OUTER HOUSE, COURT OF SESSION

[2011] CSOH 196

P268/11

OPINION OF LORD STEWART

in the Petition of

TL [Assisted Person] No 2

Petitioner;

for Judicial Review of an Age Assessment by Angus Council dated 24 January 2011 that the Petitioner is over eighteen years of age

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First Respondents: D B Ross, Advocate; Simpson & Marwick, solicitors for Angus Council
Second Respondents: Williamson, Advocate; Solicitor for the City of Edinburgh Council, solicitors for Glasgow City Council

25 November 2011

[1] How should the Court of Session deal with age assessment cases? Should the Court deal with age assessments at all? Should age assessment cases be transferred to the Tribunal system? These are some of the issues canvassed in the present proceedings about a North African who has arrived in Scotland claiming asylum and telling officials he is under 18 years of age.

Background

[2] On 29 December 2010 the master of a vessel lately arrived at Montrose from Morocco handed the petitioner to the UK Border Agency. The petitioner was said to be a stowaway. The petitioner landed without papers. He claimed at some stage to be a 15 year old Moroccan.

[3] The UK Border Agency requested the local authority, Angus Council, first respondents in the present process, to assist in accommodating the petitioner. The first respondents accommodated the petitioner in the Young People's Unit, Kinnaird Street, Arbroath.

[4] Ms Rinku Sharma, a social worker employed by the first respondents, undertook an assessment of the

petitioner's age. The assessment is reported on a form headed "Age Assessment of Asylum Seeking Child" [Production No 6/1]. The assessment is dated 24 January 2011. The assessment is substantially based on interviews with the petitioner, through a Spanish-speaking interpreter, on 30 December 2010 and 7 January 2011.

[5] The assessment concludes that the petitioner is "18+". The "Age Assessment Form" states among other things: "Self care skills are those usually associated with a young adult and are performed by you without any form of prompting being required" [Production No 6/1].

[6] In oral submissions counsel for the petitioner told me that, in February 2011, precise date unspecified, the petitioner was transferred to the UK Border Agency Immigration Detention Centre at Dungavel, Lanarkshire. He was bailed from detention and is currently accommodated in self-catering accommodation provided by the National Asylum Support Service in Glasgow [NASS].

[7] By Reasons for Refusal Letter dated 9 March 2011 the UK Border Agency rejected the petitioner's applications for asylum, to be recognised as a refugee and for a grant of humanitarian protection and refused leave to enter or remain in the United Kingdom. The reasons included rejection of the petitioner's claim that he is a child, i.e. under 18 years of age, for the purposes of Immigration Rules HC 95, paragraph 349 [*sic*], having regard to *inter alia* the terms of the age assessment by the first respondents.

[8] There have been suggestions that the petitioner is not well-settled in NASS accommodation. He has been charged on summary complaint with a breach of the peace alleged to have been committed on 29 April 2011 at, I think, the common close of the block where he was then residing in Glasgow [Production No 7/1]. For further background see my Opinion issued in connection with the petitioner's application for interim orders [*TL for Judicial Review of an Age Assessment* [2011] CSOH 98 (7 June 2011)].

Judicial Review, remedies sought and decision

[9] The petitioner has invoked, or purported to invoke the supervisory jurisdiction of the Court of Session by an application for judicial review. Following amendment the remedies sought include (1) reduction of the age assessment decision made by the first respondents on 24 January 2011 on the ground that the decision-making process was flawed; (2) reduction of said age assessment decision on the ground that the decision is factually wrong; (3) declarator that the petitioner was born on 7 October 1995; and (4) declarator that the petitioner's date of birth is 7 October 1995 for the purposes of the exercise by Glasgow City Council, second respondents, of their functions under the Children (Scotland) Act 1995, Chapter 1, Part II ("Support for Children and their Families").

[10] This sort of application has come to be known in England & Wales as an "age assessment judicial review". There are two others in the Court of Session that I know of. The two other applications involve Nigerians who are, or who claim to be brothers brought to the United Kingdom on visitor visas by their father and abandoned. Those applications have been joined for the purpose of a proof of age, allowed of consent by the Outer House Administrative Judge. I presided at the proof, which is now concluded but not yet advised after eight days of evidence and submissions. One foster parent, one Border Agency higher executive officer, one refugee support worker, one independent social worker the two claimants, two local authority social work staff and three medical professional have testified. There is also a large amount of affidavit evidence.

[11] In the present case I have had the opportunity to direct that before proof of age can be considered parties should address me on the question of competency, the question of transfer to the Upper Tribunal and the question of reduction on the ground of alleged flaws in the first respondents' decision-making. Submissions on these matters were made at a first hearing and a continued first hearing on 24 June and 13 July 2011.

[12] Having made *avizandum* I have decided that the application cannot be transferred to the Upper Tribunal; that insofar as it seeks reduction on the basis of factual error and declarators of a date of birth, the application is incompetent; and that insofar as it seeks reduction of the first respondents' age assessment on the basis of flawed decision-making, the application is unfounded. My decision involves that the court should not hear witness evidence.

Age Assessment Judicial Reviews

[13] As at 12 January 2011 there were 64 age assessment judicial reviews pending in England & Wales. The phenomenon has been described by Mr Justice Keith [*R (Y)* v *Hillingdon LBC* [2011] EWHC 1477 (Admin) (15 June 2011) at § 1]:

> "There is a new growth industry in the Administrative Court. It relates to those cases in which the court is being asked to assess the age of youngsters claiming to be children - almost all of them asylum-seekers from overseas arriving in this country as unaccompanied minors - who look to the local authority for accommodation and support. In the past, it was thought that it was the local authority which had to decide the youngster's age, subject only to judicial review on the usual principles of fairness and rationality. But the Supreme Court decided in *R (on the application of A)* v *Croydon London Borough Council* [2009] 1 WLR 2557 that in cases of dispute it is for the court to assess the youngster's age..."

In this context "children" are persons under the age of 18 years [United Nations Convention on the Rights of the Child art. 1; Borders, Citizenship and Immigration Act 2009 s. 55; Children Act 1989 s.105 (1); Children (Scotland) Act 1995 ss. 15 (1) and 93 (2) (a)].

[14] Mr Justice Hickinbottom has given a helpful outline of the legislative and administrative benefits for

asylum seekers in England & Wales of being "children" [*R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) (4 August 2010)]:

> **"The Relevance of Age to Asylum Seekers**
> [...]
> 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 171/2 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."

[15] The wider context includes a number of international instruments to which the United Kingdom is party. The Council of Europe Convention on Action against Trafficking in Human Beings, article 10.3 provides:

> "When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age."

The United Nations Convention on the Rights of the Child [UNCRC], Article. 3.1 states:

> "In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

These instruments have the potential to constrain domestic judicial and administrative action. The UK Border Agency guidance "Processing an Asylum Application from a Child", at § 1.1, states:

> "Where the age of the applicant (and their status as a child) is in doubt, reference should be made to the detailed guidance provided in the 'Asylum Instruction on Assessing Age'. Please note that where the person's age is in doubt he/she should be treated as a child unless and until a full age assessment shows him to be an adult."

The Supreme Court decision in *R (on the application of A)* v *Croydon LBC etc*

[16] *Regina (A)* v *Croydon London Borough Council etc (Secretary of State for the Home Department and Another intervening)* and *Regina (M)* v *Lambeth London Borough Council etc (Secretary of State for the Home Department and Another intervening)*, decided by the Supreme Court in 2009, were the two lead cases of a group of seven. All seven claimants were unaccompanied asylum seekers who asserted that they were under 18 years of age. They claimed entitlement to local authority accommodation. In terms of the Children Act 1989 s. 20 local authorities in England & Wales are bound to provide accommodation "for any child in need within their area" subject to a number of qualifying conditions. By s.105 (1) of the Act "a child" is a person under the age of 18.

[17] The local authorities in each case assessed the claimants to be over 18 years of age. The claimants challenged the respective age assessments by judicial review. The seven cases were joined for the purpose of deciding a number of preliminary issues including: is the question whether an individual is "a child" for the purpose of the Children Act 1989 s. 20 one for the court to determine on the balance of probabilities? The matter went up to the Supreme Court.

[18] In its judgement of 26 November 2009, [2009] UKSC 8, the Supreme Court held that the question was one of fact to be determined, in the event of dispute, by the court, after hearing evidence. The decision rested on the wording of the statute, the construction of the statute and, possibly, on the doctrine of "precedent fact" [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at §§ 26-32 *per* Baroness Hale JSC

with whom the other Justices agreed].

[19] The rubric of the report in *Weekly Law Reports* states: "*Held*... that although the local authority had to make its own determination in the first place, such decision, if remaining a matter of dispute, was for the court to decide by judicial review..." [[2009] 1 WLR 2557 at 2558]. The ruling that judicial review is the appropriate process for age assessments by the court is not explicit in the Supreme Court judgment: but it is fair to say that it is clearly implied [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at § 33 *per* Baroness Hale JSC with whom the other Justices agreed].

[20] This is the understanding of the Court of Appeal. In *R (FZ)* v *Croydon LBC* [2011] EWCA Civ 59 (1 February 2011), Lord Justice May PQBD delivering the judgment of the Court said at paragraph 4:

> "The Supreme Court held in *R (A)* v *Croydon London Borough Council* [2009] 1 WLR 2557 that the question whether a person is or is not a child, which depends entirely on the objective fact of the person's age, is subject to the ultimate determination of the courts. It is a fact precedent to the exercise of the local authority's powers under the 1989 Act and on that ground also is a question for the courts. If such a decision remains in dispute after its initial determination by the local authority, it is for the court to decide by judicial review. This means that the court hearing the judicial review claim will often have to determine the fact of a claimant's age by hearing and adjudicating upon oral evidence."

[21] His lordship continued in paragraph 4:

> "This may be an extensive and time consuming process. The Supreme Court does not seem to have been concerned with the administrative consequences for the court of this. The judgments of Baroness Hale of Richmond JSC and Lord Hope of Craighead DPSC are expressed in terms which appear sanguine about this - see for example Baroness Hale at paragraph 33 and Lord Hope at paragraph 54. The Administrative Court does not habitually decide in orthodox judicial review proceedings questions of fact upon oral evidence, although it has power to do so in appropriate individual cases. It stretches the court's resources to have to do so more than occasionally. Yet there were, on 12th January 2011, 64 age assessment cases in the Administrative Court's list at various stages of progress."

[22] The upshot is that the Court of Appeal has decided that permission-granted, age assessment judicial reviews that do not call into question any decision made under the Immigration Acts or the British Nationality Act 1981 should as a rule - in exercise of the powers conferred by the Senior Courts Act 1981 s. 31A (3) as inserted by the Tribunals, Courts and Enforcement Act 2007 s. 19 - be transferred from the Administrative Court to the Upper Tribunal [*R (FZ)* v *Croydon LBC* [2011] EWCA Civ 59 (1 February 2011) at §§ 31-32 *per* May LJ PQBD]. Counsel for the second respondents told me that scores of age-assessment judicial reviews have now been transferred from the Administrative Court to the Upper Tribunal.

Is *R (A)* v *Croydon LBC etc* binding as to procedure?

[23] Counsel for the petitioner contended that the Supreme Court decision in *R (A)* v *Croydon LBC etc* is binding to the effect that contested age assessments have to be determined in the Court of Session by way

of fact-finding hearings under RCS Chapter 58 (Applications for Judicial Review). I do not agree that the decision is binding for the reasons, broadly speaking, given by counsel for the respondents.

[24] Procedural developments in England & Wales derive from the Supreme Court's decision that, on a proper interpretation of the Children Act 1989 s. 20, disputes about whether the applicant is "a child" are proper matters for what I might call "fact-finding review" under the Civil Procedure Rules 1998 [CPR] Part 54. The provisions at issue in the present proceedings are sections of the Children (Scotland) Act 1995, Part II, Chapter 1, particularly section 25 (provision of accommodation). While the definition of "child" for the purpose of the Chapter 1 provisions is, by section 93 (2), the same as in the English Act namely "a person under the age of eighteen years", the statute is a different one and the provisions are not identical.

[25] No submission was made to me on the proper construction of the Scots statute or as to the application of the doctrine of "precedent fact" in Scotland. If the Scots statute were similar in substance, and all other things were equal, the decision in *R (A)* v *Croydon LBC etc* would demand to be treated as very highly persuasive: but all other things are not equal. In particular it appears that the determining factor for the Supreme Court, as regards procedure, was that the only remedy available in England & Wales is judicial review [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at § 33 *per* Baroness Hale JSC with whom the other Justices agreed]. In Scotland, in contrast, relief is available by way of an ordinary action of declarator. At least, this was the uncontested submission of the first and second respondents.

Transfer to the Upper Tribunal

[26] There is also a difference between the provisions for transfer to the Upper Tribunal north and south of the border. The practice in England & Wales established by the Court of Appeal in *R (FZ)* is to transfer age assessment judicial reviews to the Upper Tribunal in exercise of the powers conferred on the High Court by the Senior Courts Act 1981 s. 31A (3) as inserted by the Tribunals, Courts and Enforcement Act 2007 s. 19.

[27] The equivalent - but not identical - legislation for Scotland is the Tribunals, Courts and Enforcement Act 2007 ss. 20 and 21. In terms of s. 21 (1) and (2) the Upper Tribunal has the same powers of review in transferred applications as the Court of Session has in original applications to its supervisory jurisdiction.

[28] The transferability of applications from the Court to the Tribunal is governed by section 20. The section 20 headnote reads: "Transfer of judicial review applications from the Court of Session." By section 20 (1), the transfer powers exist in certain cases "where an application is made to the supervisory jurisdiction of the Court of Session". By section 20 (2) a pre-condition of transferability in all cases is that

"the application does not seek anything other than an exercise of the supervisory jurisdiction of the Court of Session".

[29] Clearly if the present application, properly understood, is not purely for judicial review in exercise of the Court's supervisory jurisdiction, there can be no question of transfer. Parties differ on this point. My view, explained below in the discussion about the competency of the application, is that properly understood - at least on the submissions made to me in this case - the present application insofar as seeking a declarator of the petitioner's birth date is not an application for judicial review.

[30] In deference to the arguments presented, however, I have to deal with the matter on the assumption that the present application is for judicial review properly so-called. On that basis the question arises whether the subject-matter brings this application within the classes of application that must be, or that may be transferred in terms of the Tribunals, Courts and Enforcement Act 2007 ss. 20 and 21.

[31] Parties are agreed that the present application does not meet the test for mandatory transfer in terms of the 2007 Act s. 20 (1) (a) and (3): the application does not fall "within a class specified for the purposes of [*subsection 20 (3)*] by act of sederunt made with the consent of the Lord Chancellor". The only relevant act of sederunt is Act of Sederunt (Transfer of Judicial Review Applications from the Court of Session) 2008 Scottish SI 2008 No 357. Scottish SI 2008/357 deals with challenges to procedural decisions and rulings of the First-tier Tribunal - nothing to do with the present case.

[32] Accordingly, mandatory transfer being out of the question, the issue is about discretionary transfer. Section 20 of the 2007 Act authorises discretionary transfers where two negative conditions as to subject-matter are met. The conditions are that the subject-matter *is not* "a devolved Scottish matter"; and that the application *does not* call into question any decision made under "the Immigration Acts", etc [*my emphasis*].

[33] Parties' submissions cover almost every permutation: neither a devolved matter nor an immigration decision - counsel for the petitioner; a devolved matter but not an immigration decision - counsel for the first respondents; an immigration decision but not a devolved matter - counsel for the second respondents. In short, no party wants the application to be transferred and on that basis alone I would not intend to transfer it: but for future reference the arguments presented deserve to be rehearsed.

[34] Leaving aside for the moment the devolution speciality, indications for discretionary transferability reside in (1) the fact that declaratory age assessments brought as judicial reviews against local authorities in the Administrative Court in England & Wales are now routinely transferred to the Upper Tribunal under broadly equivalent legislation; and (2) the fact that the subordinate legislation dealing with the allocation of business within the Tribunal system actually makes provision for age assessment judicial

reviews transferred from the Court of Session, stipulating that such reviews are to be allocated to the Immigration and Asylum Chamber of the Upper Tribunal [The First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 SI 2010 No 2655, art 11 (c) (ii)].

[35] Counsel for the petitioner submitted that the subordinate legislation on the allocation of functions within the tribunal system cannot create a jurisdiction for the tribunal system where none exists; and, he continued (referring to the condition that "the application does not call into question any decision made under (a) the Immigration Acts...") that the primary legislation makes it clear that applications of the present kind are non-transferable.

[36] In terms of the Interpretation Act 1978, as amended, s. 5 and sched. 1, the term "The Immigration Acts" has the meaning given by the UK Borders Act 2007 s. 61. The UK Borders Act s. 61 (f) specifies the Nationality, Immigration and Asylum Act 2002 as one of "the Immigration Acts".

[37] Counsel explained that the UK Border Agency, in exercise of powers conferred by the Nationality, Immigration and Asylum Act 2002, has treated the petitioner as an adult asylum seeker and has refused him leave to enter or remain. Admittedly the present application does not seek review of the Border Agency decision to refuse the petitioner leave: but, counsel submitted, "to call into question" has a wider meaning than "to seek review of"; and clearly the present application must "call into question" the Border Agency leave-refusal decision since that decision is substantially and explicitly based on the first respondents' age assessment [UK Border Agency Reasons for Refusal Letter, 9 March 2011, §§ 36-42].

[38] Counsel for the first respondents disagreed. He submitted that the subject matter is the exercise of the first respondents' duties in terms of the Children (Scotland) Act 1995. These duties arise under the 1995 Act regardless of the petitioner's immigration status.

[39] Counsel for the second respondent added another perspective. She submitted that immigration is "the pith and marrow" of the application. While the Immigration and Asylum Act 1999 s. 94 (7) gives the Home Secretary the power to make age assessments for the purpose of Part VI of the Act, in practice immigration age assessments are confided to local authority social services departments. (I note that, for England & Wales, the practice is governed by the "Age Assessment Joint Working Protocol between the UK Border Agency and the Association of Directors of Social Services": see *R (A)* v *Croydon LBC* [2008] EWCA Civ 1445 (18 December 2008) at § 1 *per* Ward LJ.)

[40] Section 94 of the 1999 Act defines "asylum seeker" as "a person *who is not under 18* and has made a claim for asylum..." [*my emphasis*]. In terms of section 95 the Home Secretary has power to provide support only for asylum seekers, i.e. for persons who are 18 years of age or more seeking asylum. The Home Department gives this support through the National Asylum Support Service [NASS]. Across the

United Kingdom support for unaccompanied child migrants, i.e. unaccompanied migrants under 18 years of age, is, I am told, provided, where there is need, by social services departments in terms of the respective Children Acts. Counsel told me that the second respondents' Social Work Department currently provides support under the Children (Scotland) Act 1995 for between 180 and 200 "Unaccompanied Child Asylum Seekers" [UCASs].

[41] The purpose of the age assessment, counsel continued, was to determine the double question: whether or not the petitioner is an "asylum seeker" within the Immigration and Asylum Act definition; and which public authority, NASS or the first respondents' Social Services Department, had, at the material time, the duty to support him? The outcome of the first respondents' assessment was that the petitioner came to be treated by the Border Agency as an "asylum seeker", was removed to Dungavel Immigration Detention Centre and was subsequently bailed to reside in NASS accommodation in Glasgow pending consideration of his claim for asylum.

[42] Counsel for the second respondents told me that the equivalent legislation for England & Wales, namely the Senior Courts Act 1981 s. 31A (7) inserted by the Tribunals, Courts and Enforcement Act 2007 s.19, also makes it a pre-condition of the transfer of judicial reviews to the Upper Tribunal that "the application does not call in question any decision made under (a) the Immigration Acts..."

[43] Counsel explained that the Court of Appeal felt able to order the transfer of the claim by FZ precisely because, unlike the situation in the present case, no immigration decision had been made [*R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011) at § 32]. I suppose this is possible. I have read the Court of Appeal judgment and the judgment of Deputy High Court Judge James Dingemans QC sitting in the Administrative Court [*R (FZ)* v *London Borough of Croydon* [2010] EWHC 3163 (Admin) (26 November 2010)]. It is true that neither judgment refers to any decision of the Border Agency.

[44] It is also true that the judicial review in the present case is possibly a little unusual in that there has been quite a long delay between the age assessment and the initiation of proceedings; and that, in the interval, the petitioner's asylum claim has been processed by the Border Agency.

[45] Counsel's explanation has the merit of giving content to the provision in the subordinate legislation that allocates age assessment reviews transferred from the Court of Session to the Upper Tribunal, Immigration and Asylum Chamber. Indeed it might be said that the subordinate legislation makes clear that the legislature sees age assessment as an immigration matter [The First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 SI 2010 No 2655, art 11 (c) (ii); *R (FZ)* v *Croydon LBC* [2011] EWCA Civ 59 (1 February 2011) at § 31].

[46] The explanation also offers a reason for distinguishing the present case from *R (FZ)*. In the present case the Reasons for Refusal Letter evidences awareness of the challenge or proposed challenge to the first respondents' age assessment of 24 January 2011; and the terms of the letter suggest that the Border Agency decision might have to be revisited if the challenge, brought in the present proceedings, were to be successful [UK Border Agency Reasons for Refusal Letter, 9 March 2011, §§ 37 and 42]. There is clearly a sense in which a review of the age assessment does "call into question" the subsequent Border Agency immigration decision.

[47] It might have been contended that the age assessment itself was a "decision made under the Immigration Acts" on the view that the age assessment effectively determined whether or not the petitioner could be treated as an asylum seeker within the meaning of the Immigration and Asylum Act 1999. (The Immigration and Asylum Act 1999 is another of "the Immigration Acts" specified by the UK Borders Act 2007 s.61). However I did not understand counsel for the second respondents to press her argument so far.

[48] Counsel for the second respondents further submitted that, because the Petition is essentially about immigration issues, the subject matter cannot be described as "a devolved Scottish matter". In terms of the Scotland Act 1998 ss. 29 and 30 and sched. 5, Part II, B6, "Nationality, immigration, including asylum and the status and capacity of persons in the United Kingdom who are not British citizens, etc" are matters specifically reserved.

[49] Counsel for the first respondents made the opposite submission, namely that the subject matter of the Petition is "a devolved Scottish matter". Counsel pointed out that the expression "devolved Scottish matter" used in section 20 of the Tribunals, Courts and Enforcement Act 2007 is nowhere defined. The Scotland Act 1998 does not specify "devolved matters": it deals with legislative competence; and it does so by reservation not by devolution. It is open to infer that what the legislature meant by "devolved Scottish matters" in the 2007 Act is "matters in relation to which legislative competence is not reserved" [*Eba* v *Advocate General for Scotland* [2011] UKSC 29 (22 June 2011) at § 5 *per* Lord Hope DPSC].

[50] Counsel continued to the effect that child welfare is, in the foregoing sense, a "devolved matter". If the Petition succeeds, child welfare duties may well arise for the local authority in whose area the petitioner resides in terms of the Children (Scotland) 1995 ss. 22 (duty to promote welfare) and 25 (duty to provide accommodation). Section 25 does not involve any matter in respect of which legislative competence is reserved.

[51] There is a specific legislative reservation in terms of the Scotland Act 1998 ss. 29 and 30 and sched 5, Part II, F1 of "social security schemes supported from central or local funds". Does this include so much

of the subject-matter of section 22 of the Children (Scotland) Act 1995 as relates to the giving of assistance in cash and to the recoupment of cash assistance from benefits payable under the Social Security Contributions and Benefits Act 1992, the Jobseekers Act 1995 and the Welfare Reform Act 2007? The answer is "no", because, as counsel pointed out, reservation F1 contains an express exception for the subject-matter of section 22.

[52] Counsel for the petitioner submitted simply that child welfare is not a matter reserved to Westminster by the Scotland Act 1998, sched. 5. On that basis a necessary condition for discretionary transfer to the Upper Tribunal does not exist.

[53] If I had to choose between the approaches of the first and second respondents - and I am not sure that I do since it is not entirely clear that the devolution and immigration conditions are to be read as mutually exclusive - I should incline to prefer the analysis offered by counsel for the second respondents. That approach comes nearest to explaining all the legislation, primary and subordinate; and, if we are to have judicialised age assessments, the approach also offers the best prospect of allowing the tribunal system to function as a unified United Kingdom jurisdiction. The pragmatic argument for transferring age assessments to the tribunal system is apparently that "the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims" [*R (FZ)* v *Croydon LBC* [2011] EWCA Civ 59 (1 February 2011) at § 32].

[54] Having said that, if I thought that I had the power to order a transfer in this particular case, I am not sure that I should exercise it. The reason is that the Upper Tribunal is bound to "apply principles that the Court of Session would apply in deciding an application to the supervisory jurisdiction of that court" when deciding transferred applications [The Tribunals, Courts and Enforcement Act 2007 s. 21 (3)]. It might be helpful for at least one age assessment judicial review to go through the Court of Session before making any transfer orders.

Competency of the application

[55] My view is that in any event the present application cannot be transferred to the Upper Tribunal because, although as a matter of form the petition is an application for judicial review, as a matter of substance it is not, the reason being that it seeks something "other than an exercise of the supervisory jurisdiction of the Court of Session". To put it another way, the petition seeks some things that the court does not have power to grant in the exercise of its supervisory jurisdiction; and the Upper Tribunal does not have a competence in this area greater than the Court of Session [see §§ 27-29 above].

[56] The scope of, and the limitations on judicial review in Scotland are explained in *West* v *Secretary of*

State for Scotland 1992 SC 385, especially at 412-413 *per* the Lord President (Hope) giving the Opinion of the Court. *West* has been approved by the Supreme Court in *Eba* v *Advocate General for Scotland* [2011] UKSC 29 (21 June 2011).

[57] Having regard to the guidance given in *West* and *Eba* I take the view that the present application is incompetent insofar as it seeks (1) reduction of the first respondents' age assessment on the ground of factual error and (2) declarators of the petitioner's birth date, both the general declarator and the declarator directed against the second respondents. The Court of Session has no power in the exercise of its supervisory jurisdiction either to review decisions that have not been made or to usurp functions confided by law to other decision-makers.

[58] As regards the second respondents, Glasgow City Council, there is nothing to review - no decision, no act, no omission, nothing at all [*cf.* RCS Forms, Form 58.6, "Form of Petition in application for judicial review", articles 2 and 4]. The second respondents had not even heard of the petitioner until he served his Petition on them. The English decisions on which counsel for the petitioner relies make it clear that the courts of England & Wales regard their powers of review as being engaged only if a local authority has made an age assessment which remains in dispute [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at § 33 *per* Baroness Hale; and, for example, *R (Y)* v *Hillingdon LBC* [2011] EWHC 1477 (Admin) (15 June 2011) at § 3]. On this basis the claim for a specific declaratory order directed against the second respondents is incompetent.

[59] The Petition does seek reduction of the age assessment decision by the first respondents, Angus Council, dated 24 January 2011, for alleged decision-making errors. No suggestion is made that this claim is incompetent: it is based on what the Petition calls "traditional judicial review grounds". The implication is that the other claims, the claim for reduction based on error of fact and the declaratory claims, are meant to be a non-traditional type of judicial review; and it is correct that these claims do have two features which have not hitherto, at least on the submissions made to me by counsel in these proceedings, been recognised as characteristics of judicial review in Scotland.

[60] The alternative claim for reduction and the declaratory claims are founded on the averments in article 6.12 of the Petition to the effect that the age assessment of 24 January 2011 is "factually wrong". Article 6.12 concludes: "The petitioner claims that because the decision is factually wrong it is also unlawful *et separatim* unreasonable *et separatim* irrational."

[61] This suggests, as counsel for the first respondents submitted, a pure "merits review" - I have something to say about the terminology in due course - and an invitation to the court to substitute its own judgment, something which on a conventional view at least the court is not empowered to do. In *West* at

412 - 413 the Lord President described the court as having power in the exercise of its supervisory jurisdiction "to regulate the process by which decisions are taken"; and he said "it is not competent for the court to review the act or decision on its merits". There are *dicta* to the effect that, provided there is no error of law, decision-makers are entitled to be wrong; and that being wrong is not an error of law [*Eba* v *Advocate General for Scotland* [2010] CSIH 78 at § 41 *per* Lord President; [2011] UKSC 29 (22 June 2011) at § 32 *per* Lord Hope DPSC citing *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147, at 171 *per* Lord Reid]. My view is that, on the submissions made, it would be an incompetent exercise of the court's supervisory jurisdiction to review the decision on the ground of factual error.

[62] Another novelty is that the averments in article 6.12 give notice of the petitioner's intention to present evidence (consisting of dental records and, possibly, an expert opinion) which was not available to the first respondents. My understanding is that the supervisory jurisdiction of this court is intended to be confined to reviewing the decision-making process on the basis of the same material as was available to the original decision-maker.

[63] I am not blind to the fact that these novel features are characteristic of "precedent fact review" as that procedure has developed in England & Wales. The procedure in age assessment cases is well described by HH Judge Thornton in *BA* v *Home Office* [2011] EWHC 1446 (QB) (8 June 2011) at paragraph 14. Beyond reference to the decision of the Supreme Court in *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557, no attempt has been made to persuade me that this way of proceeding is or ought to be part of judicial review in Scotland. (Given what was said by Baroness Hale at paragraph 29 there might in any event be difficulty in knowing whether I am being asked to apply the precedent fact doctrine.)

[64] I have since glanced at the Scots textbooks and have found no systematic treatment of the matter [see Rt Hon the Lord Clyde and D J Edwards, *Judicial Review* (2000), § 22.32]. I note that the concept of "jurisdictional fact" has been recognised by the Inner House in *Cameron* v *Gibson* 2006 SC 283, an ordinary action of reduction. I should therefore state, more particularly, that no attempt has been made to persuade me that, on a proper construction of the Children (Scotland) Act 1995, the doctrine of "jurisdictional fact review" or "precedent fact review" or some other innominate fact review applies for determination of the issue in this case.

[65] Returning to the Petition, although article 6.12 bears to be directed against the lawfulness of the first respondents' age assessment, the first declaratory claim as now framed in article 3 (iv) is of potentially universal application. Clearly the court can, and frequently does, pronounce declarators in the exercise of the supervisory jurisdiction in order to regulate the situation as regards the parties involved [RCS 58.4 (b);

Clyde and Edwards, *Judicial Review* (2000), §§ 24.01, 24.07]: but in this case counsel for the petitioner submitted that the order was "akin to a status declarator", which I suppose it is, in that one of its effects, were it to have universal application, would be to confer on the petitioner the legal status of "a child" for all purposes, including immigration and criminal justice purposes.

[66] Would the declarator, if granted, have universal application? I think I am entitled to judge the intended scope of the application - and its competency - on the basis of the explanation given by counsel for the petitioner. Counsel explained that the general declaratory order was intended to be good against the whole world and to be *res judicata* against all comers [see Note of Argument on behalf of the petitioner § 16 to similar effect]. By way of example counsel referred to the unqualified declaration made by Deputy High Court Judge Neil Garnham QC in *R (N)* v *Croydon LBC* [2011] EWHC 862 (Admin) (16 March 2011) at § 52:

> "Upon hearing counsel for the claimant and counsel for the defendant, upon the court considering the requirements of CPR 21.10 and the evidence as to the claimant's age, and upon the court being satisfied that the most likely date on which the claimant was born was 1 April 1995, it is declared that the claimant was born on 1 April 1995..."

Yes, Deputy Judge Garnham's declaration does bear to be unqualified: but I do not know enough about English law and practice to say that the declaration decided the matter for anyone but the parties involved.

[67] In any event, I was not directed to any authority for the proposition that the supervisory jurisdiction of this Court may be invoked for the purpose of declaring the status of a person or of making some other declaratory order "akin to a status declarator" that would be good against the whole world. Counsel for the first respondents referred to *R (PM)* v *Hertfordshire County Council* [2010] EWHC 2056 (Admin) (4 August 2010) at § 52 where Hickinbottom J said [*my emphasis*]

> "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."

[68] From the submissions for the petitioner it is clear that the intended "function of the proceedings", as regards the birth-date declarator, is to determine the petitioner's "status or rights as against the world". The general declaratory claim is intended to bind the second respondents, who are at least parties to the process, and the Border Agency and others, including the Lord Advocate as head of the criminal prosecution system, who are not.

[69] In that connection I should mention - though this point was not debated at the hearing and for that reason it does not form part of my reasoning - that a particular difficulty for the petitioner could be that the Border Agency's Reasons for Refusal Letter of 9 March 2011 includes a finding if not a determination

of the petitioner's age; and that the petitioner has a right of appeal, albeit a limited one, under the Nationality, Immigration and Asylum Act 2002 s. 82 [*cf. R (PM)* v *Hertfordshire County Council* [2010] EWHC 2056 (Admin) (4 August 2010) at § 1]. In terms of RCS 58.3 an application for judicial review is incompetent if there is an appeal by virtue of any other enactment. I was not told whether the petitioner had actually appealed the Border Agency decision of 9 March 2011 though it would be a surprise if he had not.

[70] In the current process, the legal basis of the challenge by way of a declaratory claim appears at articles 6.4 and 6.5 of the Petition, under reference to *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 and *R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011). As explained above, it appears that the reasoning in those cases is shaped by the fact that the *only* remedy available in England & Wales is by way of judicial review [Civil Procedure Rules, Rules 54.2, 54.3 (1)]: in Scotland, the remedy, if not involving an application to the "supervisory jurisdiction" of the court, may competently be obtained by an action of declarator [Macfadyen, *Court of Session Practice*, H/2 - 5]. Undoubtedly the Court of Session does have power "to determine status or rights as against the world": but my understanding is that the power is exercised in ordinary actions of declarator in proper form.

[71] For the foregoing reasons I conclude that the application for review on the basis of error of fact and the claims for a declarator of the petitioner's birth date are incompetent. What might the petitioner have undertaken to prove had his application continued? The answer is: "not very much." The averments about factual error are [Petition, article 6.1]:

> "The petitioner claims that his date of birth is 7 October 1995. There does not appear to be any available documentary evidence as to the petitioner's date of birth. The views of Dr Evans (above) support the petitioner's claim that he is 15 years old. The petitioner's legal representatives have requested the dental records and intend (if practicable) to have them analysed by an expert."

It was conceded in oral submissions that the views of the dentist, Dr Evans, are neutral. The matter is discussed in the next section.

Judicial review on "*Wednesbury* grounds"

[72] I agree with counsel for the first respondents, Angus Council, that the claim for reduction of the first respondents' age assessment decision of 24 January 2011 on traditional, or *Wednesbury* grounds is unfounded. Counsel submitted that the court should not decide questions that have been rendered academic by supervening events. I also agree with that.

[73] The only duty said to be owed to the petitioner is the duty to provide accommodation in terms of the Children (Scotland) Act 1995 s. 25 [Petition, articles 6.6 and 7]. The single most important point in this

connection is about the geographical location of the petitioner.

[74] The first respondents' duty to provide accommodation is potentially engaged in respect of "any child... residing or having been found within their area..." The Petition does not state that the petitioner is resident in the Angus Council area; the Petition gives a Glasgow address for the petitioner, now, following amendment, an address in Glasgow G31; and it is a matter of agreement that the petitioner is in fact now living in NASS accommodation there. As at the date of the continued first hearing, 13 July 2011, Glasgow City Council, the second respondents, were in course of completing their own age assessment.

[75] The qualifying circumstances for local authority support under section 25 are (a) that no one has parental responsibility for the child; or (b) that the child is lost or abandoned; or (c) that the person who has been caring for the child is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care. None of these qualifications is the subject of averment; and none of them is self-evidently met in this case. As to qualification (a), interesting questions might well arise as to whether the Law of Scotland applies for determination of the question of parental responsibilities in connection with a domiciled Moroccan [Children (Scotland) Act 1995 s.14]. As regards qualification (b), it is not self-evident that an adolescent adventurer - if that is what the petitioner is - who stows away on a ship for the purpose of coming to the United Kingdom, is "lost or abandoned" simply because he lands in Montrose. Qualification (c) involves a conundrum because the petitioner reportedly claims to have lived on his own in Morocco for three years and, apparently, to have cared for himself [Age Assessment Form No 6/1 of Process, page 6].

[76] Even if the first respondents' age assessment were flawed, there is apparently nothing to be gained for the petitioner in terms of the Children (Scotland) Act 1995 s. 25 in quashing the assessment and having his age re-assessed by the first respondents. Now that the petitioner has moved on, the first respondents have no power to consider his claim and to re-assess him. The Petition does not spell out any border-control advantage for the petitioner in having the first respondents' age assessment quashed. The issue might have been focused by a plea of "no title or interest" or "no standing": but one way or the other I am satisfied that I should not exercise my supervisory power to quash the decision for no practical benefit. [*Agnew* v *Laughlan* [1948] SC 656; *Cameron* v *Lightheart* 1995 SC 341; *Lennox* v *Scottish Branch of the British Show Jumping Association* [1996] SLT 353].

[77] Nonetheless I have to consider the criticisms of the age assessment on the hypothesis that some practical result might flow from setting it aside. The criticisms made in the Petition of the first respondents' age assessment are essentially that the process is not "*Merton*-compliant" *i.e.* not compliant with the "*Merton* guidelines", so called because they were proposed (by Stanley Burnton J, as he then

was) in a 2003 age assessment case involving the London Borough of Merton [*R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin) (14 July 2003)]. In England & Wales consensus has grown around the *Merton* guidelines [*R (A)* v *Croydon LBC etc* at § 6 *per* Baroness Hale JSC; *R (FZ)* v *Croydon LBC* at §§ 3 and 8 *per* May PQBD]. The *Merton* guidelines have been re-articulated in subsequent cases [*e.g. R (R)* v *Croydon LBC* [2011] EWHC 1473 (Admin) (14 June 2011) at § 17].

[78] In the present case counsel for the first respondents agreed that "the requirements for a lawful age assessment are well-summarised in *Merton*". This concession goes too far in my view: it is unhelpful to treat the *Merton* guidelines as prescriptive; and to do so gives rise to the mischief that Stanley Burnton J was trying to avoid, namely the judicialisation of the assessment process [*R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin) (14 July 2003) at §§ 36 and 50]. However, I do agree with counsel for the first respondents that the age assessment in the present case is "*Merton* compliant" and that this ground of review also fails.

[79] It is worth noting that there were several criticisms of the process in the *Merton* case itself that cannot be made in the present case. In the *Merton* case the local authority's age assessment was quashed by Stanley Burnton J because of "procedural unfairness". The decision was made in the context of an assessment process that was criticised for its potential to give rise to misunderstandings. Strands of criticism in *Merton* which do not exist in the present petitioner's case concern the assessment form, the interview technique including the language-interpretation process, the duration of the interview, the failure to use additional sources of information and the absence of speedy internal review.

[80] In the *Merton* case the template used was said to be one designed for inquiry "as to whether the child and his family were in need, not whether the person claiming to be a child is such" [*R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin) (14 July 2003) at § 49]. This is a criticism which cannot be made in the present case.

[81] The template used for assessment of the petitioner's age in the present case appears to be the Asylum Seeking Children *pro forma* appended to the "Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers" issued by the London Boroughs of Croydon and Hillingdon (August 2005). The "Practice Guidelines" have been noticed judicially without adverse comment [*R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin) (14 July 2003) at §§ 33, 34; *R (FZ)* v *Croydon LBC* at § 8 *per* May PQBD].

[82] The assessment form for the petitioner is headed: "Age Assessment of Asylum Seeking Child". The form has the following section headings: (1) Physical Appearance, Demeanour; (2) Interaction of Person During Assessment; (3) Social History and Family Composition; (4) Developmental Considerations; (5)

Education; (6) Independent/ Self-Care Skills; (7) Health and Medical Assessment; (8) Information from documentation and Other Sources; (9) Analysis of information gained. The last sheet, on page 10, is a copy of the "Form to be handed to the person assessed". This contains the assessment - "You have been assessed to be over 18" - with summary "Conclusions and Reasons" and details of the procedure for challenging the outcome through an internal review.

[83] Beneath each section-heading there are explanatory notes drawn from the "Practice Guidelines" apparently intended to prompt the assessor to elicit the relevant information and to assess it appropriately [*cf*. "side notes" referred to in *R (B)* v *Merton LBC* at § 34]. All of the sections have been completed. The petitioner makes no criticism of the assessment template or of the content of the assessment in this case.

[84] Nor does he criticise the interview method by which information was elicited directly from him. The precise interview-interpretation process is not apparent on the face of the completed assessment form. It does not appear from the pleadings or the affidavits. The assessment, section (1), refers to a "telephone interpreter... used through Angus Council Interpretation Service". The interview language was Spanish.

[85] It looks as if there was a three-way conversation involving a Spanish-speaking interpreter on the end of the telephone who translated the assessor's questions from English into Spanish and the petitioner's answers from Spanish into English. A conference phone may have been used - I don't know. I mention the interview method, because the same general method was used in the *Merton* case where it was said "to carry a risk of misunderstandings" [*R (B)* v *Merton LBC* at §§ 9, 49, 55]. In the present case there might have been scope for contending that the risk of misunderstanding was greater, given the issue about the petitioner's familiarity or otherwise with the Spanish language.

[86] The Border Agency Reasons for Refusal Letter dated 9 March 2011 contains the following information about the petitioner's proficiency in Spanish:

> "Past events in Morocco
> [...]
> 64. .... due note has been taken of your claim that you only speak a little Spanish, and that you have never had an interview in Spanish...
> 65. Firstly, it is noted that you advised an immigration officer that you speak "no Spanish" before later stating that you speak "a little Spanish". Crucially, the following comments are drawn from your age assessment:
> - '[*TL*] appeared to communicate in two languages (Arabic and Spanish). For the purpose of the interview, [*TL*] had chose to communicate in Spanish.
> - [*TL*] appears to communicate well in Spanish. Interpreters have described his understanding of Spanish as 'very good'. He was able to converse and understand the translator over the telephone on 30 December and on the 07 January 2011.
> [...]
> - He appears to have good gross motor skills and was able to write confidently and clearly in Arabic/ Spanish.'"

I stress that the petitioner in this case, unlike the claimant in the *Merton* case, makes no complaint

whatsoever about the interview technique or the interpretation process.

[87] Another issue in the *Merton* case was the duration of the interview. There was one interview: according to the claimant it lasted 25 to 30 minutes; and according to the interviewer it lasted 45 minutes. In the present case no complaint is made about the duration or thoroughness of the interview. There were in fact two interviews, both conducted by Social Worker Rinku Sharma. The first interview, on 30 December 2010, lasted for between three and four hours. The second interview, on 7 January 2011, lasted for about one and a half hours [Affidavit of Rinku Sharma No 16/1 of Process].

[88] In oral submissions counsel for the petitioner made a point about each section of the assessment. He criticises sections (2), (4), (6) and (8) on the basis that observations of the petitioner by residential staff and others, not involved in the interview, have been fed into the assessment. I reject this criticism. It cannot be inappropriate for assessors to take account of observations of the subject's actions and interactions in a non-interview setting over a period of time.

[89] In the *Merton* case Stanley Burnton J described as "sensible" the suggestion that assessment should take place "over a period of time and involve other professionals, such as residential social worker staff, teachers, and other young people"; and the criticism by counsel for the claimant in that case was that the local authority had failed to assess the claimant over a period [*R (B)* v *Merton LBC* at §§ 33, 51].

[90] Ms Sharma herself met with the petitioner four or five times simply to find out "how he was getting on" [Affidavit of Rinku Sharma No 16/1 of Process]. She received information about daily interactions between the petitioner and staff and young people in the residential unit - when the petitioner arrived in the unit one 14 year old became visibly shocked and stated that the petitioner was "a man not a boy" [Affidavit of Karen Soutar No 16/2 of Process].

[91] The guidance notes for section (1) of the assessment form, "Physical Appearance, Demeanour", state:

> "All assessments begin with initial impressions, made from visual presentation. An initial hypothesis of age range is formed based on height, facial features... voice tone and general impression..."

Ms Sharma did record the initial presentation in detail: but she did not record any initial hypothesis as to age. Counsel for the petitioner criticised this "omission". It is not clear that, or why, an initial hypothesis, as opposed to the details of presentation on which a hypothesis might be based, should be recorded. In any event I see no reason why the non-recording of an initial hypothesis must undermine the exercise. (I have since seen an age assessment in another case where two experienced Hillingdon social workers using the same *pro forma* did not record "an initial hypothesis of age range".)

[92] In addition and otherwise the criticisms about Ms Sharma's assessment made in oral submissions can

be brought under the heads of complaint on grounds of *Merton* non-compliance made in the Petition.

[93] The Petition at article 6.10 avers that: "The failure of Angus Council to use two Assessment Workers renders the decision of the petitioner's age unreasonable *et separatim* irrational". In oral submissions counsel for the petitioner pointed out that the name of the "Assessing Worker" is given on the first and last pages of the form as "Rinku Sharma". Ms Sharma's affidavit confirms that she made the assessment (with input from others). Counsel's criticism is based on the following passage in the *Merton* judgment [*R (B)* v *Merton LBC* at § 33]:

> "A draft document entitled "Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers", issued by the London Boroughs of Hillingdon and Croydon, who are participating in a pilot project for practitioners in social work with unaccompanied asylum-seeking children, makes sensible suggestions. It states that it is beneficial to have two assessing workers: clearly, two heads may be better than one."

[94] In oral submissions counsel argued that it is "unfair" to have just one age assessor because of the subjective nature of the judgement to be made and because the stakes are so high for the claimant. Like Stanley Burnton J, I can see that it might be "beneficial" to have more the one assessor, not only on the basis that assessment must be substantially a matter of impression - the more impressions, the less chance of individual preconceptions dominating - but also on the basis that it gives greater protection to the local authority should the interview record be challenged.

[95] In this case the longer interview, the first interview, was conducted in the presence of Audrey Richardson, Social Care Officer. Karen Still, member of staff at the residential unit at Kinnaird Street, sat in on the second interview. There is a suggestion that Karen Soutar, manager of the residential unit, was in fact a contributory assessor who monitored the daily interactions of the petitioner and that, had she not been on leave, she too would have signed the assessment [Affidavit of Rinku Sharma No 16/1 of Process; Affidavit of Karen Soutar No 16/2 of Process].

[96] The fact that there was only one assessor in the *Merton* case was not a reason for setting aside the decision; and I do not see that it should be a reason to quash the decision in the present case. To have only one age assessor does not amount to procedural unfairness in my view. For completeness, my impression, reading and re-reading the age assessment document and the affidavit, is that the exercise conducted by Ms Sharma was a conscientious one that pulled in information from all then available sources.

[97] The Petition avers at article 6.8 that "it does not appear" that any "concerns" expressed in the analysis section or "any other 'adverse provisional conclusions' were put to the petitioner so that he had the opportunity to deal with them or clear up any misunderstandings". In the *Merton* case the age assessor's witness statement referred to four inconsistencies in the claimant's account of his history in

West Africa and on arrival in the United Kingdom which made her doubt the claimant's credibility [*R (B)* v *Merton LBC* at § 15]. The claimant complained to the Administrative Court that he had not been given an opportunity to explain himself. This was the basis for quashing the decision.

[98] Stanley Burnton J said [*R (B)* v *Merton LBC* at §§ 55-57] [*my emphasis*]:

> "Other requirements as to fairness
> 55 .... *If the decision maker forms the view, which must at that stage be a provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can*. In other words, in the present case, the matters referred to in paragraph 15 above should have been put to him, to see if he had a credible response to them. *The dangers of misunderstandings and mistranslations inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the Claimant an opportunity to explain*.
> 56. *The Claim Form clearly alleged that the Claimant should have been given an adequate opportunity to answer the points that the Defendant was minded to hold against him*. Ms Rodney does not suggest that this was done. *It follows that her decision should be set aside unless the Defendant has established that his responses to the matters on which she relied could not reasonably have affected her decision.* The Claimant addresses these matters in paragraph 14 of his second witness statement. Not surprisingly, he gives no explanation of the implausibility referred to in paragraph 15(d) above. His explanations of the matters referred to at (b) and (c) are unsatisfactory, and in essence amount to an assertion that Ms Rodney must have misunderstood him. *It is the risk that there was some misunderstanding of what he said, a risk that is accentuated by the inconsistency between her notes of the two statements as to his religion to which I have referred, and the possibility that he might have been able to rectify any misunderstanding if the matters relied upon had been put to him, that leads me to conclude, albeit with considerable hesitation, that the Defendant has not satisfied the onus of establishing that even if they had been put to the Claimant, the same decision would inevitably have been made*.
> 57. ... The availability of internal review was not referred to by the Defendant in correspondence or in the Defendant's acknowledgment of service, and *I have no evidence before me as to the complaints or review procedure operated by the Defendant*, and in particular how it would have been operated if it had been implemented by the Claimant. In these circumstances, I am not satisfied that there was a suitable alternative procedure available to the Claimant to challenge the Defendant's decision."

[99] I have added emphasis to highlight the salient points. Subsequent cases have noticed particularly the words in paragraph 56 - "the claimant should have been given an adequate opportunity to answer points that the defendant was minded to hold against him". A niche jurisprudence has developed, unhelpfully in my view, around Stanley Burnton J's expression "minded to", giving us such quasi-technical terms as "minded-to opportunities", "minded-to procedures" and "minded-to letters" [*R (FZ)* v *Croydon LBC* [2011] EWCA Civ 59 (1 February 2011) at §§ 19-21].

[100] The complaint made at article 6.9 of the Petition and expanded on by counsel for the petitioner in oral submissions is that Ms Sharma's age assessment records a number of negative reports from third parties about the petitioner and also a number of negative impressions formed by Ms Sharma herself; that the petitioner was not given an adequate opportunity to address these matters; and that the age assessment is therefore flawed because of procedural unfairness.

[101] I reject this complaint on the basis that the petitioner had adequate if not ample opportunities to put his case. Even if there were no "wash up session" towards the end of the exercise where provisional concerns were formally put to the petitioner one by one for his comments, the petitioner was given a copy

of the assessment on completion and was notified orally and in writing that he had: "a right to disagree with the outcome of the assessment, and to challenge the decision." In this connection he was given contact details for Lorraine Young, social work manager [Witness Statement of Rinku Sharma No 16/1 of Process, paragraph 4; Age Assessment Form No 6/1 of Process, page 10]. I do not accept the submission by counsel for the petitioner that it was by then too late to deal with procedural fairness issues, mistakes and misunderstandings.

[102] The first respondents' internal review procedure is, I think, different from the statutory review procedure referred to in the *Merton* case at paragraph 57. In any event, there was no evidence before Stanley Burnton J as to the complaints or review procedure operated by Merton London Borough Council. In the present case counsel for the first respondents directed me to the affidavit of Lorraine Young, senior manager, Department of Social Work and Health, Angus Council [No 16/3 of Process]. Ms Young states that she would have dealt with any "appeal" as expeditiously as possible; and that pending her decision no action would have been taken in reliance on the outcome of the age assessment.

[103] I am satisfied that the assessment remained, practically speaking, provisional for a reasonable period. I was referred, by way of example, to an age assessment challenge in the case of a Nigerian [*ISA*] and to the first respondents' response [attached to Ms Young's affidavit No 16/3 of Process]. In the *ISA* case, the assessment was dated 16 September 2010; the review request from the claimant's solicitor was made on 30 September 2010; and the first respondents' response was sent on 9 October 2010. Essentially the matter was processed within one working week.

[104] The request and the response in the *ISA* case are detailed documents and deal with every kind of complaint about the assessment process: the request is five pages long and the response runs to almost eight pages. I am satisfied that the internal review process is a satisfactory medium for addressing issues of procedural fairness, mistakes and misunderstandings, if any, that remain outstanding. The petitioner in the present case did not request a review [*cf. R (B)* v *Merton LBC* at § 57].

[105] A solicitor wrote the review request for *ISA*. The petitioner in the present case also had the assistance of a solicitor at or shortly after the point in time when he received the completed age assessment. Ms Sharma's affidavit states:

> "When he met with the solicitor he had a signed copy of the Age Assessment with him. The Age Assessment had details of what he could do if he was not happy with the terms of the Age Assessment..."

I might regard it as troubling if the solicitor referred to were to be the same solicitor who is now instructing counsel with the benefit of Legal Aid to the effect that the petitioner did not have an

opportunity to challenge the assessment.

[106] In any event it appears that during the interview Ms Rinku Sharma gave the petitioner an opportunity to answer what was probably the most important adverse point, namely that the petitioner had given conflicting information about his age [*TL Petitioner for Judicial Review of an Age Assessment* [2011] CSOH 98 (7 June 2011) at § 22]. The petitioner's response was to say that he was confused and to shrug his shoulders. Ms Sharma also met with the petitioner to discuss the outcome and tried "to ascertain the petitioner's views on *the reasons for her finding*" [*my emphasis*]. The petitioner was "not forthcoming at all"; and "he still refused to volunteer information that would support his claim to be 15" [Affidavit of Rinku Sharma No 16/1 of Process]. It is not good enough for the petitioner to aver that "it does not appear" that the assessor's concerns and "adverse provisional conclusions" were put to the petitioner [Petition article 6.8]. He was there. He should know.

[107] In oral submissions counsel for the petitioner submitted that "being confused" was a reasonable explanation, given the petitioner's recent experiences; and that the assessor should have given reasons, if only brief ones, for rejecting the explanation. I disagree. It is enough for Ms Sharma to have been unconvinced.

[108] Further, I accept the submission of counsel for the first respondents that giving the petitioner a formal opportunity to comment on proposed findings would have made no difference. The issue in the present case is not, as in the *R (B)* v *Merton LBC* case, that there were apparent contradictions in the petitioner's history that might possibly have been the result of misunderstandings, caused by the interview and interpretation process, capable of resolution had the petitioner been given an opportunity to address them.

[109] As counsel for the first respondents pointed out, the Petition has been amended twice; the first respondents' Answers include a call on the petitioner to disclose the evidence he intends to rely on to support his claim to have been born on 7 October 1995; the petitioner has not answered the call; and the petitioner has still not addressed the findings in the age assessment which counsel on his behalf complains about.

[110] The "adverse findings" complained about include the following:

- Section (2): "Karen Soutar (Team Manager, Kinnaird Street Young Persons' Unit) advised that [*TL*] does not show interest with peers of the age group he claims. He seems to be more inclined to spend his time with the oldest male peer in the unit who is over 17 years of age."
- Section (3): "I am under the impression that [*TL*] was choosing not to provide me with the information relating to his family history/ composition."

- Section (4): "During a shopping trip to Tesco supermarket, [*TL*] had picked up a 'Zoo Magazine' which is a men's magazine targeted at the older male group 20+. He has also been seen reading the daily newspaper at Kinnaird Street. A member of staff has reported that the page [*TL*] was reading had no photographs and he appeared to be quite capable reading [*sic*] the information in English."
- Section (5): "[*TL*] was able to write in Arabic/ Spanish. He was also looking over the notes I was writing in English during the telephone interview. He... was able to write confidently and clearly in Arabic/ Spanish."
- Section (6): "Staff at Kinnaird Street have noted that he has been shaving regularly."
- Section (8): "... Karen Soutar, Team Manager of Kinnaird Street Young Persons Unit regards his presentation as being consistent with that of an older teenager of 18+."

In contrast to the position in *R (B)* v *Merton LBC*, no witness statement or affidavit has been lodged by the present petitioner to address supposedly "unfair" findings. Compare the situation in *R (B)* v *Merton LBC* where it was the claimant's second witness statement that persuaded Stanley Burnton J, "albeit with considerable hesitation", that there could possibly have been rectifiable misunderstandings [*R (B)* v *Merton LBC* at § 56]. It might be thought that, in the circumstances narrated by his lordship, it was over-generous to the claimant to set aside the decision of the Merton Council.

[111] Referring to article 6.11 of the Petition, counsel for the petitioner also submitted that Ms Sharma had left relevant material out of account. He criticised the fact that the dental opinion given by Dr Dafydd Evans, honorary consultant in paediatric dentistry, Dundee Dental Hospital, has not been taken into account specifically in the analysis section of the age assessment form, Section (9) [see *TL Petitioner for Judicial Review of an Age Assessment* [2011] CSOH 98 (7 June 2011) at § 36]. It is true that the dental opinion is not specifically mentioned in the analysis section, section (9). However the introductory words of the section, "Given the above...", do refer back to everything that has gone before, including section (7).

[112] In section (7) "Health and Medical Assessment", Ms Sharma has recorded:

> "Monica Hodgkinson had requested the opinion of a dental consultant in order to determine [*TL's*] age. Whilst it has not been possible to conclude that he is 15 years, the Dental Consultant (Dr Evans, Dundee Dental Hospital Consultant) has signed a statement which states that 'there is nothing inconsistent visible on the Radiographs of [*TL's*] teeth with his stated age of 15 years.'"

At article 6 of the Petition it is averred: "The views of Dr Evans (above) support the petitioner's claim that he is 15 years old." In oral submissions I understood Counsel for the petitioner to accept that the dental opinion was essentially neutral. I note that section (7) of the assessment also includes the information that

the community paediatrician had advised that "... [*TL*] would be at the top centile range if he were 15 years of age." This tends to be adverse to the petitioner's contention about his age. It is not specifically mentioned in the analysis section, section (9), either.

[113] I do not accept that the assessment has left relevant material out of account. Nor do I accept that matters have been inadequately dealt with in the analysis section, section (9), or in the Conclusions and Reasons section of the Age Assessment Form. Stanley Burnton J expressed the view that sufficient reasons would have been constituted in the *R (B)* v *Merton LBC* case by a reference to "the appearance and behaviour (or demeanour) of the claimant" and to the matters which led the assessor to conclude that the claimant was not truthful [*R (B)* v *Merton LBC* at § 48].

[114] I deduce that in the *Merton* case the completed assessment form was not given to the claimant [*R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin) (14 July 2003) at § 16]: in the present case, the whole assessment with the Conclusions and Reasons section was handed over [Affidavit of Rinku Sharma No 16/1 of Process]. Reading all the material would have given the petitioner in the present case and his solicitor a more than adequate understanding as to why, in the absence of documentation, Ms Sharma assessed the petitioner to be 18 years of age or more.

Fact-finding judicial review

[115] Counsel for the first respondents described the Petition, so far as based on alleged factual error, as an application for "pure merits review". This is correct in the sense that the Petition seeks a review of the merits of Ms Sharma's Age Assessment. It may also be correct if the substantive issue is whether the petitioner qualifies as a "child" for the purposes of UK Border Agency policy, since in that context age is the only determinant. But, as Baroness Hale said in *R (A) etc* at paragraph 1: "So much depends upon how one frames the question." In *R (A) etc* the question was framed as one about the application of the Children Act 1989 s. 20 (1). Equally, if the issue in the instant case is about the obligation to provide accommodation for the petitioner in terms of the Children (Scotland) Act 1995 s. 25 (1), the age assessment can be seen as a question precedent to "the merits" of the accommodation decision. If that is the correct approach - I reserve my opinion and shall return to this at the end - then it is potentially misleading to describe the application as being one for "pure merits review". Because of the ambiguity and because of difficulties, explained below, with the description "precedent fact review", I think the safe way to describe what the petitioner seeks is "fact-finding review".

[116] Because - and I think counsel were right about this - the process cannot be diverted to the Upper Tribunal, as now happens in England & Wales, it becomes important to think clearly about whether the

terms of the Children (Scotland) Act 1995 provide a relevant basis for fact-finding judicial reviews in the Court of Session. The matter was not argued in detail: but I was referred to the relevant authorities. I believe I am in a position to ask a number of pertinent questions and to suggest some very tentative answers. This may serve a purpose in providing context for further debate and decision-making.

[117] Parties' submissions on fact-finding review in this case turned on the question whether or not the decision of the Supreme Court in *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 is binding on the Scottish courts. My view is that the decision of the Supreme Court in *R (A) etc* is not binding and, further, that the Supreme Court's reasoning has limited application in deciding the meaning of the Children (Scotland) Act 1995 s. 25. I say "limited" for four reasons, not including the procedural differences: first, the terms of the England & Wales Children Act 1989 s. 20 are different from the terms of the Children (Scotland) 1995 s. 25; second, the expectation of the Supreme Court as to the practical effect of its interpretation of the Children Act 1989 s. 20 has been confounded by actual developments; third, the Children (Scotland) Act 1995 contains provisions relevant to its interpretation that are either not found in the Children Act 1989 or which, if they are there, were not considered; and, fourth, there is no equivalent in the Children (Scotland) Act 1995 of certain provisions of the Children Act 1989 which were material to the Supreme Court's decision. Before developing these points it may be helpful to give some context to "age assessment" as a legal phenomenon.

[118] The claimants' submissions to the Supreme Court in *R (A) etc* imply a solipsistic system of border control and child welfare provision premised on the existence of reliable birth registration and certification: "age assessment" is presented as answering the challenge of processing adolescent and young adult claimants arriving from abroad, who cannot or will not provide accurate information about their date of birth, so as to bring them within the system.

[119] How effective can age assessment hope to be? Definitionally "children" have grown older to the point where there is a disconnect between the legal concept of adulthood and the physiological markers. Compare the position a century ago as evidenced by the Children Act 1908 s. 131: "The expression "child" means a person under the age of 14 years." As to physiology, the 1999 guidelines published by the Royal College of Paediatrics and Child Health are quoted in a number of the cases put before me [e.g. *R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin) (14 July 2003) at § 22; *R (A)* v *Croydon LBC etc* [2008] EWCA Civ 1445 (18 December 2008) at § 5]. The guidelines describe age determination as "extremely difficult" and state: "for young people aged 15-18, it is even less possible to be certain about their age". A margin of error of up to five years is suggested.

[120] The appellants A and M in the Supreme Court case claimed to be in the age range of fifteen to

seventeen years. Reading between the lines permission would never have been granted for their judicial reviews if it had not been for the paediatric assessments by Dr Colin Michie and Dr Ruth Birch [*R (A)* v *Croydon LBC* [2008] EWCA Civ 1445 (18 December 2008) at §§ 3-4; *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at §§ 9 - 10]. Did the Supreme Court appreciate quite how much-debated the methods used by these doctors are? By May 2009 it seems that even claimants' representatives had come to regard Dr Michie's reports as "unimpressive" and the baton then passed to Dr Birch. [*R (A)* v *Croydon LBC* [2008] EWHC 2921 (Admin) (28 November 2008) at § 33; *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at § 12; *R (WK)* v *Kent CC* [2009] EWHC 939 (Admin) (8 May 2009) especially at § 29; *R (R)* v *Croydon* v *LBC* [2011] EWHC 1473 (Admin) (14 June 2011)]. In the course of preparing this judgement I have learned that, on 9 August 2011, when refusing an application for leave to appeal a refusal by the High Court of England & Wales to grant permission for an age assessment judicial review, Buxton L J said: "No court should in future decide a case on the basis of evidence from Dr Birch" [*R (FM)* v *Secretary of State for the Home Department and Anr*, in the Court of Appeal, Civil Division, C4/2011/1274, 9 August 2011].

[121] The professional guidelines continue:

> "Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical, family and social history."

But the individuals in question generally present with no reliable medical and family history; and the social signifiers of maturation that we take for granted - starting secondary education, moving up from grade to grade, taking various exams, leaving school, buying cigarettes, claiming benefits, getting social housing, electoral registration, taking the driving test, going to the pub, the annual birthday panoply of greetings, cards, presents and parties - may have little or no relevance in the societies from which the subjects of age assessments come.

[122] The chronological age of a particular individual is, the Supreme Court has ruled, an "objective fact": but it is an objective fact that is likely to be unknowable in the kind of cases that we are dealing with - certainly unknowable with the degree of precision required for literal implementation of the obligations imposed by the Children (Scotland) Act 1995. These are individuals who arrive without papers, or who destroy their papers or who carry false papers and who have an incentive to be accepted as "children".

[123] The standard age assessment *pro forma* allows local authority age-assessors to assess the age of applicants "to be over 18", or "to be a child" [i.e. under 18 years of age] with the option of specifying a precise age or date of birth if that information is available. The appellants in *R (A) etc* sought to persuade

the Supreme Court that the issue whether a person is a child or not is for determination by the courts "on the balance of probabilities". Determining issues of fact on "the balance of probabilities" presupposes the existence of competing factual propositions.

[124] That kind of determination is an option where the issue between parties is simply "child or not", "over 18 or under 18": but, where the issue is the precise age or date of birth and where the range of possibilities extends over two, three, four or five years, talk of "the balance of probabilities" is hardly meaningful. This point may well have occurred to the Supreme Court: "balance of probabilities" does not find its way from the submissions into the judgments. The decision of the Supreme Court is not, or at least is not in and of itself, authority for the proposition that fact-finding reviews have to fix the precise age of the applicant.

[125] However, it is not much use if the fact-finding court determines that, on a particular date a few weeks or months ago when the claimant was assessed by a social worker or by Dr Birch, the claimant was "under 18". Is the claimant still under 18 today and what might he or she be tomorrow or the next day? Further, courts have found it difficult to resist the plea that literal implementation of the statute over the months and years ahead on an "objective fact" basis requires an actual birth date to be specified [*cf. R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011) at § 1]. For example, in Scotland, the care and support functions mentioned in sections 17, 22 and 25 of the Children (Scotland) Act 1995 may continue until the claimant's eighteenth birthday; section 29 (1) functions continue until the claimant's nineteenth birthday; and section 29 (2) functions continue until the claimant's 21st birthday. Section 30 (3) functions continue for claimants who have been, or ought to have been, "looked-after children" until the completion of adult education or training [*cf. R (Hossein)* v *Secretary of State for the Home Department* [2011] EWHC 1924 (Admin) (24 June 2011) at § 4].

[126] The decision of the Supreme Court in *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 has effectively compelled the courts of England & Wales to determine the unknowable as a matter of fact. Because age assessment is such an inexact science, the only way to do this is by attributing notional birth-dates [e.g. *MC* v *Liverpool City Council* [2010] EWHC 2211 (Admin) (16 July 2010); *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) (4 August 2010) at § 66; *R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011) at § 2; *R (N)* v *Croydon LBC* [2011] EWHC 862 (Admin) (16 March 2011); *R (R)* v *Croydon LBC* [2011] EWHC 1473 (Admin) (14 June 2011)].

[127] In the case of *MC* v *Liverpool City Council*, Langstaff J plumped for 24 September 1992 while appreciating that the date "almost certainly will not be his actual date of birth"; and in *R (N)* v *Croydon LBC* on the same basis Deputy High Court Judge Neil Garnham QC assigned April Fool's Day 1995.

[128] Is this what the Supreme Court meant by "the truth" [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at § 45]? When *R (FZ)* came to the Court of Appeal - on permission granted by the President to enable "problematic aspects" of the Supreme Court decision in *R (A) etc* to be considered - the Court of Appeal expressed a respectful lack of enthusiasm for the idea that age assessments should be undertaken by the Administrative Court and - *lavit manus, dicens vos videritis* - directed that all such determinations should be removed to the Upper Tribunal "at Field House, 15 Breams Buildings, London EC4A 1DX" [*R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011) at §§ 4, 16 and 31].

[129] Paradoxically, it was a common concern that drove the Supreme Court and the Court of Appeal in *R (A) etc* to opposite conclusions. The concern was about "inappropriate" judicialisation of the process: the Court of Appeal's concern was that widespread judicialisation would result from allowing fact-finding review of age assessments; and the Supreme Court's concern was that judicialisation would result - because of potential Article 6 ECHR complications - from not allowing it. The Supreme Court additionally expressed a degree of optimism that its decision would actually reduce the number of age assessment cases [*R (A)* v *Croydon LBC etc* [2008] EWCA Civ 1445 (18 December 2008) at § 31 *per* Ward LJ; *R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at §§ 33- 34, 44 - 45 *per* Baroness Hale JSC, at §§ 48, 54 - 57, 61 *per* Lord Hope DPSC.]

[130] The Court of Appeal's approach was shaped by the following submissions about the administrative downside of judicialisation [*R (A)* v *Croydon LBC etc* [2008] EWCA Civ 1445 (18 December 2008) at § 28 *per* Ward L J]:

> "[*Counsel*] for Croydon, respond, tellingly in my view, that if it is correct, as the appellants contend, that in case of every dispute, the courts have to determine age, then the consequences would be adverse to good administration. The cost of processing such claims will be considerable; there will be significant delay, urgent decisions will have to be taken in the interim and all of this uncertainty and delay will be inimical to the welfare of young people thereby undermining a crucial cornerstone of the Children Act's philosophy. Croydon have added flesh to this submission by giving evidence that in 2007/08 there were 415 approaches for Children Act support for unaccompanied asylum seeking minors. In 217 or 52% of those age was disputed. Croydon assessed 89 of those 217 to be over 18 and 128 to be under 18. The potential for litigation is obvious. Thus [*Counsel*] submit that Parliament must have intended that all necessary decisions were to be made quickly and with a minimum of formality by those operating the service on the ground..."

[131] The principle of fact-finding review having been laid down by the Supreme Court, it now turns out that the Court of Appeal's concerns were well-founded; and, precisely as counsel for the appellants in *R (A) etc* had submitted to the Court of Appeal, "in the case of every dispute the courts have to determine age". The reality is that traditional *Wednesbury*-type reviews are entirely superseded by the new-style fact-finding reviews [*R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011) at §§ 4 - 5]. The legal significance of this development is that the considerations of expediency that were determinative for the Court of Appeal in *R (A) etc* - and were then rejected by the Supreme Court - have

now re-emerged as an aid available for ascertaining the intendment of the Scots statute.

[132] The choice of law provision, section 14, sufficiently shows that there is no imperative to think of the Children (Scotland) Act 1995 as inward-looking. The measure enacted a number of the Scottish Law Commission's proposals [*Report on Family Law*, Scot Law Com No 135, 1992]. The proposals took account of the United Nations Convention on the Rights of the Child, adopted by the General Assembly on 20 November 1989, including article 1, the definition of a child, *viz* "a human being below the age of 18 years..." [*Report on Family Law*, 2.8]. The Convention was substantially aspirational, in that many states, including Morocco, had only "fragmentary" registration of births and a limited ability to establish age as an "objective fact" [*e.g. United Nations Demographic Yearbook 1990*].

[133] One provision of the Scots statute that invites consideration when interpreting section 25 is section 47, "Presumption and determination of age" [*cf.* Children Act 1908 s. 123; Children and Young Persons Act 1933 s. 99; Children and Young Persons (Scotland) Act 1937 s. 103; Children's Hearings (Scotland) Act 2011, ss. 124 and 199; Criminal Procedure (Scotland) Act 1995 s. 46].

[134] This is in connection with children's hearings. The section provides for the determination of age as what might be called a "jurisdictional" or "precedent fact" in the well-understood sense, namely "a point collateral to the merits of the case upon which the limit to [*the tribunal's*] jurisdiction depends" [*Bunbury* v *Fuller* (1853) 9 Ex 111 at 140 *per* Coleridge J]. In terms of section 47 (2) determinations of age by children's hearings are conclusive for the purposes of Part II of the Children (Scotland) Act 1995 - section 25 included; and in terms of section 47 (3) decisions of children's hearings based on such determinations cannot be invalidated by subsequent proof of the correct age.

[135] Two inferences can be drawn. First, the legislature recognised that age is not necessarily certain, that is, I would say, not necessarily an "objective fact" in the sense posited by the Supreme Court. It might reasonably be said that the legislature recognised a distinction between "age", a working hypothesis, and "correct age", an objective fact which may or may not be subsequently provable.

[136] Secondly, without section 47 (3), coercive orders or "compulsory measures", to use the language of section 52, might otherwise be impeachable on the ground of error as to the precedent fact of age. Why not give the same status and protection to section 25 welfare determinations? I think the likeliest explanation is that the legislature did not contemplate and did not intend that the latter class of decisions could, would or should be fact-reviewable on the basis of alleged age-error.

[137] Accepting that age may be a "fact" about which judgements can reasonably differ acknowledges the reality of a situation which has now been evidenced by scores of age assessment cases. In this connection, the decision of the House of Lords in *R* v *Hillingdon LBC Ex p Puhlhofer* [1986] AC 464, particularly the

dictum of Lord Brightman at 518, is relevant:

> "Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision-making power save in a case where it is obvious that the public body, consciously or unconsciously, are acting perversely."

The Supreme Court in *R (A) etc* declined to apply *Puhlhofer*, although, with respect, I am unable to confirm from my reading of the *Puhlhofer* report the grounds of distinction relied on by Baroness Hale at paragraph 24.

[138] What the council had to decide in *Puhlhofer* was whether a particular room was "accommodation" for the applicant and his family for the purpose of the Housing (Homeless Persons) Act 1977 s. 1 (1). The statute did not qualify the word "accommodation". True, the statute did abound, as Lord Brightman said, "with the formula when, or if, the housing authority are satisfied as to this, or that, or have reason to believe this, or that": but no such formula attached to the word "accommodation"; and it was unnecessary for the House of Lords to imply any words into the provision in order to read it as confiding the factual decision to the council, subject only to *Wednesbury* review.

[139] Until *R (A) etc*, as I understand it, the law of England & Wales recognised only one basis for fact-finding review, namely the "jurisdictional" or "precedent fact" doctrine. Did the Supreme Court apply the precedent fact doctrine in *R (A) etc*? Baroness Hale said that her conclusion on the wording of the Children Act 1989 was reached without recourse to the argument "that 'child' is a question of jurisdictional or precedent fact". The other Justices agreed: but one of them, the Deputy President Lord Hope of Craighead, added reasoning of his own - reasoning which might be understood to state that the precedent fact doctrine was what decided the case [§§ 47, 52 -53].

[140] Lord Hope supported his judgment with reference to *R* v *Secretary of State for the Home Department Ex p Khawaja* [1984] AC 74 at 110 where Lord Scarman invoked the rule "that where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied." Without necessarily subscribing to Lord Hope's conclusion as having application to the Children (Scotland) Act 1995 s. 25, I must respectfully agree with his Lordship's characterisation of the successful submission. As the Court of Appeal subsequently understood matters in *R (FZ)*, the Supreme Court had decided *R (A) etc* on *both* grounds, *viz* construction of the Children Act 1989 *and* precedent fact doctrine [*R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 (1 February 2011) at § 4].

[141] The uncertain note may owe something to the way in which the issues in *R (A) etc* were cleverly

recast by counsel for the appellants. The relevant issue as presented to the Court of Appeal was: "Is the question whether an individual is a child for the purposes of section 17 and 20 of the Children Act 1989 one of precedent fact, which the court may review on the balance of probabilities?" The reformulation for the purposes of the appeal to the Supreme Court was:

> "(i) whether, as a matter of statutory construction, the duty imposed by section 20 (1) is owed only to a person who appears to the local authority to be a child, so that the authority's decision can only be challenged on '*Wednesbury'* principles..., or whether it is owed to any person who is in fact a child, so that the court may determine the issue on the balance of probabilities;
> (ii) whether the issue 'child or not' is a question of 'precedent' or 'jurisdictional fact' to be decided by a court on the balance of probabilities...?"

[142] The distinction drawn by Baroness Hale between (i) the argument on statutory construction and (ii) the precedent fact doctrine is, with respect, an elusive one: the only authorities cited to the Supreme Court on fact-finding review are examples, like *Khawaja*, of the application of the precedent fact doctrine; and the essence of the doctrine according to those authorities is that whether or not a factual pre-condition for the exercise of executive functions is justiciable depends on proper construction of the empowering statute. I am unaware of any jurisprudential underpinning for fact-finding review except the precedent fact doctrine.

[143] If the Court of Appeal's understanding is correct there must be a question as to whether the decision in *R (A) etc* amounts to a veiled extension of the precedent fact doctrine. After referring to *Khawaja*, Baroness Hale stated at paragraph 31: "This [*precedent fact*] doctrine is not of recent origin or limited to powers relating to the liberty of the subject" This is true. *Bunbury* v *Fuller* (1853) 9 Ex 111, earlier referred to by Baroness Hale herself, is clear authority for both propositions - not recent and, being concerned with a burden on landed property, not about personal liberty: but to say what the doctrine is not limited to is not to say that the doctrine is without limits.

[144] What might the limits be? My impression is that the precedent fact cases are concerned with the question whether public authorities are *empowered* to act *against* the persons or property rights in question, whereas the issue in age assessment cases is whether public authorities are *obliged* to act *in favour* of the claimants. The matter would benefit from analysis; and contemporary sentiment might wish to frame the distinction, if it be a helpful one, with an eye to the question of whether or not constitutional freedoms are at risk, understanding always that any rule derived from the decisions must yield in particular cases to clear legislative intent.

[145] In this context I should say that I am respectfully in agreement with Lord Hope's analysis of the Article 6 ECHR issue: the local authority's duty to provide accommodation for a qualifying child does not give rise to a "civil right" that requires to be judicialised. This is because "the award of benefit is

dependent upon a series of evaluative judgments as to whether the statutory criteria are satisfied and, if so, how the need for it as assessed ought to be met..." [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at §§ 57 - 65]. I also agree that, in contrast, and as indicated by Baroness Hale, coercive measures ought as a rule to be subject to Article 6-compliant adjudication.

[146] The concept of a "precedent fact" begs the question: precedent to what? A factual condition may be precedent to the power to entertain the question; or it may be precedent to the power to make the order or do the act. The antinomy at the centre of the *R (A) etc* discussion was, as first defined, the opposition between "a child", said to be a wholly objective term, and "a child in need", said on the other side to involve an evaluative judgement. "Child in need" is a term of art, defined by the Children Act 1989 s. 17: in *R (G)* v *Barnet LBC* [2004] 2 AC 208 at § 23 Lord Nicholls of Birkenhead said that section 20 "is concerned specifically with the accommodation needs of children in need".

[147] The discussion in *R (A) etc* represents different perspectives not just on the terms of the preliminary question but also as to the nature and location of the threshold. If the threshold is represented by all preconditions for the existence of the duty to provide accommodation, then, for local authorities in England & Wales, the threshold is not reached short of there being "a child in need within their area who appears to them to require accommodation as a result of there being no person who has parental responsibility for him, etc." That is a composite condition, certainly not a wholly "objective" one, involving as it does on any view substantial elements of evaluation, the evaluative elements of which are indisputably confided to the local authorities, subject only to *Wednesbury* review. Such a mixed condition would not appear to meet the standard for precedent fact review enunciated by Wade and Forsyth [*Adminstrative Law*, 9th edn, (London, 2004) at 257, cited by Baroness Hale at § 31, by Ward L J in the Court of Appeal at § 23: see now 10th edn (London, 2009) at 226].

[148] The words "in need" are omitted from the equivalent provision in the Scots statute. This makes the interpretative challenge a different one. Also, if I understand matters correctly, in terms of the Children (Scotland) Act 1995 ss. 1 and 2, the parental rights and responsibilities relevant to the provision of accommodation apply only to children under sixteen years of age, so that the age question can enter the section 25 decision-making process at more than one point [Children (Scotland) Act 1995 s. 25 (5), (6) and (7); see also Marriage (Scotland) Act 1977; Age of Legal Capacity (Scotland) Act 1991]. Going further, there is a debate to be had as to whether the section 25 (1) qualifying conditions are framed in such a way as to confine the mandatory provision of accommodation under section 25 (1) to children under sixteen years of age [Children (Scotland) Act 1995 ss.1, 2 and 5]. Discretionary powers to provide accommodation are available elsewhere in section 25 with various age limits, implied and expressed. In

England & Wales according to my personal reading of the Children Act 1989 s. 20 (3) there is a distinct, "serious prejudice to welfare" test before it becomes mandatory for a local authority to provide accommodation for "any child in need within their area who has reached the age of sixteen" If this reading is correct, it reflects back on the scope of section 20 (1). (See also *S* v *Stirling Council (Local Authority Care)* 2000 SLT 979; *cf. R (M) (FC)* v *Hammersmith and Fulham LBC* [2008] 1 WLR 535 at § 16 *per* Baroness Hale; *R (G)* v *Southwark LBC* [2009] 1 WLR 34, [2009] 1 WLR 1299 where it was conceded that the Children Act 1989 s. 20 (1) (c) had potential application to a seventeen-year old Somali who refused to live with his mother, possibly - the reports are unclear - because she objected to him being involved in gang activities.)

[149] Some of the 16 and 17 year olds in the "young persons" category for whom accommodation is provided on a discretionary basis are themselves parents. Just as there may be an incentive to dissemble age for border control purposes, so there may be an incentive to exaggerate age for the purpose of acquiring independent-living accommodation. I suspect that in practice local authority decisions on accommodation for individuals in the 15 to 20 year old age range are driven more by assessment of needs, wishes, capacity for independent living and resources than by chronological age assessment. The statute is designed to allow this flexibility.

[150] I raised the question above whether different rules might be indicated for the interpretation on the one hand of coercive powers and on the other of obligations to provide services. In *R (A) etc* in the Supreme Court, the successful argument on statutory interpretation owed much to the analysis of the coercive powers, powers to detain children, in England & Wales given by the Children Act 1989 ss. 25 and 46; and, as indicated above, it may not be difficult to accept as a matter of principle that alleged wrongful detention ought to be justiciable on the basis of precedent-fact error [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557 at § 17 - 19].

[151] The Children Act 1989 s. 25 example was said by Baroness Hale to be the "more telling for our purposes." It might also be thought, with respect, to be implausible. One version of the scenario involves an adult taking advantage of section 20 children's accommodation who is locked up for absconding and who then challenges the detention on the precedent-fact ground that he or she is not a child.

[152] I think I am right in saying there are no provisions equivalent to sections 25 and 46 of the Children Act 1989 in Scotland. Secure accommodation orders in terms of the Children (Scotland) Act 1995 s. 70 (9) are confided to children's hearings. Hearings are bound to make an age determination and their determination cannot be challenged. In any event and with respect, I do not understand why the use of the same definition of the word "child" for both welfare and coercive provisions, if this is what the English

statute provides, logically requires that there should be corresponding justiciability. Justiciability rather than definition is the real issue.

[153] Justiciability cannot sensibly be determined in the abstract divorced from the question of constitutionality on the one hand and expediency on the other. Croydon's argument in the Court of Appeal, at paragraph 31, drew support from *R* v *Oldham Metropolitan Borough Council ex parte Garlick* [1993] AC 509, a case under the Housing Act 1985, where at 520 Lord Griffiths said: "All these very immediate investigations and decisions are necessary to make the system work and they can only be carried out by the authorities concerned." This leads back to a question about age assessment investigations: why should age-dispute reviews escalate straight to a full scale witness action in court? Why not - if the issue is shortage of reliable data - order local authorities to gather further evidence and make a re-determination? In the present case for example, there are lines of inquiry that might be followed up, maybe not in Morocco, but at least with the Moroccan authorities. (If this seems far-fetched, I note that in *R (FZ)* Croydon Social Services Department tried to contact the Iranian public authority that had supposedly issued the claimant's vaccination card.)

[154] The answer could be that it is no part of local authority functions to make these investigations; and that the statute does indeed envisage "immediate" decisions being made by local authorities, as in the *Garlick* situation, simply on the claimant's presentation and the information and documents, if any, offered by him or her at the time. There is support for this view in the contrast with other provisions that do impose duties to make inquiries and to investigate, for example the Children (Scotland) Act 1995 ss. 53 and 71.

[155] Local authority age determinations for welfare purposes are essentially provisional. They have to be working definitions, more about apparent maturity than chronological age: but they can be reassessed repeatedly and indefinitely if further information comes to hand. For example, in *R (FZ)* there was an initial age assessment on 4 September 2009, followed by a reassessment on 7 May 2010, when the photocopy vaccination card with translation was produced, followed by another reassessment on 5 August 2010, when a medical report was produced. Welfare determinations, or (where the process goes no further) the age assessment component, are also amenable to *Wednesbury* review by the courts to address decision-making flaws including unfairness and failure to take evidence into account [*R (PM)* v *Hertfordshire County Council* [2010] EWHC 2056 (Admin) (4 August 2010) at § 88].

[156] "Best interests" was not something the Supreme Court considered: but there may well be an argument that this flexibility - fairly-made decisions, immediate decisions but provisional decisions - is what the interests of putative 16 and 17 year-olds require; and that this consideration should have a

bearing on the interpretation of the statute [United Nations Convention on the Rights of the Child, Article 3.1]. (On 12 October I heard a case about an Iranian UASC, found to be an adult by Hillingdon LBC Social Services, who had subsequently managed to recover school reports and a birth certificate from Iran, *prima facie* genuine, which showed him to be under 18.) Failing to meet the criteria for mandatory accommodation is not the end of the story since local authorities, at least in Scotland, have discretionary powers to provide accommodation in terms of the Children (Scotland) Act 1995 s. 25 for 16 and 17 year old children and for adults up to and including the age of 20.

[157] Is it better to risk being judged definitively by a court to be over the age of 18 on the basis of imperfect evidence or to have the opportunity to apply to the local authority for reassessment on the basis of fresh documentation? This is supposing that judicial age determinations are meant to be conclusive: but perhaps this is not clear from the Supreme Court decision in *R (A) etc.*

[158] The on-the-spot decisions that local authorities have to make are not without implications for children with whom applicants like the petitioner could potentially share accommodation. The petitioner claims to be 15. Counsel for the first respondents told me that "provision of accommodation" means in practice the provision of accommodation either in a unit for children and young persons, such as the Kinnaird Street Unit, Arbroath, or with foster carers. In the case of *ISA* I learned, on 14 October 2011, that there are no registered foster homes in the first respondents' area that do not already have children resident, either children of the foster carers or foster children.

[159] The petitioner has been assessed to be an adult. In the Kinnaird Street Unit, his behaviour became challenging [Age Assessment No 6/1 of Process, Section 8]. On his own account he is sexually active [Age Assessment No 6/1 of Process, Section 7]. Unlike foster parents and residential unit staff the petitioner has not had a suitability check. The first respondents had a duty to assess the petitioner's age responsibly and to make arrangements to accommodate him, or for him to be accommodated, accordingly. The statute makes no provision for the accommodation of applicants who are in an age limbo.

[160] Looking at the matter from the accommodation perspective, I do not accept that the "stakes are high" for the petitioner. If the first or second respondents do not provide accommodation for him, he will be accommodated by NASS in self-catering accommodation until he is removed from the United Kingdom. The real issue for the petitioner appears to be his immigration status, not his living arrangements: for claimants who are "in fact" over 18 an advantage, if not the primary advantage of age-assessment litigation is the interruption or frustration of immigration decision-making and the potential accretion of Article 8 ECHR rights.

[161] In the *R (A) etc* the Court of Appeal gave primacy to a reading of the Children Act 1989 that

attributed to Parliament an intention to legislate in a socially responsible manner. The Court of Appeal could have gone further: the "consequences adverse to good administration" that flow from the interpretation advanced by the appellants in that case include the impact on border controls. That is the practical effect because as a rule the Border Agency accepts local authority age determinations and stays its processes pending age-dispute court proceedings: but the courts should not be misled into thinking that they must become involved in fact-finding for the purpose of providing a judicial determination of the immigration status of individuals like the petitioner.

[162] As was observed by the Court of Appeal in *R (FZ)* Immigration Judges are well-practised at making age determinations - this happens, as it did in the petitioner's case, in the course of asylum appeals to Immigration Judges in the First Tier Tribunal. Immigration Judges hear expert witnesses and receive expert witness reports in evidence. If an Immigration Judge determines that the appellant is a child, the Secretary of State will grant discretionary leave to remain; and local authorities making age determinations for their own purposes are bound to take account of the determinations made by a tribunal [*R (A)* v *Croydon LBC etc* [2009] 1 WLR 2557, the case of *R (M)* at § 10; *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) (4 August 2010)].

[163] Looking at the matter pragmatically, if a specialist judicial determination of age can be obtained from an Immigration Judge in the First Tier, why should there have to be a complicated procedure, as there now is in England & Wales, for obtaining a judicial determination of age from the Immigration Chamber of the Upper Tier, a procedure which may well not involve a significant step-up in supposed age assessment expertise? As I understand it the Upper Tribunal practice for age disputes (in England & Wales) is to have a two-person panel only, one of whom, the Senior Immigration Judge, is an immigration specialist, the other member being a Judge qualified to sit in the Administrative Court.

[164] This brings me back to the question: what are applications of this sort really about? My impression is that they are primarily about immigration status. If they are about immigration status then, as I understand it, age assessment does constitute "the merits" of the decision rather than a preliminary question; and if age assessment is "the merits", fact-finding review of the assessment is, I think, incompetent. The issue about the competency of this particular application is something that could well have been superseded by the time this Opinion is issued, because, when last I heard, the petitioner was about to be age-assessed by the second respondents. If he again disputes the outcome and seeks judicial review, there will be an opportunity to debate the matters that I have touched on, *obiter*, in this paragraph and above. It may be of course that the Second Respondents will assess him to be "a child", in which case all these interesting matters will have to wait for another day.

Disposal of the Petition

[165] For the reasons given earlier, I shall sustain the first respondents' second and fourth Pleas-in-Law, I shall repel the petitioner's Pleas-in-Law and refuse the Petition so far as directed, on the grounds that the decision is unlawful, unreasonable or irrational, against the decision of the first respondents dated 24 January 2011. Insofar as the Petition seeks reduction of the said decision on the ground of factual error, I shall dismiss the Petition as incompetent. Insofar as the Petition seeks declarator of the petitioner's date of birth *et separatim* declarator of the petitioner's date of birth for the purposes of the exercise by the second respondents of their duties and responsibilities under the Children (Scotland) Act 1995, I shall dismiss the Petition as incompetent. I shall reserve in the meantime all questions of expenses.