more precision. As explained above (paragraphs 28-9), they did not simply consider themselves bound by the FTT's finding, they went further and identified a date of birth for the Claimant on the basis of the weight the immigration judge apparently gave to the dental evidence. I shall return to that when I deal with the third ground of defence.

67. However, for the reasons I have given, I do not find the first ground of defence to be good.

The Abuse of Process Ground

68. In the alternative, Ms Stout submitted that, even if the FTT's finding with regard to the Claimant's age was not binding on the world, given that finding (and the fact that the Claimant did not seek to appeal the FTT's determination), it is an abuse of process for the Claimant to maintain for the purposes of any other proceedings that he is not a child. She particularly relied upon Bradford & Bingley Building Society v Seddon [1999] 1 WLR 1482 at pages 1490-3 for the proposition that a collateral attack on a judgment in other proceedings may amount to an abuse of process, even where there are different parties involved and even where there is no estoppel bar as such. As Auld LJ said (at page 1491A):

> "[An abuse of process] may also arise where there is such an inconsistency between the two [i.e. the earlier finding and the new contention] that it would be unjust to permit the later one to continue."

Auld LJ suggested that any mere re-litigation short of cause of action or issue estoppel would not necessarily be an abuse; but it may amount to an abuse if there is an additional element, such as a collateral attack on a previous decision. Ms Stout submitted that the Claimant's contention in this claim does amount to a collateral attack on the FTT determination.

69. I can deal with this ground shortly. I do not consider that it has any merit.

70. The Claimant's stance in this claim does not amount to a collateral attack on the FTT's determination, which he has not sought to challenge. Whatever happens in this

claim, the Secretary of State's decision to remove the Claimant will stand. The appeal against that decision has been dismissed, and the Claimant's appeal rights have been exhausted.

71. It is perfectly rational for the Claimant to say that, although he does not agree with the FTT determination, he does not propose to challenge that determination: but he is a child and, pending his removal, he wishes to be treated as a child and have the support to which a child is entitled.

72. Ms Stout submitted that, if that was his stance, then he ought to have appealed the FTT finding as to age: but an appeal on that limited basis would not of course have been accepted. In my view, this submission betrays the fact that this ground is, in substance, little more than a recasting of the first ground. Whether an issue can be appealed has been advocated as the hallmark of a substantive determination or an essential part of the legal foundation of a judgment, as opposed to a fact that was merely collaterally in question (see Phipson at paragraph 43-31, and the cases there cited in footnote 52). If the FTT had jurisdiction to make a substantive determination *in rem* with regard to the Claimant's age, that would of course have been an appealable determination. However, the FTT lack that jurisdiction. That means that the finding of the judge in respect of age is not binding *in rem*, nor is it appealable; and the Claimant is not estopped or otherwise prevented from denying it - with additional evidence, if he has it - in proceedings involving a party other than the Secretary of State.

73. This ground of defence, too, fails.

The Adoption Ground

74. Third and finally, Ms Stout submitted that, even if not bound by the age finding of the FTT, the Council would not act unlawfully if they simply adopted that finding - made by the immigration judge on the basis of all the evidence before him, including all of the evidence adduced on behalf of the Claimant himself.

75. Again, however, I do not agree. The 1989 Act places a burden upon local authorities to assess the age of young people who may be under 18 years old, and who may therefore be entitled to section 20 support. A and M considered the nature of challenge that could be made to an age assessment made by a local authority: it did not suggest that the primary statutory obligation to assess age for the purposes of section 20 is other than on the relevant local authority.

76. Mr Buttler conceded that the Council could properly take the immigration judge's finding as to age into account, giving it the weight they considered appropriate, such a finding being a material consideration for the Council because of the desirability of consistency in public decision making (skeleton argument, paragraph 32). In support of that desirability, he cited the comments of Mann LJ made in the context of successive planning decisions in North Wiltshire Borough Council v Secretary of State for the Environment (1993) 65 P&CR 137 at page 145.

77. Despite that concession, I consider caution is required here.

78. There is a public law principle of formal equality, that requires decision makers to apply the law (including their own policies) consistently and equal-handedly (see De Smith's Judicial Review, 6th Edition (2007), at paragraphs 11-062 to 11-066). It was that principle which founded Mann LJ's comments. Where a planning authority considered successive applications, he stressed the importance of respect for, and consistency of, *process*. He expressly denied that authorities and inspectors had to decide cases - even like cases - alike. The decision maker must always, he said, 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."

If the later application was different and hence distinguishable from the earlier application, that may be a reason for departure (see my comments in Miller v North Yorkshire County Council [2009] EWHC 2172 (Admin) at [63]-[64]): as may a different exercise of judgment, e.g., on the weight to be given to a particular factor.

79. However, I consider that caution in applying that principle in this case is required for the following four reasons.

80. First, the principle of consistency in decision making refers to the importance of decision makers applying the law or policy consistently. The case before me concerns two different decision makers in two different fields - the FTT in the shoes of the Secretary of State exercising her functions in relation to immigration control, and the Council in the exercise of its obligations towards children) - making factual assessments as to age.

81. Second, the evidence upon which those respective assessments are made is different: the Council has more evidence of the Claimant's behaviour than was before the FTT. The Claimant has been in the Council's care for nearly two years, and the allocated social worker will have first-hand knowledge of the Claimant's behaviour and demeanour from observing and talking to him, and liaising with his foster parents and school (which appears to be content to continue schooling the Claimant, despite the FTT's age finding), not all of which could have been conveyed to the tribunal. The Council are also aware of the experience and qualifications of those who have made the age assessments of the Claimant in the past, and the level of interaction before these assessments were made, which the immigration judge did not apparently have (FTT determination, paragraph 64). The decision making processes are therefore distinguishable.

82. Third, I have referred already to Hollington v F Hewthorn & Co Ltd (at paragraph 39 above), which is authority for the proposition that, for or against strangers to the original proceedings, a judgment *in personam* is not evidence of the truth of either the determination or any findings leading to that determination. For these purposes, (i) the Council is a stranger to the FTT proceedings, and (ii) although the age assessment in the hands of the Council is not a legal proceeding, following A and M, this court may be called upon to determine the Claimant's age using procedural rules of evidence - in any event, the rules of admissibility of evidence merely seek to exclude evidence of no or relatively limited probative value. Whilst the rule in Hollington has

been widely criticised (see a summary of that criticism in Lincoln National Life Assurance Co v Sun Life Assurance Co of Canada [2004] EWHC 343 (Comm) at [52] per Toulson J as he then was), it has been treated as authoritative in a number of cases in the higher courts (Hui Chi-Ming v R [1992] AC 34 (PC), and Secretary of State for Trade and Industry v Bairstow [2003] EWCA 321 (CA)), and has never been overruled by the House of Lords or Supreme Court, with the result that the standard texts affirm the Hollington principle (e.g. Phipson at paragraph 43-79; Cross & Tapper on Evidence, 11th Edition (2007), at pages 118-9). In the face of that authority, I do not think that I can blithely say that the Council is able simply to take the *finding* of the immigration judge as to age into account and give it the weight that they consider appropriate, as Mr Buttler's concession suggests.

83. However, with respect to him, I think that Mr Buttler's submission was incorrectly focused. The *finding* of the FTT is not, in itself, of any evidential weight or value to the Council, who must exercise their own judgment in assessing the Claimant's age for the purposes of their section 20 duty. Nevertheless, in any reassessment of age they now make, the previous proceedings before the tribunal will be materially relevant in two ways.

(i) First, evidence as to age may have been put before the tribunal that has not previously been before the Council. The Council are, of course, able to take any such new evidence into account in considering their own assessment.

(ii) Second, the Council will have, not just the finding of the tribunal, but the judge's reasoning and the process by which he came to the conclusion that the Claimant was over 18 years old, which might assist their own assessment of the Claimant's age (although, of course, in considering even that, the Council will have to bear in mind the differences between the evidence available to the judge and that available to them to which I have referred). In my view, that is what, in a planning context, Mann LJ was getting at in North Wiltshire. For that reason, I do not find any inconsistency between the evidential principle of Hollington, and the public law principle illustrated by North Wiltshire: the subsequent public decision-maker must respect, not the *finding* made by an earlier decision-maker *per se*, but the earlier decision-making *process*.

84. Fourth and finally, as I have intimated (paragraph 65 above), the age issue for the FTT was somewhat different from that which the Council has to address. The FTT were simply concerned with whether the Claimant was over 18 years old: the judge found he was. The Council have to assess age more precisely than that. Even if the Claimant were over 18 in March 2010, he may have been under 18 when he was committed to the care of the Council - as Mr Buttler for the Claimant pointed out, the judge's finding of age is consistent with the Council's age assessment in December 2008 - and, if he were, that would give rise to continuing leaving care obligations on the part of the Council. In assigning a date of birth to the Claimant in November 1989, the Council erred in two respects. First, they considered themselves bound by the FTT finding as to age, i.e. that the Claimant was over 18 years old as at March/April 2010. However, that error was compounded by their speculation that, if required, the immigration judge would have found the dental evidence determinative and would have given a date of birth in November 1989; or, at least, as the judge gave

the dental evidence particular weight, the Council should give that evidence determinative weight with regard to the Claimant's birth date.

85. Mr Buttler submitted that I could be satisfied that the Council had erred in considering they were bound by the age finding of the FTT, and consequently not making their own assessment before revoking the September 2009 age assessment for one which put him as over 18 on arrival in November 2008, and ceasing the Claimant's section 20 support. As an alternative and secondary argument, he relied upon the lack of reasons for that decision. However, this is not a reasons case. Although Mr Griffiths has recently said - I accept innocently - that he effectively reviewed the age assessment in the light of the FTT finding, and he saw no reason to disagree with it (Statement 11 June 2010, paragraph 19), in my judgment the contemporaneous documents make it clear that the Council considered themselves bound by the FTT age finding and, for that reason, they did not consider that any further age assessment by them was necessary or indeed appropriate. That is clear from the effective decision letter dated 14 April 2010 (quoted at paragraph 28 above); and also from paragraph 19 of Mr Griffiths' 11 June 2010 Statement (quoted at paragraph 27 above). Where he says in that statement, "I understood that [the FTT finding] had to be *respected* by the [Council]" (emphasis added), I am quite sure he meant that he understood that it was binding upon them. I have found that to be wrong in law, but it of course not surprising that Mr Griffiths had that understanding: the binding nature of the immigration judge's finding has been the basis of the Council's defence of this claim.

86. However, I find Mr Buttler's primary submission compelling. I do not consider that the Claimant's age was the subject of any substantive review by the Council after the FTT determination. The Council considered they were bound by that finding. For the reasons I have given, they were wrong. Under the 1989 Act, before ceasing support, they were bound substantively to review the September 2009 age assessment, taking account of the FTT determination in the limited manner I have outlined. By failing to make that reassessment before revoking their own assessment - and ceasing section 20 support for the Claimant - the Council acted unlawfully.

87. As I have said, the assessment of age for the purposes of the 1989 Act is primarily a matter for the Council, albeit subject to judicial review on A and M grounds. I cannot say that, had they exercised that judgment themselves, they would have necessarily exercised it one way or the other. In those circumstances, I shall quash the Council decision of 14 April 2010, and remit the matter back to them for a re-assessment of the Claimant's age.

Summary and Conclusion

88. For the reasons I have given in the course of this judgment, I do not consider that a local authority charged with obligations to children under sections 17 and 20 of the 1989 Act is bound by a simple finding of fact by the FTT as to the age of an applicant for support, that finding not being a judgment *in rem* or otherwise binding in law on the local authority, or on other strangers to the asylum and immigration appeal. After such a finding has been made, in an appropriate case, it is for the authority to reassess the age of the section 20 applicant. In doing so, they must take into account any new evidence (including evidence before the tribunal that was not previously been before

them), and give due respect to the basis and reasoning of tribunal's finding, whilst taking account of the fact that they may have different evidence available to them.

89. In this case, the Council failed properly or lawfully to make that reassessment after the 1 April 2010 determination of the FTT, before revoking their own age assessment and replacing it with another. In that failure, in my judgment, they acted unlawfully.

90. In those circumstances, subject to submissions on the precise terms of the order, I shall order as follows:

    (i) I shall allow the application, and quash the decision of 14 April 2010 to cease providing services for the Claimant in the form of accommodation, support and schooling.

    (ii) I shall direct the Council to continue to provide those services on the basis of their age assessment dated 7 September 2009 pending a reassessment by them of the Claimant's age, and for 14 days after informing the Claimant of that reassessment and (as a result of it) the services the Council consider themselves obliged to provide to him in the future.