Case No: HQ13X04321

Neutral Citation Number: [2014] EWHC 2483 (QB)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22 July 2014

Before:

MR SIMON PICKEN QC
(sitting as a Deputy Judge of the High Court)

- -

Between:

VS

Claimant

- and -

THE HOME OFFICE

Defendant

- -
- -

Shu Shin Luh (instructed by **Maxwell Gillott**) for the Claimant.
William Hansen (instructed by **The Treasury Solicitor**) for the Defendant.

Hearing dates: 17, 18, 19 and 20 June 2014
- -
- -

JUDGMENT

MR SIMON PICKEN QC:

Introduction

1. The Claimant, an Iranian national, who entered the United Kingdom on 2 July 2012 on the back of a lorry, claims damages for unlawful detention relating to two periods: the first on 2 July 2012 when the Claimant was detained by the Defendant for 7½ hours before he was released into the care of Kent County Council's Children's Services ("Kent CS"); the second a period of twenty-five days, starting on 17 July 2012 and ending on 10 August 2012, when the Claimant was detained by the Defendant as a result of Kent CS having age-assessed him as an adult.

2. The Claimant claims, in summary:

   (1) as regards the first period of detention, that he should have been referred to Kent CS immediately after his detention at 16.00 hours on 2 July 2012, alternatively soon after completion of the booking-in process at the Defendant's Dover Enforcement Unit (at, Miss Luh submits, 17.30 hours), alternatively at some point between the completion of the booking-in process and the start of the Claimant's interview at 18.35 hours, alternatively at some point during the Claimant's interview and, in any event, before a referral was actually made at 19.05/19.10 hours; and

   (2) as regards the second period of detention, that his detention was unlawful throughout this period because the Defendant did not have in its possession a *Merton*-compliant age assessment and failed to exercise its own independent obligation to consider whether or not the age assessment from Kent CS which it did have was *Merton*-compliant, alternatively that his detention was unlawful from 26 or 31 July 2012 onwards when the Claimant provided the Defendant with fresh evidence demonstrating that he was a minor and not an adult (contrary to the age assessment carried out by Kent CS).

3. It was agreed by the parties that the question of damages should only be addressed after liability has been determined. Accordingly, this judgment is confined to that liability question alone.

The Facts

4. The facts are largely agreed, the parties having helpfully prepared an Agreed Summary of Facts. What follows is based on that document as well as on the parties' skeleton arguments and, of course, also the underlying documents.

5. The Claimant had apparently travelled from Iran through various European countries. Indeed, he was previously fingerprinted in Italy, albeit that he did not make an asylum claim there.

6. On the day of arrival, at some point before 10.25 hours, when Kent Police first informed the UK Border Agency, by telephone, of his apprehension, he was

arrested along with seven others after a member of the public had reported seeing him (and the others) getting out of a German registered lorry on the A2.

7. The Claimant was then held by Kent Police until, later the same day, he was detained under paragraph 16(1) of Schedule 2 to the Immigration Act 1971, on being served with form IS151A whilst still in police detention at 16.00 hours, pending a decision whether or not to give removal directions.

8. The Claimant was transferred to the Defendant's Dover Enforcement Unit, arriving at 17.25 hours (based on the Reliance record). His basic details were taken and recorded in a document described as a *"Minors KRT Booking-in Sheet"*. The same document records, under *"Personal Details"*, the Claimant's date of birth as being 21 September 1995 (indicating that he was saying that he was 16 years old), his nationality as being Iranian and his language as being Farsi. The form also stated this next to *"Hair Colour/Type"*: *"Black, short – a little grey"*. There was then a tick in a box next to the words *"Welfare of child considered"*, followed by the word *"None"* under a printed question asking if there were *"any medical conditions"*.

9. It is common ground, as borne out by the booking-in form, that the Claimant told the immigration officer(s) booking him in that he was a minor, albeit that he did not present documentation at that time to support this claim. It is, therefore, equally common ground that at all times during the Claimant's detention by the Defendant on 2 July 2012 the Defendant treated the Claimant as a minor. It is clear that the Claimant had also told the police that he was a minor because the IS91 form authorising the Claimant's detention, which was prepared by the Defendant based on information provided to the Defendant by the police, gave the same date of birth as is recorded in the booking-in form. (The position is different in relation to the later period of detention because at that stage, as will appear, the Defendant had an age assessment from Kent CS which stated that the Claimant was an adult).

10. After being given time to settle in and offered refreshments, the Claimant was subsequently interviewed between 18.35 and 18.55 hours. That interview was recorded in a document described as a *"Children's Current Circumstance Pro Forma"*, which sets out printed questions and (in manuscript) the answers which the Claimant gave to those questions.

11. The rubric at the start reads as follows:

"Below to be read in full in all cases

I am a UK Border Agency officer and I need to ask you a few questions today. This will last around 5 minutes and I will ask you brief details about why you left your country. I will be using a telephone interpreter to interview you; they will ask you my questions in your language and will then tell me your answers in my language. If at any stage you don't understand my questions please tell me and I will explain. Once this is completed we will refer you to Kent Social Services, an agency designed to assist children in the UK, who will come and take you somewhere safe."

12. The first few questions then largely replicate the questions asked on booking-in since they are concerned, again, with date of birth, language and the interviewee's medical condition. As to the latter, the questions and answers were as follows:

Are you feeling fit and well today?	*I'm tired. I spent several days in a lorry.*
Do you have any medical conditions?	*No I don't have any but in Turkey when they wanted to put me in a lorry they broke my nose – 9 or 10 days. I don't have much pain no, just a little.*
Do you take any medication? If yes what and when was it last taken. *Do you have it with you?*	*No medication.*

13. The completed form went on as follows:

I would like to ask you why you left your home country, I only need to take brief details today because we will ask you more about this another day.	*My mother had some problem with her brothers about inheritance. My cousin was Sepahi [security force] because of this I had to leave Iran, I went to Turkey but they even came there after me.*
Do you know anybody in the UK?	*No.*
If yes – can you tell me who they are and where they are?	*N/A.*
Do you have a phone number for anybody in the UK? *If yes – are they expecting you to call them?* *Who are they?*	*No.*
Do you have any concerns that you would like to tell me about?	*The only worry is that they don't arrest me. My cousin who is a member of Sepahi. I cannot go back to Iran under any conditions.*

14. It was only after the conclusion of this interview that, shortly after 19.00 hours (either 19.05 or 19.10 hours – the two times are given in the documents), the Defendant referred the Claimant to Kent CS. It was then not until 21.00 hours that a representative from Kent CS attended. The Claimant was eventually released from the Defendant's detention, an IS96 having at some stage that night been issued to him authorising his temporary admission to the UK, at 23.30 hours. The formal written referral was sent to Kent CS the following morning, it being explained that the Claimant was an *"Unaccompanied minor*

with no family or contacts in the UK" who *"will require care and accommodation pending processing of case"*.

15. The Claimant remained in Kent CS's care until 17 July 2012, during which time he was age-assessed by Kent CS. The result of that age assessment was that the Claimant was assessed as being 2 years older than he claimed, specifically that he had been born in 1993 instead of 1995. This meant that Kent CS had assessed him as an adult rather than as a child as claimed.

16. The Defendant was informed of this age assessment on 17 July 2012, when Kent CS telephoned and subsequently sent through a fax which named the Claimant and then stated as follows:

"The above named young person has been assessed by Kent Social Services as being over the age of 18 years. The Assessment was a full assessment as required by 'Merton'. …".

17. Attached to the fax was a document, described as *"Age Assessment Results"*, which set out, in Part A, the Claimant's name and *"Claimed DOB"* (21 September 1995) and also Kent CS's *"Assessed DOB"* which was given as 21 September 1993. The form went on in the following terms:

"<u>PART B: Age Assessment Factors Considered</u>

Physical Appearance and demeanour:

X Strongly *X Adult*
Child
Young Person

The applicants physical appearance/demeanour:

Weakly

Observation of interaction with peers:	*Y*	*Cultural or linguistic skills:*	*Y*
Family and social history:	*Y*	*Maturity and developmental considerations*	*Y*
Education:	*Y*	*Health or medical considerations, if any:*	*N*
Independent self-care skills:	*Y*	*Other e.g. documents validated by IND:*	*N*
Self-disclosure:	*Y*		
Interaction of person during assessment:	*Y*	*Medical reports:*	*N*

Having considered the above factors, Kent County Council Children's Services has assessed the above person as having a date of birth of about: 21/09/93

Name of Social Worker/Assessor: *Sarah Dolan*

Contact Phone: … *Date assessment completed: 17/07/12*

Note: Except in obvious cases of a child or adult, this pro-forma represents a summary of a more in-depth assessment conducted with the intent to comply with both 'Merton Judgements'. The Home Office, judges, solicitors and other parties are <u>required</u> to obtain the assessed person's written permission to allow Kent County Council to disclose the full Child in Need assessment which informs the decision on age.

…".

18. It is common ground that there were no full reasons disclosed with the 2-page fax from Kent CS, and indeed that Kent CS had not typed up full reasons by 17 July 2012. The full reasons were not, in the event, typed up until 15 August 2012, which was five days after the Claimant was released from immigration detention.

19. Having received Kent CS's fax and the accompanying form, it was the evidence of Anne Helbling, who on 17 July 2012 was acting temporarily as Chief Immigration Officer at the UKBA Kent Response Team in Dover, that the decision was made by the Defendant to issue IS91 and IS91R forms authorising the Claimant's detention, based on the fax and *'Age Assessment Results'* document received from Kent CS. Miss Helbling acknowledged, however, that she could not remember *"any of this day"* and that her evidence was based on the information available on the Defendant's Office Case Information Database ("CID") rather than recollection of the Claimant's particular case.

20. On 20 July 2012, the Claimant was informed that his asylum claim was being treated as a Third Country case and that the Defendant was considering an application to Italy to accept responsibility for examining the Claimant's asylum claim pursuant to the Dublin II Regulations (Council Regulation (EC) No. 343/2003). This is an application which can only be made if a person is an adult since, as will appear later, Article 6 of the Dublin II Regulations requires the member-state where the child is present and where he has lodged an asylum claim to examine his claim for asylum irrespective of whether he has claimed asylum elsewhere in the EU: ***MA (Eritrea) v Secretary of State for the Home Department*** [2013] 1 WLR 2961.

21. On 31 July 2012, the Claimant's solicitors wrote to the Defendant under the Judicial Review Pre-Action Protocol, providing the Defendant with copies of the Claimant's birth certificate, national identity card and school certificate from Iran, contending that the Claimant's detention was unlawful and inviting the Defendant to release the Claimant into the care of Kent CS. It is the Claimant's case that he received these documents on 26 July 2012 and that he also provided the same documents to the Defendant on that day, 26 July 2012. This is neither admitted nor denied by the Defendant. In oral argument, however, it was pointed out by Miss Luh, on the Claimant's behalf, that the CID record sheet indicated that even earlier, on 20 July 2012, the Claimant was apparently telling staff at the Deal Unit, where he was being detained, that he had *"obtained photocopies of two identification documents which he believes when*

translated will prove he's a minor". The entry then states: *"Copies faxed to Kent LIT"*. The same record states in the next entry (again for 20 July 2012), as follows: *"Copies of ID documents received at KRT and faxed to NAIU/TCU"*. This is an issue to which I shall return later, but an email on 27 July 2012 from the detention centre to the Defendant (albeit the addressee details are blanked out) refers to the Claimant having given the documents (which were attached) to *"us today for your attention"*.

22. The Claimant's solicitors also wrote to Kent CS challenging the age assessment said to have concluded on 17 July 2012. On 3 August 2012, Kent CS replied to the Claimant's solicitors to confirm that no age assessment had been written up.

23. On 6 August 2012, the Defendant was informed that Kent CS had agreed to carry out a re-assessment of the Claimant's age.

24. Further pre-action correspondence was sent to the Defendant by the Claimant's solicitors to challenge the Claimant's ongoing detention on the basis that the Defendant was in breach of the Defendant's published policies and to request his immediate release.

25. On 7 August 2012, the Claimant's solicitors lodged an application for judicial review against the Defendant. That same day, 7 August 2012, Blair J refused permission to apply for judicial review on the basis that the application was premature since *"the defendant must have a proper opportunity to reach a decision on the age issue"*. By an order of Silber J dated 8 August 2012, an oral *inter partes* hearing on the Claimant's renewed application for interim relief was to be listed for 13 August 2012 where the lawfulness of the Claimant's detention would be reviewed by the Court.

26. On 10 August 2012, the Defendant released the Claimant into the care of Kent CS, having previously carried out detention reviews and maintained the decision to detain the Claimant from 17 July until 10 August 2012.

27. On 15 August 2012, Kent CS issued a report confirming its assessment of the Claimant's age (actually concluding that his date of birth was 21 January 1993 rather than 21 September 1993, although nothing probably turns on this). Subsequently, Kent CS concluded in November 2012, following an age re-assessment, that the Claimant was in fact his age as claimed, born on 21 September 1995. The fully formulated reasons were produced in April 2013. This means that the Claimant was, as he has consistently claimed, in fact a child, aged 17, at all material times during the 2 periods of his detention. He only turned 18 in September 2013.

28. The Defendant accepted Kent's re-assessment and, on 26 April 2013, confirmed that it would accept the Claimant's stated age and treat him as a child. The Defendant also agreed to withdraw the decision to certify the Claimant's claim for asylum on Third Country grounds and agreed to examine the Claimant's claim for asylum as an unaccompanied child in the United Kingdom.

29. The parties subsequently agreed for the Claimant's claim for declaratory relief and damages arising from his detention by the Defendant to be transferred to the Queen's Bench Division pursuant to CPR r.54.20.

The Law

Unlawful detention

30. It was not in dispute between the parties that the Court's role is to guard liberty with jealous care. As Lord Dyson put it in ***R (Lumba) v Secretary of State for the Home Department*** [2012] UKSC 12 [2012] 1 AC 245 at [53]:

> *"the right to liberty is of fundamental importance and ... the courts should strictly and narrowly construe general statutory powers whose exercise restricts fundamental common law rights and/or constitutes the commission of a tort."*

31. The tort of false imprisonment is committed when a claimant is directly and intentionally imprisoned by a defendant, without lawful justification. It is actionable regardless of whether the claimant suffers any harm, and the claimant does not have to prove fault on the part of the defendant because it is a tort of strict liability. Again as Lord Dyson put it in ***Lumba***, at [64]:

> *"Trespassory torts (such as false imprisonment) are actionable per se regardless of whether the victim suffers any harm. An action lies even if the victim does not know that he was imprisoned: see, for example,* ***Murray v Ministry of Defence*** *[1988] 1 WLR 692, 703a–b where Lord Griffiths refused to redefine the tort of false imprisonment so as to require knowledge of the confinement or harm because*
>
> *'The law attaches supreme importance to the liberty of the individual and if he suffers a wrongful interference with that liberty it should remain actionable even without proof of special damage.'*
>
> *By contrast, an action on the case (of which a claim in negligence is the paradigm example) regards damage as the essence of the wrong."*

32. The burden of showing that there is lawful justification for the detention lies on the Defendant: see ***Lumba*** per Lord Dyson at [65]:

> *"All this is elementary, but it needs to be articulated since it demonstrates that there is no place for a causation test here. All that a claimant has to prove in order to establish false imprisonment is that he was directly and intentionally imprisoned by the defendant, whereupon the burden shifts to the defendant to show that there was lawful justification for doing so. As Lord Bridge of Harwich said in* ***R v Deputy Governor of Parkhurst Prison, Ex p Hague*** *[1992] 1 AC 58, 162c–d: 'The tort of false imprisonment has two ingredients: the fact of imprisonment and the absence of lawful authority to justify it.'"*

(It has been recently held that the burden on the Defendant of having to prove that there is lawful justification for the detention means, in the context of a

case concerned with whether the Defendant has complied with its own published policies, the obligation to show that there has, indeed, been such compliance: see ***HXT v Secretary of State for the Home Department*** [2013] EWHC 1962 (QB) per HHJ Burrell QC (sitting as a Deputy High Court Judge) at [14]).

33. Further, again as Lord Dyson put it in ***Lumba***, at [71]:

"I can see that at first sight it might seem counter-intuitive to hold that the tort of false imprisonment is committed by the unlawful exercise of the power to detain in circumstances where it is certain that the claimant could and would have been detained if the power had been exercised lawfully. But the ingredients of the tort are clear. There must be a detention and the absence of lawful authority to justify it. Where the detainer is a public authority, it must have the power to detain and the power must be lawfully exercised. Where the power has not been lawfully exercised, it is nothing to the point that it could have been lawfully exercised. If the power could and would have been lawfully exercised, that is a powerful reason for concluding that the detainee has suffered no loss and is entitled to no more than nominal damages. But that is not a reason for holding that the tort has not been committed."

Accordingly, the public authority must not only have the power to detain but must also lawfully exercise that power in making the detention.

Power to detain

34. The power to detain an illegal entrant to the UK derives from the power to remove. Hence paragraph 16(2) of Schedule 2 to the Immigration Act 1971 provides that:

"If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions."

This follows paragraph 16(1), which states as follows:

"A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter."

35. As Miss Luh points out, the power to detain under Schedule 2 makes no distinction between the detention of adults and the detention of children. However, it is *"not exhaustive of the 'law'"* governing the power to detain, and nor are the ***Hardial Singh*** principles: see ***Lumba*** per Lord Dyson at [32].

36. Other relevant sources of 'law' bearing on the discretionary power purported to be exercised by the executive are the Dublin II Regulations (2003/343/EC) and the Defendant's published policies (which give rise to a public law duty of adherence: see ***Lumba*** at [30]). As to the latter, Lord Dyson explained in ***Lumba*** at [66] that:

"… A purported lawful authority to detain may be impugned either because the defendant acted in excess of jurisdiction (in the narrow sense of jurisdiction) or because such jurisdiction was wrongly exercised. ***Anisminic Ltd v Foreign Compensation Commission*** *[1969] 2 AC 147 established that both species of error render an executive act ultra vires, unlawful and a nullity. In the present context, there is in principle no difference between (i) a detention which is unlawful because there was no statutory power to detain and (ii) a detention which is unlawful because the decision to detain, although authorised by statute, was made in breach of a rule of public law. … ."*

37. The same point was acknowledged by the Supreme Court in ***Kambadzi v Secretary of State for the Home Department*** [2011] UKSC 23 [2011] 1 WLR 1299, in which Lord Hope said this at [36]:

"We are dealing in this case with what the Secretary of State agrees are public law duties which are not set out in the statute. Of course it is for the courts, not the Secretary of State, to say what the effect of the statements in the manual actually is. But there is a substantial body of authority to the effect that under domestic public law the Secretary of State is generally obliged to follow his published detention policy. …"

He went on at [41] to say:

"… a failure by the executive to adhere to its published policy without good reason can amount to an abuse of power which renders the detention itself unlawful. I use this expression to describe a breach of public law which bears directly on the discretionary power that the executive is purporting to exercise. …".

38. This was consistent with Lord Dyson saying in ***Lumba*** at [68] that a public law error capable of vitiating the authority to detain *"must bear on and be relevant to the decision to detain"*. Baroness Hale put it as follows in ***Kambadzi***, at [69], citing her own dicta in ***Lumba*** at [207]:

*"**Nadarajah** was a case principally brought under article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The question, therefore, was whether the detention was 'lawful' in the sense that it complied with the Convention standards of legality. It is not surprising that the court held that, to be 'lawful', a decision to detain had to comply, not only with the statute, but also with the Secretary of State's published policy. But it is also not surprising that the majority of this court has now held, in* ***R (WL (Congo)) v Secretary of State for the Home Department*** *[2011] 2 WLR 671 (**'Lumba'**), that a failure to comply with the Secretary of State's published policy may also render detention unlawful for the purpose of the tort of false imprisonment. While accepting that not every failure to comply with a*

published policy will render the detention unlawful, I remain of the view that 'the breach of public law duty must be material to the decision to detain and not to some other aspect of the detention and it must be capable of affecting the result—which is not the same as saying that the result would have been different had there been no breach': see ***Lumba****, para 207."*

39. In contrast to Schedule 2, both the Dublin II Regulations and the Defendant's published policies do distinguish between adults and children.

Dublin II Regulations

40. As Miss Luh explains, Article 31 of the 1951 Geneva Convention provides that refugees are to be granted protection against refoulement (or removal) in their receiving countries. This is a right which is underlined within EU law by Article 21 of the Qualification Directive (2004/83/EC), and by Article 18 of the EU Charter on Fundamental Rights which guarantees a right to asylum.

41. The purpose of the Dublin II Regulations (2003/343/EC) is to create a clear and workable method based (see recitals (3) and (4)) on *"objective, fair criteria for both the Member States and for the persons concerned"* to determine which Member-State of the EU is responsible for the examination of a person's asylum application.

42. As part of this, the Dublin II Regulations stipulate what approach is to be adopted in allocating responsibility amongst EU member states for examining a person's asylum application. The Regulations deal, specifically, with the (restricted) circumstances in which one member state can remove a person to another member state so that that person's asylum application is determined by that other member-state. To this end, Article 5(1) provides that the *"criteria for determining the Member state responsible shall be applied in the order in which they are set out in this Chapter"* (namely, Chapter III which comprises Articles 5 to 14).

43. Importantly, the first of the *"criteria"* (Article 6) is concerned with unaccompanied minors, a reference (as made clear in the definition at Article 2(h)) to *"unmarried persons below the age of eighteen who arrive in the territory of the Member states unaccompanied by an adult responsible for them whether by law or by custom, and for as long as they are not effectively taken into the care of such a person"*. Article 6 is in the following terms:

"Where the applicant for asylum is an unaccompanied minor, the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor.

In the absence of a family member, the Member State responsible for examining the application shall be that where the minor has lodged his or her application for asylum."

44. As observed by Maurice Kay LJ in ***R (MA/BT/DA) v Secretary of State for the Home Department*** [2011] EWCA Civ 1446, at [19], it is likely that the

second paragraph of Article 6, *"following on from a 'best interests' test in the first paragraph, was intended to have a protective element"*. As the CJEU later put it in the same case, ***MA (Eritrea) v Secretary of State for the Home Department*** [2013] 1 WLR 2961, at [55], *"unaccompanied minors form a category of particularly vulnerable persons"*. As the CJEU went on to say in the same paragraph, this *"means that, as a rule, unaccompanied minors should not be transferred to another member state"*. Rather, as stated at [66], *"where an unaccompanied minor with no member of his family legally present in the territory of a member state has lodged asylum applications in more than one member state, the member state in which that minor is present after having lodged an asylum application there is to be designated the 'member state responsible'"*.

45. The position is only different if, in accordance with the first paragraph of Article 6, the unaccompanied minor has a *"member of his or her family"* who *"is legally present"* in another member state and it is in the best interests of the minor that that other member state is responsible for examining the minor's application. The position in relation to adults is not the same. An adult can be returned to the member state where he or she first lodged his or her application for asylum or where he or she had first passed through the EU Common Asylum Area: see Articles 7-14 and 16-20. The consequence for present purposes is that there cannot be reasonable grounds to suspect that an unaccompanied minor who is not removable under the Dublin II Regulations may be given removal directions (within the language of paragraph 16(2), Schedule 2 to the 1971 Act) and so no power to detain arises under that paragraph.

Section 55 of the Borders, Citizenship and Immigration Act 2009

46. Section 55(1) of the Borders, Citizenship and Immigration Act 2009 (the '2009 Act') provides that the Defendant *"must make arrangements for ensuring that"* various of her *"functions"* as mentioned in sub-section (2) "*are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom"* (*"children"* being defined in Section 55(6) as meaning *"persons who are under the age of 18"*). Those *"functions"* include *"any function in relation to immigration, asylum or nationality"* (sub-section (2)(a)) and *"any function conferred by or by virtue of the Immigration Acts on an immigration officer"* (sub-section (2)(b)).

47. The Supreme Court, in ***ZH (Tanzania) v Secretary of State for the Home Department*** [2011] UKSC 5 [2011] 2 AC 166, has explained that Section 55 was designed to translate into national law the internationally binding obligation contained in Article 3 of the UN Convention on the Rights of Child, which provides that:

> *"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."*

As Baroness Hale pointed out at [23]:

"This is a binding obligation in international law, and the spirit, if not the precise language, has also been translated into our national law."

She went on to refer both to Section 11 of the Children Act 2004 and to Section 55, making it clear at [24] that the Section 55 duty:

"applies, not only to how children are looked after in this country while decisions about immigration, asylum, deportation or removal are being made, but also to the decisions themselves. This means that any decision which is taken without having regard to the need to safeguard and promote the welfare of any children involved will not be 'in accordance with the law' for the purpose of article 8(2)."

48. Under Section 55(3), the Secretary of State may give guidance and, if guidance is issued, there is a duty on the part of any *"person exercising any of [those] functions"* to have regard to such guidance. Guidance has been issued: *'Every Child Matters. Change for Children: Statutory Guidance to the UK Border Agency on making arrangements to safeguard and promote the welfare of children'* issued in November 2009.

49. Paragraph 1.3 of this guidance states:

"The duty does not give the UK Border Agency any new functions, nor does it over- ride its existing functions. It does require the Agency to carry out its existing functions in a way that takes into account the need to safeguard and promote the welfare of children."

50. Paragraph 1.14 provides as follows (as with all my quotations from the various policies, the emphasis is in the original):

"In order to safeguard and promote the welfare of individual children, the following should be taken into account, ***in addition to the relevant section of Part 2 of this guidance****. The key features of an effective system are:*

...

- *Practitioners are clear when and how it is appropriate to make a referral to Local Authority children's services where children may need services to safeguard them or to promote their welfare;"*

51. Section 2 then provides, *inter alia*, as follows:

(1) Paragraph 2.5:

"Other parts of the UK Border Agency's contribution include:

- *Exercising vigilance when dealing with children with whom staff come into contact and identifying children who may be at risk of harm.*
- *Making timely and appropriate referrals to agencies that provide ongoing care and support to children."*

(2) Paragraph 2.7:

"The UK Border Agency must also act according to the following principles:

- *Every child matters even if they are someone subject to immigration control.*
- *In accordance with the UN Convention on the Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children. …".*

(3) Paragraph 2.19:

"It may be helpful to set out here, by way of example, some of the key policy commitments which apply at different stages of the process:

…

- *When unaccompanied or separated children are being escorted from their normal place of residence to a port where removal will take place, they must be subject to detention procedures in the sense of being served with formal notice whilst the supervised escort is taking place. Other than in these situations, unaccompanied or separated children must be detained only in the most exceptional circumstances whilst other arrangements for their care and safety are made.*

…".

(4) Paragraph 22:

"The UK Border Agency must always make a referral to a statutory agency responsible for child protection or child welfare such as the police, the Health Service, or the Children's Department of a Local Authority14 in the following circumstances:

…

- *When a child appears to have no adult to care for them and the Local Authority has not been notified.*

…".

Chapter 55, Enforcement Instructions and Guidance

52. The Defendant's policy on detention is primarily contained in Chapter 55 of the Enforcement Instructions and Guidance ('EIG Chapter 55'), a section entitled *"Detention and Temporary Release"*.

53. Paragraph 55.1.1 states, *inter alia*, as follows:

"The power to detain must be retained in the interests of maintaining effective immigration control. However, there is a presumption in favour of temporary admission or release and, wherever possible, alternatives to detention are used …".

54. Paragraph 55.1.1 goes on to state as follows:

"To be lawful, detention must not only be based on one of the statutory powers and accord with the limitations implied by domestic and Strasbourg case law but must also accord with stated policy.

As well as the presumption in favour of temporary admission or release, special consideration must be given to family cases where it is proposed to detain one or more family member(s) and the family includes children under the age of 18 (please see chapter 45 for ensured family returns process). Similarly, special consideration must be given when it is proposed to detain unaccompanied children pending their hand over to a local authority or collection by parents or relatives or by other appropriate adult carers or friends, or to escort such children when removing them, for example to an European Union (EU) member state. …".

55. Paragraph 55.1.3 (*"Use of detention"*) then states:

"Detention must be used sparingly, and for the shortest period necessary. …".

56. Paragraph 55.3 (*"Decision to Detain (excluding pre-decision fast track and CCD cases)"*) states:

"1. There is a presumption in favour of temporary admission or temporary release – there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

2. All reasonable alternatives to detention must be considered before detention is authorised.

3. Each case must be considered on its individual merits, including consideration of the duty to have regard to the need to safeguard and promote the welfare of any children involved."

57. Paragraph 55.3.1 stipulates that *"All relevant factors must be taken into account when considering the need for initial or continued detention, including … Is the subject under 18?".*

58. Paragraph 55.8 (*"Detention reviews"*) then provides that continued detention must be reviewed at minimum intervals set out in a table (24 hours, 7 days, 14 days, and so on), and that at these reviews "*robust and formally documented consideration should be given … information relevant to the decision to detain"*. Furthermore, where detention *"involves or impacts on children under the age of 18, reviewing officers should have received training in children's*

issues … and must demonstrably have regard to the need to safeguard and promote the welfare of children".

59. Paragraph 55.9.3 (*"Young Persons"*) deals with the position of unaccompanied children, stating that they *"must not be detained other than in the circumstances below"* and then stating as follows:

"As a general principle, unaccompanied children (i.e. persons under the age of 18) must only ever be detained in the most exceptional circumstances (for example, where it is necessary to establish the identity of an unaccompanied child and pending suitable alternative arrangements being made for their care and safety, such as whilst waiting collection by family/friends). They should normally only be detained for the shortest possible time, with appropriate care though where necessary this may include detention overnight. This includes age dispute cases where the person concerned is being treated as a child.

In those exceptional circumstances where there are no relatives or appropriate adults to take responsibility for the child and alternative arrangements need to be made for their safety a period of very short term detention will also usually be appropriate to prevent them absconding (i.e. going missing) pending the arrangement of a care placement. Again, this includes age dispute cases where the person concerned is being treated as a child."

60. The same paragraph goes on to state that:

"Detention of unaccompanied children must take account of the duty to have regard to the need to safeguard and promote their welfare; this must be demonstrable in line with the statutory guidance issued by the Secretary of State under section 55 of the 2009 Act. When detaining unaccompanied children the underlying basis for detention must be in accordance with paragraph 55.1.1."

It then provides that unaccompanied children *"may only be detained in a place of safety as defined in the Children and Young Persons Act 1933"*, before stating that:

"Where an individual detained as an adult is subsequently accepted as being aged under 18, they should be released from detention as soon as appropriate arrangements can be made for their transfer into local authority care."

The paragraph ends with this:

"In all cases, the decision making process must be informed by the duty to have regard to the need to safeguard and promote the welfare of children."

61. Miss Luh observes that this part of EIG Chapter 55 explains the practical effect of Section 55 of the 2009 Act in the detention context consistently with the UK's obligations under Article 37 of the UN Convention on the Rights of the Child, which also provides, *inter alia*, that the detention of children *"shall be used only as a measure of last resort"*, and Article 22, which provides that

children seeking refugee status shall receive *"appropriate protection and humanitarian assistance"*. EIG Chapter 55 distils, she suggests, Article 36 and paragraphs 61 to 63 of General Comment No. 6 (2005): *Treatment of Unaccompanied and Separated Children Outside Their Country of Origin* (which deal with detention).

62. Paragraph 55.9.3.1 is in the following terms:

"Sometimes people over the age of 18 claim to be children in order to prevent their detention or effect their release once detained."

Referring to the website which gives the Defendant's *'Asylum Process Guidance on Age Assessing'* (see later), it continues:

"*Information on the policy and procedures concerning persons whose ages have disputed is available on the website at [the website for the 'Assessing Age' guidance]."*

The paragraph then states as follows:

"UK Border Agency will accept an individual as under 18 (including those who have previously claimed to be an adult) unless one or more of the following criteria apply:

- *there is credible and clear documentary evidence that they are 18 years of age or over;*
- *a full "Merton-compliant" age assessment by Social Services is available stating that they are 18 years of age or over. (Note that assessments completed by social services emergency duty teams are not acceptable evidence of age);*
- *their physical appearance/demeanour* ***very*** *strongly indicates that they are* ***significantly*** *over 18 years of age and no other credible evidence exists to the contrary."*

Skipping a paragraph, there is then this:

"Once treated as a child, the applicant must be released to the care of the local authority as soon as possible. Suitable alternative arrangements for their care are entirely the responsibility of the local authority. Care should be taken of the child during any handover arrangements, preferably by agreement with the local authority."

63. As for the Defendant's *Asylum Processing Guidance on Assessing Age* (the *'Assessing Age'* guidance) this starts by setting out, in Section 1.1, the purpose of the guidance:

"This instruction sets out the policy and procedures to follow when an asylum applicant claims to be a child with little or no evidence, and their claim to be a child is doubted by the Agency.

Specifically, this instruction provides guidance on when it is appropriate to dispute an applicant's age; how age assessments should be conducted; sharing information with local authorities and handling age dispute issues during the end to end process, including substantive asylum interviews, refusal letters and appeals."

64. Section 2 (*"Assessing age – general policy"*) then deals with *"Initial age assessment"* in paragraph 2.1 as follows:

"Where there is little or no evidence to support the applicant's claimed age and their claim to be a child is doubted, the following policy should be applied:

1. The applicant should be treated as an adult if their physical appearance/demeanour ***very strongly suggests that they are <u>significantly</u> over 18 years of age****. …*

2. ***All other applicants should be afforded the benefit of the doubt and treated as children, in accordance with the '<u>Processing an asylum application from a child</u>' [sic], until a careful assessment of their age has been completed****. …".*

65. Paragraph 2.2 deals with Section 55 of the 2009 Act, with paragraph 2.2.1 stating as follows:

"The assessing age policy has in-built safeguards to ensure it is compliant with the new duty, for example, applicants whose age has not been accepted by the Agency, will initially be afforded the benefit of the doubt and treated as children unless their physical appearance/ demeanour very strongly suggests they are <u>significantly</u> over 18. …".

66. Then there is a section on *"Screening"*, before Section 4 deals with *"Routing and accommodation"*, which states as follows:

"Following completion of screening procedures, applicants whose age is in doubt should be referred to the Asylum Routing and Initial Accommodation Team (ARIAT) with clear instructions that the applicant's age is in doubt and that they are being treated as a child. ARIAT must then route the applicant to an asylum case owner who has been trained to interview asylum seeking children.

Where a local authority has declined to accommodate an applicant referred to them as a child or a possible child, there could be various reasons for this decision, one of which may be that the applicant has been assessed as an adult. Clarification should be sought from the local authority and if completed, a copy of the age assessment report should be obtained.

If the local authority has assessed the applicant as an adult and the local authority's decision on age is accepted by the Agency it is likely that the applicant will need to be transferred to the adult asylum support system administered by the Agency. In such cases liaison between the Agency and the

local authority on the arrangements will usually be necessary and the ARIAT should be informed by email."

67. This is followed, perhaps most importantly for present purposes, by Section 5 (*"Local authority age assessments"*), which I need to set out in some detail:

"Local authorities will often have a duty to provide accommodation and support to an unaccompanied asylum seeking child under provisions of the Children Act 1989, therefore all applicants who are being treated as unaccompanied children should be referred to the relevant local authority.

As part of its duties, the local authority will normally conduct an assessment of the applicant's age in order to determine eligibility for children's services, and in some cases, the level of the applicant's needs.

5.1 Merton judgment

There is no prescribed way in which local authorities are obliged to carry out age assessments; the courts have, however, provided some general guidance to local authorities in a case involving Merton Council (B v London Borough of Merton [2003] EWHC 1689 (Admin), in which judgement was handed down by Stanley Burnton, J in the High Court on 14 July 2003. Some of the key points noted by the court were:

- *The decision maker must explain to an applicant the purpose of the interview.*
- *Except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant.*
- ***In general**, the decision maker must seek to elicit the general background of the applicant, including the applicant's family circumstances and history, educational background, and the applicant's activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to their age, the decision maker will have to make an assessment of the applicant's credibility, and he will have to ask questions designed to test the applicant's credibility.*
- *If the decision maker forms the provisional view that the applicant is lying, the applicant must be given the opportunity to address the matters that have led to that view.*
- *Adequate reasons must be given for a decision that an applicant claiming to be a child is not a child (though these need not be long or elaborate).*
- *Cases vary, and the level of inquiry required in one case may not be necessary in another.*
- *A local authority may take into account information obtained by the Home Office, but it must make its own decision, and for that reason must have adequate information available to it.*

5.2 Considering local authority age assessments

Case owners should give considerable weight to the findings of age made by local authorities, recognising the particular expertise they have through

working with children. In cases where the local authority's assessment is the only source of information about the applicant's age – their assessment will normally be accepted as decisive evidence.

Nevertheless, case owners should carefully consider the findings of the local authority and discuss the matter with them in appropriate circumstances, such as where the findings are unclear; or do not seem to be supported by evidence; or it appears that the case is finely balanced and the applicant has not been given the benefit of the doubt; or that it appears the general principles set out in the Merton judgement were not adhered to.

The case of R (T) v Enfield [2004] EWHC 2297 (Admin) highlights the importance of ensuring the age assessment has been carefully considered. In this case the local authority was instructed to carry out a fresh age assessment after it was found that the manner of the interview was unfair and unduly hostile in light of the applicant's vulnerable condition and state of mental health. It was also determined that the local authority had failed to take into account relevant considerations and matters relating to the applicant.

...

5.3 Obtaining the local authority's age assessment

Case owners should request a full copy of the local authority's age assessment and confirmation from the local authority that it has been carried out in compliance with the guidelines in the Merton case. In some instances local authorities may still feel unable to share their full age assessment with the Agency citing data protection and/or confidentiality concerns. Whilst accepting that the information contains sensitive personal data, it should be pointed out to the local authority that there is provision for sharing such information with the Agency within the Data Protection Act 2008.

This approach reflects the findings of the judge in A & WK Vs SSHD & Kent County Council [2009] EWHC 939 (Admin), where it was considered that, 'since it [the local authority assessment] is being obtained for the benefit of the Home Office as well as the authority, it is in my judgement entirely reasonable that it should be disclosed to the Home Office. Only if the full report is available can it be seen whether there are any apparent flaws in it and whether it is truly Merton compliant. And sight of the full report will be essential if there is any challenge raised to the decision by the Home Office.'

Case owners should discuss with the relevant local authority and obtain in writing, ***at the very least*** *their assessment conclusion, the reasons on which their conclusion is based and an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case.*

Where applicants have been assessed as adults by the local authority, but maintain they are children, it is important to establish the local authority's reasons for their decision on age. The applicant should be asked to provide

the age assessment or provide permission for the local authority to disclose it (where the local authority is reluctant to do so). ...

5.3.1 Recording attempts to obtain age assessments

Case owners must document on file and CID ***all*** *attempts to obtain a local authority age assessment, including telephone calls. All responses from the applicant, local authorities or legal representatives must be noted and retained on file, since these may have a bearing on future appeal hearings.*

... ."

68. Section 6 (*"Other evidence of age"*) goes on to provide as follows:

"This section provides guidance on different types of evidence that may be submitted in support of an applicant's claimed age. This evidence should be considered alongside a local authority age assessment.

If an applicant submits a document to a local authority in support of their claimed age, Agency staff should provide assistance to the local authority where possible to help determine the likely veracity of these documents. Where possible, this should be completed before the local authority conducts their age assessment.

...

6.2 Birth certificates

An original and genuine birth certificate in the applicant's name will normally be acceptable proof of the applicant's age, provided that it is accompanied by other genuine official documentation bearing a photograph of the holder, e.g. a military card, identity card, government pass, etc. However, caution must be exercised in accepting birth certificates and other official documents from some countries where there is evidence they can be obtained improperly or through ways that provide little evidence the information is accurate. Where there is no other genuine official documentation to support the birth certificate, it should still be considered alongside all the other evidence, but will not necessarily be considered determinative.

...".

69. Section 8 (*"Weighing up conflicting evidence of age"*) states, *inter alia*, as follows:

"It is Agency policy to give prominence to a Merton compliant age assessment by a local authority, and it is likely that in most cases that authority's decision will be decisive. However, all sources of information should be considered and an overall decision made in the round. Account may be taken of the overall credibility of the applicant, established for example through the asylum interview, though care should be taken in doing so ...

...

8.2 New relevant evidence received post age decision

Case owners will normally need to review a decision on age if they later receive relevant new evidence .... Where the original decision on the applicant's age was based on a local authority assessment, the local authority should normally be made aware of the new evidence and be invited to review their earlier decision. The local authority's view should be considered by the case owner before they reconsider the decision on age.

...".

Merton-compliant age assessments

70. It was not disputed between the parties that, as Miss Luh submits, when deciding to treat a young person as an adult instead of a child in circumstances where the young person is claiming that he or she is a child, the Defendant is under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person's age, and failure to discharge this duty lawfully gives rise to a public law error rendering the detention unlawful: see ***Secretary of State for Education and Science v Tameside MBC*** [1977] 1 AC 1014.

71. In the present case the duty to make the necessary inquiries arises in the context of an age assessment carried out by Kent CS which concluded that the Claimant was 18 and not 16 as he was claiming. In that context there is authority that there is an independent obligation on the Defendant to reach its own decision as to whether the age assessment carried out by the local authority is what is known, by way of shorthand, as *Merton*-compliant.

72. As Coulson J put it in ***J v Secretary of State for the Home Department*** [2011] EWHC 3073 (Admin) at [31]:

"... although the defendant was entitled to rely on a Merton compliant age assessment completed by a local authority, there was an independent obligation on the part of the defendant to consider that assessment and to reach her own conclusion as to whether or not it was Merton compliant."

He went on to refer to the fact that the Defendant's *'Assessing Age'* guidance reflects this obligation:

"And the defendant's own policy document, at paragraph 5.2, confirms this: although case owners within the defendant's department 'should give considerable weight to the findings of age made by local authorities ... case owners should carefully consider the findings of the local authority and discuss the matter with them ... if it appears the general principles set out in the Merton judgement were not adhered to.' The policy also states, at paragraph 5.3, that 'where applicants have been assessed as adults by the local authority, but maintain they are children, it is important to establish the local authority's <u>reasons</u> for their decision on age'."

73. In a subsequent case, ***AAM v Secretary of State for the Home Department*** [2012] EWHC 2567 (QB), Lang J, at [110], approved of the approach adopted by Coulson J, like him taking the view that:

"On an objective interpretation of the policy, the immigration officer is required to evaluate the evidence and form a judgment under the criteria in para 55.9.3.1."

74. More recently still, in ***Durani v Secretary of State for the Home Department*** [2013] EWHC 284 (Admin), Walker J, again dealing with the Defendant's *'Assessing Age'* guidance, said this at [88] to [90]:

"88 Here, too, Mr Singh made a preliminary point. The terms of the defendant's policy, he said, were such that officials could properly proceed on the basis of a local authority age assessment unless it were obviously not Merton -compliant.

89 It will be apparent from what I have said in section F above that even if Mr Singh's preliminary point were right it would not assist the defendant in the present case. For the reasons given in that section, in the two respects there identified it was obvious that the 2009 assessment was not the type of assessment which the Merton judgment had in mind.

90 I add that I would not in any event accept Mr Singh's preliminary point. As Ms Luh observed, the policy required officials to apply their mind to whether or not the assessment in question complied with the Merton principles. There is in this case a dearth of evidence as to whether this was done. If it had been done, then the conclusion could be challenged on public law principles. Those principles cannot be collapsed into an approach which requires that an assessment can be relied upon unless it obviously failed to comply with Merton principles."

75. Similarly, in ***HXT***, HHJ Burrell QC put matters as follows at [18]:

"Hence the policy requires an immigration official to consciously apply his / her mind to the local authority's age assessment report and form a reasonable view as to whether the age assessment complies with Merton principles. This is the logical outcome of the relationship between the policy (not to detain unless the person is over 18) and the power to detain under para 16 of schedule 2 to the Immigration Act 197 … ."

76. As Miss Luh pointed out, in each of the above cases, the Court found the Defendant had failed to comply with its independent obligation to put its own mind to the question of whether the assessment completed by the local authority was compliant with the *Merton* guidelines.

77. As to *Merton*-compliance and the so-called '*Merton* guidelines', Sir Anthony May P in ***R(FZ) v Croydon LBC*** [2011] EWCA Civ 59 helpfully described the ***Merton*** decision in the following terms, at [2] and [3]:

"2. ... Some young people may be obviously and uncontroversially children. Others may accept that they are adult. It is for those whose age may objectively be borderline, between perhaps 16 and 20, that an appropriate and fair process of age determination may be necessary. A process has developed whereby an assessment is undertaken by two or more social workers, trained for that purpose, who conduct a formal interview with the young person at which he is asked questions whose answers may help them make the assessment. It is often necessary for there to be an interpreter. The young person may or may not be able to establish or indicate his age by producing documents, which themselves may require translation.

3. In ***R (B) v Merton London Borough Council*** *[2003] EWHC 1689 (Admin), [2003] 4 All ER 280 Stanley Burnton J gave guidance in judicial review proceedings on appropriate processes to be adopted when a local authority is assessing a young person's age in borderline cases. The assessment does not require anything approaching a trial and judicialisation of the process is to be avoided. The matter can be determined informally provided that there are minimum standards of inquiry and fairness. Except in clear cases, age cannot be determined solely from appearance. The decision-maker should explain to the young person the purpose of the interview. Questions should elicit background, family and educational circumstances and history, and ethnic and cultural matters may be relevant. The decision-maker may have to assess the applicant's credibility. Questions of the burden of proof do not apply. The local authority should make its own decision and not simply adopt a decision made, for instance, by the Home Office, if there has been a referral. It is not necessary to obtain a medical report, although paediatric expert evidence is sometimes provided in these cases, and there is some difference of view as to its persuasiveness in borderline cases. If the decision-maker forms a view that the young person may be lying, he should be given the opportunity to address the matters that may lead to that view. Adverse provisional conclusions should be put to him, so that he may have the opportunity to deal with them and rectify misunderstandings. The local authority is obliged to give reasons for its decision, although these need not be long or elaborate. This decision and its guidance have led to the development of what is sometimes referred to as a 'Merton compliant' interview or process."*

78. Drawing on Miss Luh's helpful summary of the *Merton* guidelines in her skeleton argument (a summary with which Mr Hansen did not take issue), albeit with some modifications in relation to the authorities which were cited, the relevant guidelines can be summarised as follows:

(1) The purpose of an age assessment is to establish the chronological age of a young person.

(2) The decision makers cannot determine age solely on the basis of the appearance of the applicant, except in clear cases: ***Merton*** per Stanley Burnton at [37].

(3) Physical appearance is a notoriously unreliable basis for assessment of chronological age: ***NA v LB of Croydon*** [2009] EWHC 2357 (Admin) per Blake J at [27].

(4) Demeanour can also be notoriously unreliable and by itself constitutes only *"somewhat fragile material"*: ***NA*** per Blake J at [28]. Demeanour will generally need to be viewed together with other things. As Collins J stated in ***A and WK v London Borough of Croydon & Others*** [2009] EWHC 939 (Admin) at [56]:

> "*… What is meant by the observation that he appeared to be comfortable in his body? It is difficult to follow what this does mean and how a discomfort with a changing body can manifest itself. Nonetheless, the assessment of his physical appearance and demeanour coupled with the discrepancies and inconsistencies in his account of how he knew his age could justify the conclusion reached."*

(5) There should be *"no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child"*: see ***Merton*** per Stanley Burnton at [37-38]. The decision, therefore, needs to be based on particular facts concerning the particular person.

(6) There is no burden of proof imposed on the applicant to have to prove his or her age in the course of the assessment: see ***Merton*** per Stanley Burnton at [38]. This is confirmed also by ***R(CJ) v Cardiff CC*** [2011] EWCA Civ 1590, in which, at [21], Pitchford LJ said this:

> *"It seems to me that once the court is invited to make a decision upon jurisdictional fact it can do no more than apply the balance of probability to the issue without resorting to the concept of discharge of a burden of proof. In my view, a distinction needs to be made between a legal burden of proof, on the one hand, and the sympathetic assessment of evidence on the other. I accept that in evaluating the evidence it may well be inappropriate to expect from the claimant conclusive evidence of age in circumstances in which he has arrived unattended and without original identity documents. The nature of the evaluation of evidence will depend upon the particular facts of the case."*

(7) In similar vein, benefit of any doubt is always given to the unaccompanied asylum-seeking child since it is recognised that age assessment is not a scientific process: see ***A and WK*** per Collins J at [40].

(8) The two social workers who carry out the age assessment should be properly trained and experienced: ***A and WK*** per Collins J at [38].

(9) The applicant should have an appropriate adult, and should be informed of the right to have one with the purpose of having an appropriate adult also being explained to the applicant: see ***FZ*** per Sir Anthony May P at [23-25]; ***J*** per Coulson J at [14]; and ***AAM*** per Lang J at [94(a)].

(10) The child should be told the purpose of the assessment see ***FZ*** per Sir Anthony May P at [3] (summarising ***Merton***).

(11) The decision *"must be based on firm grounds and reasons"* for it *"must be fully set out and explained to the applicant"*: ***A and WK*** per Collins J at [12].

(12) The approach of the assessors must involve trying *"to establish a rapport with the applicant and any questioning, while recognising the possibility of coaching, should be by means of open-ended and not leading questions"*. It is *"equally important for the assessors to be aware of the customs and practices and any particular difficulties faced by the applicant in his home society"*: ***A and WK*** per Collins J at [13].

(13) It is *"axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him"*: ***FZ*** per Sir Anthony May P at [21]. It is not sufficient that the interviewing social workers withdraw to consider their decision, and then return to present the applicant *"with their conclusions without first giving him the opportunity to deal with the adverse points"*: [22]. See also ***J*** per Coulson J at [15]; ***AAM*** per Lang J at [94(c)]; and ***Durani*** per Coulson at [84-87] (in particular, at [84]: *"Elementary fairness requires that the crucial points which are thought to be decisive against an applicant should be identified, in case the applicant has an explanation for them"*).

(14) Assessments devoid of details and/or reasons for the conclusion are not compliant with the *Merton* guidelines; and the conclusions must be *"expressed with sufficient detail to explain all the main adverse points which the fuller document showed had influenced the decision"* (***FZ*** per Sir Anthony May at [22]).

The Issues

79. The parties are agreed that there are three issues which I must determine in the present case (the question of damages having been deferred), namely:

(1) whether the Claimant's detention on 2 July 2012 was lawful and, if so, the extent to which it was lawful;

(2) whether the assurance given to the Defendant by Kent CS that the age assessment carried out by Kent CS was *Merton*-compliant (an assurance given without the full written age assessment being available) was in and of itself sufficient to enable the Defendant to treat the applicant as an adult in accordance with the Defendant's *'Assessing Age'* guidance, making the Claimant's detention from 17 July 2012 lawful; and

(3) if the answer to (2) is 'yes', whether the later information made available to the Defendant on 26 and 31 July 2012 amounted to fresh evidence of

the Claimant's age which was not properly dealt with, making the Claimant's detention thereafter unlawful.

80. In addressing these issues, I shall endeavour to deal with the vast majority of the points raised by the parties. However, there were very many points indeed, primarily (and I say this without criticism) raised by Miss Luh, and it is probably not feasible that I address every single point. I confirm nevertheless that I have taken into account everything which was submitted to me, by both sides, and all of the evidence before me. If I do not specifically address any particular point, therefore, it should not be assumed that I have failed to take it into account as that is not the case.

The first period of detention: 2 July 2012

81. Miss Luh, on behalf of the Claimant, accepts that the Claimant entered the UK illegally and so that, in principle, as a matter of law, there was a power under paragraph 2 of Schedule 2 to the 1971 Act to *"examine"* him *"for the purpose of determining"* whether he was a British citizen (sub-paragraph 2(1)(a)) or whether he *"may or may not enter the United Kingdom without leave"* (sub-paragraph 2(1)(b)) or whether he had *"been given leave which is still in force"*, and whether he *"should be given leave"* or whether he *"should be refused leave"* (sub-paragraphs 2(1)(c)(i)-(iii)), and that accordingly there was a power to detain in accordance with paragraph 16(1) of Schedule 2.

82. Her submission, however, is that the power to detain under paragraph 16(1) had to be exercised in accordance with Section 55 of the 2009 Act and associated guidance in the form of the *'Every Child Matters'* guidance issued in November 2009 and EIG Chapter 55. She also submits that it is necessary to have in mind that, by virtue of Section 20(1) of the Children Act 1989 (as well as Sections 21, 25 and 46 of the same Act), Kent CS itself had obligations to provide accommodation for the Claimant. On that basis, as I understand Miss Luh's submissions, the Claimant's position is that, in the present case, the power to detain either ought not to have been exercised at all (and instead the Claimant should have been referred to Kent CS directly by Kent Police), alternatively that, the power of detention having been exercised by the Defendant, it ought not to have been exercised for as long a period as it was.

83. Miss Luh places heavy reliance in the latter context on ***R(AN and FA) v Secretary of State for the Home Department*** [2012] EWCA Civ 1636, a case which she suggests is markedly similar to the Claimant's case. In that case, the appellants arrived in Dover in the back of a lorry, both as unaccompanied minors. In the case of AN, his detention in the Enforcement Unit commenced at 16.50 hours (or possibly slightly earlier at 16.40 hours). The booking-in sheet recorded that a telephone interpreter was used to obtain personal details from AN and also recorded that he said he was fit and well, the Initial Identification Sheet recording basic information such as name, date and country of birth, gender and arrival time (17.00 hours). AN was then given time to settle in, before at 20.42 hours what was described as an illegal entry interview began. That interview lasted 18 minutes, with a telephone interpreter but no responsible adult present. He was asked during the interview why he should not be returned to Afghanistan, answering that he had *"problems*

there". He was then asked what those problems were, answering that his father was old, that he had no brothers, and that he had *"nothing to do"*. He was then asked why he had come to the UK, to which he replied: *"I want work and get a passport"*. He then said, in answer to a question whether there were any other reasons for him coming to the UK, that there was *"No other reason"*. He was later asked whether his family was in Afghanistan, to which he said *"No. In Pakistan. My parents and older brother who is disabled"*. He said that they had lived there for 17 or 18 years and that he had travelled to Afghanistan from Pakistan but had not been living in Afghanistan long. He gave an account of a journey through a number of countries before arriving in the UK. AN was then fingerprinted (without a responsible adult present). It was not until 22.00/22.15 hours that a telephone referral was made to Kent CS, and it was only at 23.35 hours that he was collected by Kent CS from the Dover holding room. AN subsequently (not that night) made a claim for asylum and a screening interview took place on 11 March 2009.

84. As for FA, he arrived in the UK on 18 March 2009. He was referred to the Dover Enforcement Unit at 14.30 hours, the form authorising his detention recording that his detention by the Defendant commenced at Ashford Police Station at 14.45 hours. The booking-in sheet recorded his time of arrival at the Dover Enforcement Unit as 16.55 hours, with that process (aided by a telephone interpreter) ending at 17.30 hours. On booking-in, FA was recorded as being a minor and was said to be fit and well. He was then given a period of rest and provided with food and drink, with his illegal entry interview commencing at 19.30 hours and ending at 20.15 hours. In the interview, apparently very soon after it had started, he was asked why he had come to the UK, to which he answered: *"I came to be safe and claim asylum"*. He was then asked *"Why asylum?"*, and he replied: *"Because of my father's enemies"*. He was asked further questions about this and said that his father's enemies were his uncle's cousin and that the enemies had *"killed my brother and attacked our house so my father sent me out of the country"*. He added that his brother had been killed and he had left Afghanistan a year before to come to the UK. He said that he would be killed by enemies if he returned to Afghanistan. FA was then fingerprinted and a reference was made to Kent CS at 20.00 hours, leaving detention at 22.15 hours.

85. As made clear in Black LJ's judgment at [46], the then applicable Code of Practice for Keeping Children Safe from Harm (the guidance which predated the *'Every Child Matters'* guidance issued in November 2009) required, in paragraph 5.3, that referrals to the local authority *"must be made immediately by phone, followed up by fax using an officially agreed form"*. That requirement for immediate referral (albeit in a section of the Code which apparently was concerned with a requirement that the Defendant should *"make timely referrals of children"*) is not, as Mr Hansen points out and as Miss Luh accepts, identically replicated in the *'Every Child Matters'* guidance issued in November 2009, which states, in Section 2.5, merely that the Defendant should make *"timely and appropriate referrals to agencies that provide ongoing care and support to children"*.

86. Further, as explained by Black LJ at [25] to [33], there was a divergence in the evidence given on the Defendant's behalf, on the one hand, and that given by the Head of Asylum Services for Kent County Council, on the other. The Defendant's evidence was that at the relevant time, in March 2009 (three years before the Claimant's detention in the present case), the purpose of the initial interview was *"to establish as soon as possible, the minor's immigration status, the information needed to bring the minor into the care system, to identify if they have been trafficked and to establish if they wish to claim asylum"*. Then *"A welfare interview will … also be conducted to check if the child is fit to be interviewed and to see if they are tired, hungry, ill etc"*. Then where *"a minor wishes to claim asylum, a screening interview will take place (which does not examine the substance of the asylum claim) but seeks to register the asylum claim by gathering basic information about the child's biographical data, travel history, method of entry into the UK and documentation"*. The evidence was that that screening interview was later followed by a substantive asylum interview. However, what matters is that, in March 2009, the so-called initial interview would entail two aspects, the first not confined to obtaining the information needed *"to bring the minor into the care system"* but also the information needed *"to identify if [the minors] have been trafficked and to establish if they wish to claim asylum"*, and the second being a screening interview in the event that asylum was claimed. The Head of Asylum Services for Kent County Council gave evidence, however, that she was under the impression that children were referred to the local authority as soon as they had been identified as unaccompanied and the basic details of their name, age and nationality had been recorded, and that she knew nothing about the initial interviews which were conducted or that children were being detained for any length of time. She went on to say that, other than in cases of urgent medical need, the Defendant *"should immediately refer the child to the appropriate authority"*. There was also evidence from the Defendant, in the form of an email presented to the Court of Appeal during the hearing, that the Defendant referred matters to social services at the earliest opportunity but that social services needed more information than was obtained at the booking-in stage, specifically the reasons for a person's arrival in the UK and this required a private further interview.

87. Against this background, both as to the applicable Code of Practice and as to the evidence set out above, the appellants' case was that it was unlawful (i) for referral to social services not to have taken place as soon as it was established that they were unaccompanied children, (ii) for them to have been interviewed in the absence of a responsible adult with a view to obtaining material that may be relevant to possible asylum claims, (iii) for reliance to be placed on such material in determining their asylum claims, and (v) for them to have been detained once the booking in phase had been completed: see [68]. The Defendant's case was that the initial interviews were needed to gather information and that it added little time to the process to allow a child to make his or her claim for asylum and to indicate his or her route to the UK. It was submitted that this was not obviously a less desirable way to proceed than bringing the child back to make the claim at a later stage and the alternative of dealing with the matter on arrival but only after awaiting the attendance of a responsible adult would be worse as it would string out the process: see [88].

88. Having referred again to the fact that paragraph 5.3 of the then applicable Code of Practice required that the referral to social services *"must be made immediately by phone followed up by fax using an officially agreed form"* (see [94]), Black LJ went on to say this at [95] to [103]:

> *"95 Of course 'immediately' (in paragraph 5.3 of the Code) must be interpreted according to the circumstances of the particular case but the choice of that word and the requirement that the initial contact should be by telephone both convey a sense of urgency about making the referral of a child in need to the local authority, the form being by way of a follow up. I can see no reason why in this case the requirement to make an immediate referral should have been interpreted as meaning that a referral should take place only once the children had undergone an initial interview.*
>
> *96 I am not persuaded that social services required anything more than the basic information about the child and his circumstances that the appellants concede should properly have been sought before their cases were referred and which was obtained in the booking in process. If immigration officials thought that social services did require more, they must have been mistaken. …*
>
> *97 I accept that it is conceivable that acutely urgent issues may sometimes arise that necessarily divert the Border Agency for a time from making a referral to social services but that was clearly not the case here. What followed the booking in process was not urgent attention to an emergency medical problem or questions about trafficking issues that required pursuing immediately, for example, but a period of rest for the child.*
>
> *98 Deferring the referral to social services is not easily reconcilable in this case with making the children's best interests a primary consideration. … To use words from the Code, a timely referral would have enabled immigration officials and social services to work positively together to ensure that the children were kept safe and their best interests made a primary consideration.*
>
> *99 All in all, I am of the view that the Border Agency were required on the facts of this case to make an immediate referral to the local authority following the completion of the booking in process, by which time they knew that these appellants were apparently unaccompanied children arriving in Dover from abroad who would need to be looked after by social services."*

89. Black LJ went on, however, to say this:

> *"100 However, the fact that a referral should have been made at that point does not, of itself, mean that all that followed was unlawful. It would not be in the interests of children, individually or generally, or of immigration control to hold that, as a matter of principle, no further questions can be put to an unaccompanied child after their booking in*

interview or that no further questions can be put in the absence of a responsible adult. This would not cater for issues which may arise in relation to health, trafficking etc. and may necessitate urgent questioning.

101 It is therefore necessary to look more closely at the particular circumstances of this case in order to determine the status of what followed the booking in interviews of the appellants.

102 The appellants' initial interviews did not, in fact, address urgent issues. In so far as they were asked whether they were fit and well, this was clearly for the purposes of ascertaining whether they were fit to be interviewed; questioning with a view to alleviating any pressing health problems they had would have needed to take place much earlier in the process. The interviews were concerned with ascertaining why and how the appellants got here; they were directed towards the issue of asylum. Their content resembles, in some respects, the screening interview described by Ms Pearson.

103 No convincing explanation has been advanced as to why interviews of this type needed to be undertaken that day. This does not appear to have been a case which gave rise to particular suspicions about trafficking. I am not persuaded by the argument that it was in the child's interests to provide an opportunity to claim asylum there and then so as to avoid a separate visit later to the Border Agency for the purposes of intimating such a claim. There is more force, in my view, in the argument that a child's interests are better served by ensuring that he is enabled to explain properly any matters that may be relevant to asylum. The period of rest that was afforded to the appellants is a recognition of the difficulty for them in addressing such issues immediately after the experiences of their journeys and it may be that for some children it is simply not feasible to carry out a constructive interview on the day of arrival at all. Social services, if on hand, would be able to assist in an assessment of this issue."

90. Later on, Black LJ concluded as follows:

"129 As I have said, I proceed upon the basis that it was not unlawful to question the appellants on the day of their arrival and in the absence of a responsible adult. However, it was not necessary to carry out these interviews with these appellants then and I cannot accept that it was in the appellants' best interests for that to happen, particularly without the opportunity for any input from social services in assessing their condition and their fitness to be interviewed and given that it required a stay in the Border Agency's premises to rest and recover in preparation.

130 Mitting J said that had the detention been of any significant length, his reservations might have caused him to find that it may have been unlawful for a short period. He was influenced by his acceptance that the appellants were detained so as to recover before basic information

was obtained about them and that this recovery period was of a reasonable length. He accepted that it was necessary for interviews to be conducted that day and I have differed from him about that. That is important, I think, because if it was not necessary to conduct the interviews that day, then there was no reason why, if social services had been contacted at the outset as they should have been, the appellants should not have left the UKBA's premises as soon as social services were able to make the appropriate arrangements for them. In broad terms, the period of detention between the completion of the booking in process and the end of the initial interview would have been avoided. It was argued that the time between notifying social services and collection would have been shorter if the notification had taken place promptly as the normal team from social services would still have been on duty as opposed to the out of hours team. However I am not convinced that if it had indeed proved possible to contact the normal team (which is possibly doubtful), that would have reduced the period of detention significantly and I do not therefore propose to examine that issue further.

131 *It is to the Code that we must turn in order to determine whether the detention of the boys in these circumstances was consistent with guidance. In my view it was not.*

132 *Unaccompanied children must only ever be detained in 'the most exceptional circumstances', says paragraph 3.24 of the Code. This exceptional measure is said to be intended to deal with unexpected situations where it is necessary to detain unaccompanied children very briefly for their care and safety and for no other reason. Where they have no responsible family and friends, they should be placed in the care of the local authority as soon as practicable. I have no hesitation in viewing the circumstances of these children on arrival as 'the most exceptional circumstances', although I know that they are by no means the only children who have arrived in this way. The material questions are whether that continued to be the case later in the day, whether it was necessary to detain them for their care and safety, whether that was why they were detained, and whether they were placed in the care of the local authority as soon as practicable. I would answer all of these questions in the negative. The appellants were detained so that they could be interviewed and those interviews were not carried out for their 'care and safety'. The rest period prior to the interview was only required because of the interview and cannot properly be described therefore as for their care and safety either. If the local authority had been contacted earlier as they should have been, the appellants would have been collected sooner so they were not placed in the care of the local authority 'as soon as practicable'. It follows that for a short period, between the end of the booking in process and the time of the referral in each case to social services, each appellant was unlawfully detained."*

91. Black LJ, therefore, held that the detention was unlawful in the period between completion of the booking-in process and the end of the initial interview. Maurice Kay LJ agreed with Black LJ, whilst Elias LJ dissented on the basis that, although there had been *"a relatively trivial infringement"*, there was an unlawful detention from the conclusion of the interview until Kent CS arranged for collection: [176]. At [185], Maurice Kay LJ said this:

> *"There is a significant difference between the views of Black and Elias LJ on this issue. Whilst they both conclude that there was unlawful detention in these cases, Black LJ identifies its commencement at an earlier stage, namely the completion of the booking-in process, whereas Elias LJ puts it at the conclusion of the subsequent interviews. I respectfully agree with the analysis of Black LJ. When one combines (1) the provisions of the Code of Practice for Keeping Children Safe from Harm; and (2) the limited permissible scope of an initial interview (as I have held it to be), it is, in my judgment, unlawful to detain a minor for several hours with a view to conducting an initial interview (the permissible parts of which could have eventuated at booking-in) and only embarking upon a referral to social services at or towards the end of the postponed interview. One is bound to ask the question: what would be lost if the referral occurred soon after the completion of booking-in? The answer seems to be: the loss of an unnecessary interview in the course of which the minor may say or omit to say something which might help to undermine the credibility of his asylum claim. Given the forensic shortcomings of such an interview, that seems to me to be a small price to pay in a context where vulnerability and welfare are of specific concern."*

92. Applied to the present claim, Miss Luh submits, in the first place, that since the fact that the Claimant was saying that he was under 18 from the outset and Kent Police having told the Defendant the date of birth which the Claimant was asserting, an immediate referral ought to have been made either by Kent Police (and so there should have been no immigration detention at all) or by the Defendant at 16.00 hours, as soon as the Claimant entered into the Defendant's (immigration) detention even though he was physically at that time in Folkestone Police Station. She points out that no other risk factors were identified on the IS91 form authorising detention, other than the fact that the Claimant was a minor. On that basis, Miss Luh submits that the period of unlawful detention commenced at 16.00 hours.

93. I reject that submission. It seems to me that it is wholly unrealistic to expect that the Defendant was under an obligation to make a referral even before seeing the Claimant, whether having authorised his detention at 16.00 hours (as was the case here) or having decided not to detain the Claimant at all. I do not mean, of course, to suggest that Kent Police were mistaken in what they told the Defendant in advance of preparation of the IS91 form by the Defendant. However, the Defendant must be entitled to ascertain that information directly from somebody in the Claimant's position, and not be expected simply to rely on what Kent Police say. Indeed, Miss Finlayson, a Chief Immigration Officer who was Senior Executive Officer for the Kent Asylum Team between May 2012 and October 2012, when asked about Kent Police's role in taking details and passing them on to the Defendant, made the

point (which I accept) that *"nine out of ten times the details change when they get to us"*. Clearly, in these circumstances, it would not be right for the Defendant to rely completely on details provided by Kent Police.

94. Miss Luh submits, in the alternative, that there should have been an immediate referral after completion of the booking-in process in the Dover Enforcement Unit at or, more likely, very soon after 17.30 hours since 17.30 hours is the time given in the booking-in sheet for the *"Date and time of arrival at KRT"*. Miss Luh submits, relying heavily on ***AN and FA***, that by that point the Claimant's basic details had been taken, including his date of birth (21 September 1995), the box had been ticked saying *"Welfare of child considered"*, and no medical conditions had been recorded. Alternatively, Miss Luh submits, there should have been a referral at some point between the conclusion of the booking-in process and the start of the interview (in this case at 18.35 hours), because Miss Finlayson confirmed that an immigration officer would go into the holding area with the IS91 form and carry out a visual inspection, using the photograph on the IS91 form as a means of identification. This was evidence given by Miss Finlayson when she was taken to a document described as *'Landing in Dover: The immigration process undergone by unaccompanied children arriving in Kent'* (the 'Landing Report'). This is a report which was prepared for the Children's Commissioner and published in January 2012. It describes the immigration process which existed before that date, Miss Finlayson explaining that certain aspects of the process had subsequently changed, in about May 2012, and before the events in question in the present case. She confirmed, however, that the visual inspection which she described was what the following passage at paragraph 4.15 in the Landing Report was referring to (*"Age assessment"*):

"Prior to any interview taking place, a Chief Immigration Officer will conduct an age-assessment in line with the asylum process guidance 'Assessing Age'. The age assessment takes place at this stage to screen out those claiming to be children but whom, in the view of the CIO, are clearly not."

95. Miss Luh submits that, on any view, it was not necessary for the interview known as the *'Children's Current Circumstance'* interview, carried out between 18.35 and 18.55 hours, to have been carried out. The information obtained in that interview in relation to the Claimant's basic details and welfare was all information which, Miss Luh submits, had already been obtained from the Claimant at the booking-in stage. Accordingly, in line with the decision in ***AN and FA***, the detention was unlawful even before the interview took place. There was, in short, no need to ask for *"brief details about why you left your country"*. Indeed, even if an interview was necessary in relation to the Claimant's basic details and welfare, notwithstanding what had already been ascertained on booking-in, Miss Luh submits that at the point, probably pretty soon after the interview's commencement, that the questions went on from basic details and welfare considerations, the detention became unlawful.

96. I am satisfied that Miss Luh is right in her submission that there should have been an immediate referral of the Claimant by the Defendant to Kent CS after completion of the booking-in process very soon after 17.30 hours. It seems to

me that, applying the approach of the majority in ***AN and FA***, this is an inevitable conclusion. By this stage the Claimant's basic details had already been taken by the Defendant (at booking-in), including his date of birth showing that he was, or at least was claiming to be, a minor, and it had also been established that there were no welfare concerns in relation to him which might have justified a delay in referral. In short, the interview carried out between 18.35 and 18.55 hours was simply not necessary, and the period between completion of booking-in and conclusion of the interview could, and should, therefore, have been avoided. Had it been avoided, then, a referral would have been made sooner than it was: in the sort of timescale with which the referral ultimately came to be made, namely within about 10 or 15 minutes (the interview having ended at 18.55 hours, the referral was made either a 19.05 or 19.10 hours). Strictly, therefore, it seems to me that the period of unlawful detention in the present case starts at 17.50 hours, after allowing 5 minutes or so for the questions to be asked on booking-in and another fifteen minutes for the referral to be made (taking the longer of the two possible periods in view of the fact that, as appears below, I go on to find that the referral was not made until 19.10 rather than 19.05 and thereby favour the Claimant in that respect).

97. I reject Mr Hansen's reliance on the fact that, whereas the Code of Practice applicable in ***AN and FA***, required, in paragraph 5.3, that referrals to the local authority *"must be made immediately by phone, followed up by fax using an officially agreed form"*, Section 5 of the *'Every Child Matters'* policy, which is applicable in the present case, merely requires that the Defendant should make *"timely and appropriate referrals to agencies that provide ongoing care and support to children"*. I recognise that Black LJ referred several times to paragraph 5.3 requiring immediate referral (see, for example, [95]), but it nevertheless seems to me that this was not critical to her analysis or that of Maurice Kay LJ. The critical point as far as Black LJ and Maurice Kay LJ were concerned was that it is not in the child's best interests to ask him or her questions directed towards the asylum issue (see [102]), and it is not necessary to carry out the type of interviews which were carried out in that case (see [129]).

98. As Black LJ put it at [132], by reference to paragraph 3.24 of the Code of Practice, which stated that unaccompanied children *"must only ever be detained in the most exceptional circumstances"* (see [45]), *"exceptional circumstances"* include children arriving on the back of a lorry (as in ***AN and FA*** and as in the present case also). This applies, therefore, in the same way to the references to *"exceptional circumstances"* in paragraph 2.19 of the *'Every Child Matters'* policy and paragraph 55.9.3 of EIG Chapter 55. The material questions, then, as Black LJ explained, are *"whether that continued to be the case later in the day, whether it was necessary to detain them for their care and safety, whether that was why they were detained, and whether they were placed in the care of the local authority as soon as practicable"*. Black LJ answered all of those questions in the negative, holding that the appellants in ***AN and FA*** were detained so that they could be interviewed and that those interviews were not carried out for their 'care and safety'. I consider that Black LJ and Maurice Kay LJ would have arrived at the same decision in the

present case, through the same process of reasoning, in the present case with EIG Chapter 55 and paragraphs 2.5 and 2.19 of the *'Every Child Matters'* guidance (and Section 55 of the 2009 Act) under consideration rather than the Code of Practice (issued under Section 55's predecessor, Section 21 of the UK Borders Act 2007) which was applicable in ***AN and FA***. It follows that I should reach that same decision, and that I do.

99. Mr Hansen submits that the present case is, as he puts it, *"very different"* from ***AN and FA*** because in that case both of the appellants were asked rather more questions than the Claimant was in the present case; in essence, the questions went beyond initial assessment and welfare, and into what is known as 'screening', a process whose purpose is to register an application for asylum (see the *'Processing An Asylum Application From A Child'* guidance at paragraph 6). That screening was carried out in ***AN and FA***, Mr Hansen submits, is demonstrated by the types of questions set out in Black LJ's judgment at [10] and [18]. Mr Hansen contrasts those questions with the more limited questions asked in the present case. He submits that the single question in the *'Children's Current Circumstance Pro Forma'* (namely *"I would like to ask you why you left your home country …"*) is not sufficient to mean that the same result should be reached in the present case as in ***AN and FA***. He submits, in addition, that asking that single question did not elongate the period of detention in any significant way. Whilst I probably agree with Mr Hansen about that last point, it nevertheless seems to me that Mr Hansen's submission fails to meet the analysis favoured by Black LJ and Maurice Kay LJ. That analysis has as its focus the question whether, after the booking-in process had been completed, it was necessary for an interview to take place. The conclusion in ***AN and FA*** was that it was not necessary that there be an interview because the Defendant already had the information it required in order to act; the Defendant did not need more information and so did not need to carry out an interview for the child's care and safety. Applying this approach in the present case, I consider that the fact that the scale of the questioning in the Claimant's interview, specifically the single question which Mr Hansen highlights, differed from that in ***AN and FA*** is somewhat beside the point.

100. Nor am I persuaded by Mr Hansen's submission that throughout, starting at 16.00 hours but continuing throughout the period when the referral was made (at 19.10 hours), the Claimant's detention was lawful, in accordance with EIG Chapter 55 (specifically paragraph 55.9.3) because this was a case in which there were *"exceptional circumstances"* in that, in the language of the words in brackets in paragraph 55.9.3, it was *"necessary to establish the identity of an unaccompanied child and pending suitable alternative arrangements being made for their care and safety, such as whilst awaiting collection by family/friends"*. I am clear that this is not a case in which the Defendant was doing the latter, treating the reference to *"family/friends"* as a reference to Kent CS, until after the referral was made. Whilst paragraph 55.9.3, therefore, probably justifies the post-referral period (starting at 19.10 hours and ending at 23.30 hours), it cannot justify the period before referral.

101. I have, therefore, concluded that the period of detention from 17.50 hours onwards was unlawful. As to when that period of unlawful detention ended, applying again the approach adopted by Black LJ in ***AN and FA***, I consider that the relevant time is 19.10 hours (again adopting the more favourable time as far as the Claimant is concerned). Like Black LJ, I am not convinced that it is appropriate to take a later time than this on the basis, a basis not anyway argued before me by Miss Luh, that, had the referral been made earlier than 19.10 hours, then the time between notifying Kent CS and collection would have been shorter as the referral would have been made when Kent CS staff would have been able to attend more speedily than actually proved to be the case. This may strictly be a matter for the assessment of damages stage, and so I say no more about it for present purposes. I do, however, record that I reject the suggestion by Miss Luh that there is no causation requirement and that, therefore, as she submits, the Claimant is entitled to damages reflecting the entire period between 17.50 hours (or, as she submits, 17.30 hours, although that is the time given for the Claimant's time of arrival rather than completion of the booking-in process in the booking-in record) and 23.30 hours when the Claimant eventually left the Defendant's detention. I am quite clear that it is necessary for it to be demonstrated what would have happened had a referral been made at 17.50 hours rather than 19.10 hours (one hour and 20 minutes later). Otherwise, the Claimant would receive an illegitimate windfall, and that cannot be right. I am fortified in this thinking by Black LJ's approach at [132], and also by the following statement of the position by Baroness Hale in ***Kambadzi*** at [74]:

"…False imprisonment is a trespass to the person and therefore actionable per se, without proof of loss or damage. But that does not affect the principle that the defendant is only liable to pay substantial damages for the loss and damage which his wrongful act has caused. The amount of compensation to which a person is entitled must be affected by whether he would have suffered the loss and damage had things been done as they should have been done. …".

102. There is one final matter which I should address before coming on to consider the second period of detention. This arises out of the evidence given, initially, by Amanda Whall, a Chief Immigration Officer, who gave evidence concerning the events of 2 July 2012, and, subsequently, by Miss Finlayson. Miss Whall and Miss Finlayson, I should explain, each gave evidence and were cross-examined, together with Anne Helbling, an Immigration Officer attached to the Defendant's Kent Arrest Team, who gave evidence as to the events of 17 July 2012. I found each of these witnesses to be truthful and to have given their evidence in an open way. I reject any suggestion by Miss Luh that the contrary was the case. Whilst it may be that there were errors in recollection in places, in particular in relation to Miss Whall as regards the matter which I am about to address, I am quite clear that the evidence which each of these witnesses (including Miss Whall) gave was straightforward, and, further, that each of the witnesses was doing her best to assist the Court. I reject the suggestion, in particular, that any of these witnesses adopted a high-handed approach, whether in giving evidence or in their handling of the Claimant's case. In addition to these witnesses, I ought to mention that there were also witness statements from the Claimant and from Sebastian Baker, a

senior caseworker within the Defendant's Third Country Cases Litigation Operations (Enforcement Unit), who gave evidence as to the detention reviews which were carried out during the period between 17 July and 10 August 2012. Neither the Claimant nor Mr Baker was required to be cross-examined.

103. During cross-examination, Miss Whall was asked about the *'Children's Current Circumstance Pro Forma'*, and specifically the question asking *"why you left your home country"*. She explained that Kent CS liked, as she put it, to know whether asylum is being claimed because *"they need to know that in order to receive funding"*, clarifying that *"they can apply earlier if there is an asylum application"*. She explained also that it is *"useful to us"* also (by which, she meant the Defendant) since, if asylum is not claimed at port at the outset, then, it cannot be claimed at port later and must be claimed in the Defendant's Croydon office. She agreed, however, that it was *"not absolutely necessary"* to know whether asylum was being claimed. She was also asked about her reference in her witness statement to a *"Children's Care Plan"* which the Defendant followed at the port. She insisted that there was such a plan but that she thought it would have been made up of *"verbal agreements"* between Kent CS and the Defendant. She was then taken to ***AN and FA*** and asked about the Defendant's evidence in that case to the effect that Kent CS needed more information than that obtained at the booking-in stage and that is why an interview took place (see [33]), evidence which was contradicted by the evidence given by the Head of Asylum Services for Kent CS (see [29]) and evidence which was not accepted by Black LJ (see [96]). She explained that the position had changed after publication of the Landing Report in January 2012.

104. Afterwards, no agreement matching the description given by Miss Whall having been produced (although a heavily redacted and somewhat unilluminating Grant Agreement covering the period from 1 October 2010 to 31 March 2012 was produced during the course of the trial), Miss Finlayson was cross-examined at some length on the same topic. She explained that at some point things had changed and that, whereas now there is no differentiation between asylum seekers and non-asylum entrants at Kent CS and that that had been the position, she thought, since, about May 2012, there had previously been a differentiation in treatment in that asylum seekers went to a special unit at Kent CS. She nevertheless agreed that, as far as she knew, Kent CS did not *"have to know"* whether an asylum claim was being made before a referral was made, although it *"probably makes life easier"*; she could not say whether *"it is a need or a must"*, but she explained that *"we are always asked whether they have claimed asylum"*. She did not know whether, as Miss Whall had stated, there was an agreement between Kent CS and the Defendant concerning the need to find out whether asylum was being claimed, but she said that Kent CS have *"always"* asked. She was then asked about the *'Children's Current Circumstance Pro Forma'*. She stated that, as far as she was concerned, this comprised questions about basic details and welfare but that it did not involve 'screening', explaining that 'screening' came later. She was shown the Landing Report, in particular paragraph 8.6, which referred to the fact that grant arrangements had changed and Kent CS now had 6 weeks in which to make a grant reclaim. There was, therefore, no longer any need for

Kent CS to know whether asylum was being claimed straightaway. Kent CS's stance changed, accordingly, Miss Finlayson said, and the recommendation in the Landing Report that *"Interviewing, beyond the gathering of basic identity data, should be postponed until after a child has had a period of some days … to recover from their journey and the opportunity to instruct a legal representative"* was adopted.

105. My view in relation to this is that Miss Whall was probably mistaken about there being a formal policy, in the sense that there is a document setting out the policy or in the sense that there was anything in writing which approximates to a policy document or, indeed, in the sense that there was any real policy at all (as opposed to a practice), but that this was an innocent mistake on Miss Whall's part. I say this notwithstanding that, as pointed out to me by Miss Luh when giving me her list of typing corrections and *"other obvious errors"* in response to my sending out of this judgment in draft, Miss Whall's reference to there being such a policy in paragraph 22 of her witness statement was made in a witness statement accompanied by a statement of truth and prepared, no doubt, in conjunction with the Defendant's solicitors. Mistakes can, and frequently do, happen. That is what, in my judgment, has happened in the present case. As to whether there was nevertheless an expectation on the part of Kent CS that the Defendant would ascertain whether asylum was being claimed, based on the evidence before me, in the form of the live evidence given by Miss Whall and Miss Finlayson, I conclude that there was, indeed, such an expectation as a matter of practice but not in the form of a policy. I am, of course, aware of the evidence given by the Head of Asylum Services for Kent CS in ***AN and FA***, and that Black LJ held in that case that the Defendant was mistaken to think that Kent CS required more than the information which is obtained at the booking-in stage. That is not evidence which has been tested in the trial which has taken place before me. Nor is it evidence which relates directly to the period with which I am concerned, namely July 2012, because ***AN and FA*** was concerned with March 2009. Nevertheless, as I understood both Miss Whall's evidence and that of Miss Finlayson, it was that the change which came about in terms of Kent CS needing to know whether asylum was being claimed occurred after the Landing Report, shortly before July 2012. If that is right, then, even if the position before that change was that Kent CS wanted to know whether asylum was being claimed (contrary to the conclusion reached by Black LJ), it would explain why the 'screening' interview no longer took place until later on, but does not, as I see it, explain why the *'Children's Current Circumstances Pro Forma'* included the question asking *"why you left your home country"*. In short, whilst the Landing Report seems to me to provide some support for what Miss Whall and Miss Finlayson told me was the position prior to about May 2012, and so points away from what the Head of Asylum Services for Kent CS had to say in ***AN and FA*** (evidence rejected by Black LJ) it does not explain why that question was asked in July 2012 (after publication of the Landing Report) and why the interview had to take place at all, information having already been obtained at the booking-in stage which enabled a referral to be made if the approach adopted by Black LJ and Maurice Kay LJ is followed (as I have held it should be). Put another way, even if Kent CS had required more information, still the interview would have been unwarranted,

and the detention necessitated by its taking place would have been unlawful, in any event.

106. In conclusion, therefore, in relation to the first period of detention, I am satisfied that the Claimant was unlawfully detained after completion of the booking-in process, starting at 17.50 hours and ending at 19.10 hours. In these circumstances, I need not consider in any detail Miss Luh's alternative submissions that there should have been a referral at some point between the conclusion of the booking-in process and the start of the interview because an immigration officer went into the holding area and carried out a visual inspection, and that, if an interview was necessary, then, in any event, not all the questions asked in that interview were necessary, and so the detention became unlawful at some point during the interview. I should say, however, in relation to the first of these alternatives that I would have been reluctant to have found in the Claimant's favour on the basis suggested, since it is difficult to see how it can be said that, if more information was required after the booking-in stage which was relevant to the decision to make a referral, that is information which would have been obtainable from an immigration officer merely looking at the Claimant in the holding area.

The second period of detention: 17 July to 10 August 2012

107. I turn now to the second period of detention, starting on 17 July 2012 when the Claimant was re-detained in circumstances where Kent CS had informed the Defendant that he had been age-assessed as an 18 year old (and sent the Defendant the *'Age Assessment Results'* document), and ending on 10 August 2012, when the Claimant was released from the Defendant's detention. As previously stated, the Claimant's case is that he was unlawfully detained for the entirety of that period, alternatively that there was unlawful detention from 26 July 2012 or 31 July 2012 onwards given that the Defendant had, so it is alleged, on 26 July 2012 been provided with documentation which showed that he was not 18 but 16, as he had claimed all along.

The Claimant's primary case: the entirety of the period

108. Miss Luh submits that this is a case in which the Defendant failed to follow EIG Chapter 55 and its *'Assessing Age'* guidance, in deciding to detain the Claimant on 17 July 2012 in reliance on an assurance that the Claimant had been age-assessed by Kent CS as being over 18. As a result, she submits, the Claimant's detention thereafter was unlawful since, in the circumstances, there was no lawful basis on which the Defendant could treat the Claimant as an adult as at 17 July 2012. The Claimant should, she submits, have been regarded as an *"unaccompanied minor"* within the meaning of Article 2(h) of the Dublin II Regulations, and so as somebody whose application for asylum it was, under Article 6, the responsibility of the UK to examine. There were, therefore, Miss Luh submits, no grounds at all (let alone grounds which were reasonable) on which the Defendant could give removal directions in respect of the Claimant under paragraph 16(2) of Schedule 2 to the 1971 Act. There was, accordingly, no power to detain, with the effect that the detention was unlawful (and in breach of Article 5(1) of the ECHR).

109. In support of the Claimant's case, Miss Luh makes detailed submissions directed to the question of whether the *'Age Assessment Results'* document sent to the Defendant by Kent CS on 17 July 2012 was or was not *Merton*-compliant. Her submission is that it was not *Merton*-compliant for the following reasons (doing my best to summarise the points rather than repeat everything which Miss Luh submits, and not repeating the various authorities to which I have previously referred):

(1) First, the *'Age Assessment Results'* document was only signed by one person, alongside the printed words, *"Name of Social Worker/Assessor"*, and that an age assessment needs to be conducted by two professionals.

(2) Secondly, the Claimant was not offered the opportunity to have an independent appropriate adult. He was not even made aware of the right to have one. He did not have one.

(3) Thirdly, there is no evidence on the face of either the *'Age Assessment Results'* document or the covering letter from Kent CS to the Defendant that the Claimant was told anything about the purpose of the interview with the assessing social worker.

(4) Fourthly, the Claimant was not provided with the reasons for the assessment decision nor given an opportunity to comment on the adverse findings before a final decision on age was made.

(5) Fifthly, reliance was placed on the Claimant's physical appearance and demeanour as a determinative factor where these factors alone have been held to be notoriously unreliable. It is plain, Miss Luh submits, from the *'Age Assessment Results'* document that the Claimant's physical appearance and demeanour featured heavily in founding the basis for the age dispute, yet no details were contained in the 1-page summary sheet to provide any indication that would obviously show that the Claimant's physical appearance and demeanour would render him 2 years older than stated.

For these reasons, and bearing in mind also that the Claimant bore no burden of proof himself, Miss Luh submits that the Kent age assessment conclusion was obviously flawed and not *Merton*-compliant document.

110. Miss Luh accompanies these submissions with the submission that the Defendant failed to discharge its own, independent, obligation to satisfy itself that the age-assessment carried out by Kent CS was *Merton*-compliant. Miss Luh highlights in this context, that, in contrast to authorities such as ***J***, ***AAM***, ***Durani*** and ***HXT***, this is not a case in which the Defendant had a document which even purported to be a fully formulated written age assessment. In these circumstances, she submits, the Defendant cannot argue that it gave its own independent thought to the analysis carried out by Kent CS and considered whether the assessment process was *Merton*-compliant. Miss Luh acknowledges, at least as I understand it, that not all of the deficiencies identified by her (and listed above) were deficiencies which would have been apparent to the Defendant from looking at the *'Age Assessment Results'*

document: her position is that (1) and (5) were apparent from the face of the document, and that (2), (3) and (4) should have been matters which, not being apparent from the face of the documents, the Defendant should have asked Kent CS about but about which the Defendant did not inquire (as confirmed by Miss Helbling in her oral evidence).

111. Miss Luh submits that, in these circumstances, at the time that the Defendant made the decision to detain the Claimant on 17 July 2012, the Defendant failed to follow its own EIG Chapter 55 and *'Assessing Age'* guidance by detaining the Claimant notwithstanding that (i) there was no credible and clear documentary evidence that the Claimant was 18 years of age or over, (ii) there was no full *Merton*-compliant age assessment from Kent CS available stating that the Claimant was 18 years of age or over, and (iii) there was nothing in the Claimant's physical appearance or demeanour which very strongly indicated that he was significantly over 18 years of age and no other credible evidence existing to the contrary. Indeed, Miss Luh points out, until 17 July 2012, when Kent CS informed the Defendant of the age assessment which it had carried out, the Defendant had at all material times treated the Claimant as a child born on 21 September 1995. It is clear, she also highlights, from the IS91 and BP7 forms concerning the detention on 17 July 2012 that the only basis upon which the Defendant decided to treat the Claimant as an adult for the purposes of detention was in reliance on Kent CS's age assessment conclusion.

112. As Mr Hansen points out, the present case differs from previous authorities, in that this case is concerned with the position where there is not a full age-assessment available and that is known to be the case. As the Note at the foot of the *'Age Assessment Results'* document expressly states *"this pro-forma represents a summary of a more in-depth assessment conducted with the intent to comply with both 'Merton Judgements'".* Further, Miss Helbling confirmed during cross-examination that she knew at the time that she was looking at the *'Age Assessment Results'* document that *"it takes"* Kent CS *"time to write everything up"*, and she was *"satisfied that there was a full Merton assessment because they told me so"*, and so this is not a case in which the Defendant was under the impression that there was never going to be a fuller document prepared and that the *'Age Assessment Results'* document was all there was ever going to be. In these circumstances, I agree with Mr Hansen that it is open to doubt whether really any of the previous authorities (cases such as ***J***, ***AAM***, ***Durani*** and ***HXT***) assists, at least directly so. Indeed, it is worth noting that issue (ii) identified in paragraph 79 above was originally framed differently, in terms which asked whether the *'Age Assessment Results'* document was itself Merton-compliant. It was not, but the real question is not that but (as reflected in the reformulated issue (ii)) whether the assurance given to the Defendant by Kent CS that the age assessment carried out by Kent CS was *Merton*-compliant, an assurance given without the full written age assessment being available but in conjunction with the *'Age Assessment Results'* document, in and of itself was sufficient to enable the Defendant to treat the applicant as an adult in accordance with the Defendant's *'Assessing Age'* guidance.

113. The reason why there is a reference in the reformulated issue (ii) to the Defendant's *'Assessing Age'* guidance is that EIG Chapter 55 refers in paragraph 55.9.3.1 to a website link to that guidance. What I have to determine in the present case is how that guidance is to be construed, approaching the matter on an objective basis and applying its natural and ordinary meaning (as Lord Toulson in ***AA v Secretary of State for the Home Department*** [2013] UKSC 49, [2013] 1 WLR 2224 at [48] makes clear is the right approach). Miss Luh submits that nothing less than the full *Merton*-compliant age assessment will suffice and that, therefore, the *'Age Assessment Results'* document is not good enough, with the result that the correct answer to the reformulated issue (ii) is in the negative; Mr Hansen, on the other hand, submits that the *'Age Assessment Results'* document is sufficient, and so the answer is in the affirmative.

114. For reasons which I shall come on to explain, I have reached the clear conclusion that neither Miss Luh nor Mr Hansen is right, and that what is required by the *'Assessing Age'* guidance is neither a full *Merton*-compliant age assessment nor a document such as the *'Age Assessment Results'* document. This means that, even though I have rejected Miss Luh's submission, nevertheless the Claimant's claim succeeds since, unless I am in agreement with Mr Hansen on his submission that the *'Age Assessment Results'* document is all that is required by the *'Assessing Age'* guidance, it must follow that the Defendant's reliance on the *'Age Assessment Results'* document when deciding to detain the Claimant has the consequence that, as Miss Luh submits, there was no lawful basis on which the Claimant could be detained by the Defendant. When I put this to Miss Luh during the course of her reply submissions, she suggested that it would be sufficient if I were simply to say in my judgment that, in the circumstances, the Claimant's case succeeds, and that I should not indicate what, in my judgment, is actually required by the *''Assessing Age'* guidance. That seems to me to be a curious invitation, and it is not one which I am inclined to accept. I must inevitably explain, as part of my reasons for rejecting both sides' submissions as to what the *'Assessing Age'* guidance does or does not cover, what that guidance means and what it requires. That is what I shall do in a moment.

115. First, however, I need to deal with a point which was heavily relied on by Mr Hansen in his skeleton argument. This is Mr Hansen's submission that, notwithstanding that the Claimant was subsequently age-assessed as having been a minor in July 2012, nevertheless as at 17 July 2012, and in fact throughout the period when his detention ended on 10 August 2012, he was subject to an age assessment which stated that he was not a minor but was an adult. Mr Hansen submits that, in such circumstances, the Defendant decision to detain was lawfully made under paragraph 16 of Schedule 2 to the 1971 Act, and that that lawful detention cannot be rendered retrospectively unlawful by the later evidence, in the form of Kent CS's re-assessment produced in April the following year, that the Claimant was actually under 18. Mr Hansen bases this submission on the Court of Appeal decision in ***AA*** [2012] EWCA Civ 1383, which he says is authority for the proposition that there is no need under the statutory detention power (under Section 55 of the 2009 Act) for it to be established that at the time of its exercise the individual was not a child,

since the application of Section 55 does not depend on whether the individual is *subsequently* found to be a child but on whether the statutory detention power, circumscribed by EIG Chapter 55, permitted his or her detention *at the time that his or her detention took place*.

116. ***AA*** concerned an age-disputed Afghani asylum seeker who claimed to be a minor but who had been initially age-assessed by the local authority as an adult. He was subsequently age-assessed as a child but the Court of Appeal held that the Secretary of State was entitled to rely on the local authority's original assessment of his age for the purpose of exercising her powers of detention. Arden LJ upheld Blake J's rejection of AA's challenge to the decision to detain, explaining in summary her reasoning in these terms at [3]:

> *"(1) At the date of his detention it had not been established that AA was a child as his age had been assessed as that of an adult.*
>
> *(2) The Secretary of State's statutory power of detention was wide enough to permit the detention of a person not established to be a child, and her duty to treat the best interests of a child as a primary consideration did not apply.*
>
> *(3) The policy of the Secretary of State permitted the detention of a person not established to be a child, and the principle giving an individual the benefit of the doubt did not apply in the circumstances of this case."*

117. Having set out the background to AA's case in some detail, Arden LJ said this at [17] and [18]:

> *"17. The only point that I need to make at this stage is that, at the date of his detention, it had not been established that Mr AA was a child. There was (i) an age assessment by Hampshire and (ii) an incidental finding by the First-tier tribunal, in each case that he was not a child.*
>
> *18. As I shall explain below, the lawfulness of Mr AA's detention has to be assessed against that crucial fact."*

118. Arden LJ then went on at [34] and [35] to record the submission which was being made by AA's counsel as requiring additional words to be read into paragraph 16(2) of Schedule 2 to the 1971 Act which would mean that, were the individual actually a child even though he or she had been assessed as an adult at the time that the decision to detain was being made, the Secretary of State would have to show that she had treated the individual as a child or had taken into account the interests of the individual (a child) as a primary consideration in accordance with her Section 55 duty. Arden LJ rejected this submission, saying this at [38]:

> *"I would reject Mr Knafler's submission as to the effect of section 55 of the 2009 Act. If, when enacting section 55 of the 2009 Act, Parliament intended to amend the statutory detention power, it would have done so. The statutory detention power works perfectly well without the suggested amendment. The law requires the Secretary of State to perform her section 55 duty if she*

exercises her statutory detention power. What matters is the ambit of that duty and power. The power can only lawfully be exercised if the section 55 duty is performed."

119. Arden LJ went on as follows:

> *"40. However, as Ms Chan further submits, the crucial words in the statutory detention power are the opening words, namely "If there are reasonable grounds for suspecting". In my judgment, this is correct and these words are unequivocal. They mean that the statutory detention power is exercisable when the Secretary of State forms the view that there are reasonable grounds for suspicion. It is not necessary for her also to show that the matters which she suspects are in fact as she reasonably suspects them to be.*
>
> *...*
>
> *42 By including the opening words of the statutory detention power in issue in this case, Parliament has clearly displaced the need for precedent facts to be established objectively. It follows that there was no need under the statutory detention power for it to be established that at the time of its exercise Mr AA was not a child.*
>
> *43 As regards the Convention, I do not consider that the detention of a person, wrongly thought to be a adult, as if they were an adult would for that reason violate article 5(1)(f) of the Convention. We have not been shown any decision of the Strasbourg court that deals with this issue. Some support for my conclusion can be obtained from a case not cited to us, in which there was a dispute as to the age of a child, but the Strasbourg court did not suggest that the executive in that case could not rely on an age assessment, even though it was disputed by the applicant:* ***Salah Sheekh v Netherlands*** *(Application no 1948/04, 11 January 2007).*
>
> *44 The detention of Mr AA would, however, be unlawful if, as Mr Knafler submits, the section 55 duty applies to a person, who is subsequently determined to be a child, in the period prior to that determination. Mr Knafler submits that a person's age and the lawfulness of his detention are 'hard-edged' questions of law, that is, questions of law for the court to decide: see* ***Croydon*** *and* ***Al-Khawaja****. Thus, whatever the policy of the Secretary of State says, the age of Mr AA would have to be determined by a court. In the circumstances, this court would have to make that determination since the finding of the First-tier tribunal cannot stand in the light of the Cardiff assessment, which both parties accept. Furthermore, on Mr Knafler's submission, this court would be bound to conclude that in law Mr AA was a child when he sought asylum.*
>
> *45 As an auxiliary argument, Mr Knafler contends that the question whether a person is a child is also a hard-edged question of law for the purposes of determining whether the Hardial Singh principles are*

satisfied. This submission, however, adds nothing to the submission already summarised. Accordingly I need not mention it further.

46 In my judgment, the application of section 55 does not depend on whether Mr AA is subsequently found to be a child but on whether the statutory detention power, circumscribed by the EIG, permitted his detention at the time his detention took place. Mr AA's detention was in accordance with those provisions: for the reasons given above, ***Al-Khawaja*** *is distinguishable. The effect of* ***Croydon*** *is that age assessment of an age-dispute individual is ultimately a matter for the court if there is a dispute. In this case, however, at the date of his detention, Mr AA's age had in fact been assessed as above that of a child, and any dispute was then at an end. That therefore was then his age in law. He was detained while this state of fact persisted. He was in law an adult and outside the reach of section 55 at that time.*

47 Since the hearing, Lang J has held that the detention of a person mistakenly thought to be an adult would violate the section 55 duty: see ***Re AAM (acting by F) v SSHD*** *[2012] EWHC 2567 (QB) at [120]. We have had detailed written submissions on this decision. It turned on materially different facts and the point just mentioned did not directly arise for decision. In my judgment, section 55 cannot be read as rendering an act a breach of that section with the wisdom of hindsight. That is what would be necessary to render detention in a case such as this a breach of section 55."*

120. Arden LJ then went on to consider what she described at [48] as being *"the question whether the detention of Mr AA was within the terms of the policy issued by the Secretary of State"*, a reference to EIG Chapter 55. As explained at [52] and [53], AA's argument was that this policy was not in accordance with Section 55 and Convention jurisprudence, and as such either the Secretary of State had *"no power under the EIG to detain an adult if that adult subsequently turns out to be a child"* ([52]) or *"if the EIG allowed the Secretary of State to detain an age-dispute individual because he or she was thought to be an adult, then under Convention jurisprudence it failed to attain the degree of certainty required in law to authorise a derogation from the right to liberty"* ([53]).

121. Arden LJ rejected both of these contentions in the following terms:

"54 I do not accept these arguments. The EIG clearly contemplates the detention of persons believed to be adults even though they are subsequently accepted to be children. This can be seen most clearly from the paragraph that immediately precedes 55.9.3.1 Persons claiming to be under 18, which reads: 'Where an individual detained as an adult is subsequently accepted as being aged under 18, they should be released from detention as soon as appropriate arrangements can be made for their transfer into local authority care'.

55 If Mr Knafler's interpretation were correct, the EIG would be unworkable. It would render automatically unlawful detention in

circumstances where it was necessary for the performance by the Border Agency of its functions. The Secretary of State would have to go to the court to obtain a determination of the age of every age-dispute individual before they could be detained. Even then, the Secretary of State would not be saved from a breach of the EIG if further evidence came to light which led to a revision of the court's assessment.

56 Accordingly, in my judgment, the judge's construction of the policy was correct.

...

58 As to legal certainty, the EIG clearly anticipates that a child may be mistakenly detained as an adult ... . That paragraph applies to a child who may not be an age-dispute individual. The EIG also plainly contemplates that an age-dispute individual can be detained if he or she falls within one of the three specified criteria for detention mentioned in the last paragraph. The Secretary of State may subsequently accept that an age-dispute individual who has been detained should be treated as a child, as she did in the case of Mr AA, but until that happens the individual may under the EIG be detained."

122. I am not persuaded that Mr Hansen's reliance on these passages from Arden LJ's judgment in ***AA*** is sound. The Claimant's case in respect of the second period of detention is a claim which entails an allegation that the Defendant acted in breach of policy in detaining the Claimant on 17 July 2012. The breach of policy claim focuses on the Defendant's alleged failure to follow its *'Assessing Age'* guidance, namely guidance as to how to deal with a case where an individual's age is disputed. In such circumstances, it makes no sense for the Defendant simply to be able to say that, at the time that the '*Assessing Age'* guidance was needing to be complied with, the Claimant had been age-assessed as an adult and so that is an end of the matter. It is precisely because the Claimant was age-assessed as an adult, yet the Claimant was insisting that he was not actually a child, that the *'Assessing Age'* guidance came into play at all. In contrast, in ***AA***, at least by the time that the matter had come before the Court of Appeal, AA's case was that the Secretary of State had acted in breach of Section 55, and not that there was any breach of policy on her part. The challenge to EIG Chapter 55 was as to whether this is a policy which is compatible with Section 55 and Convention jurisprudence; the case was not that the Secretary of State had acted in breach of EIG Chapter 55 as is the allegation by the Claimant in the present case. As acknowledged by Miss Luh, in the light of the Supreme Court decision in ***AA***, it is not open to the Claimant to argue that there was a breach of Section 55 in circumstances where at that time (17 July 2012) the Defendant (mistakenly, as it turned out) believed that the Claimant was not a child, the Supreme Court having decided that it is not open to an individual to advance a case of breach of Section 55 in that situation.

123. This may not be immediately clear from the Court of Appeal judgment in ***AA***, but, as Miss Luh (who appeared for the claimant in ***AA*** with Mr Knafler QC) points out, it is clear from looking at the judgment of Lord Toulson in the

Supreme Court that this is the position. I refer in this regard to [12] to [15], where Lord Toulson set out the history of the proceedings in the following terms:

"12 The appellant continued with his application for permission to apply for judicial review against the Secretary of State. On 7 March 2011 Blake J dismissed the application after an oral hearing: [2011] EWHC 1216 (Admin). He described the appellant's argument as intermingling matters of policy with the requirements of the statutory regime for detention. Paragraph 16 permitted the detention of children if the statutory conditions were met, but there were strong policy reasons against such detention unless it was necessary in all the circumstances. He continued at para 13:

'Insofar as the applicant relies upon policy, then in my judgment the application of policy depends upon the assessment of facts made by the decision maker at the material time. At the time this applicant was detained the Secretary of State knew that Hampshire had assessed him to be over 18 in an assessment which they claimed was Merton - compliant. Secondly he knew that the immigration judge, acting on all material available to him in February 2010, had reached a similar conclusion not entirely dependant upon the approach of Hampshire. Thirdly, no discrete submissions had been made to the Secretary of State as to why the immigration judge and/or Hampshire assessment was wrong in fact.'

13 He held that in the circumstances the Secretary of State had no reason to have reached a conclusion contrary to that of the other authorities.

14 The appellant applied for permission to appeal to the Court of Appeal. After considering the application on paper, on 14 June 2011 Sir Richard Buxton granted the appellant limited permission to apply for judicial review, and directed that the case should be retained in the Court of Appeal, on the following ground:

'It is ... arguable that, on the basis of the approach of the Supreme Court in ***Croydon****, the lawfulness of the Secretary of State's decision should be assessed on the basis that, whatever the understanding at the time, the applicant was a child and should have been treated as such, including not being removed from the United Kingdom and therefore not being detained pending removal.'*

15 The reference to ***Croydon*** *was to* ***R(A) v Croydon London Borough Council*** *[2009] UKSC 8, [2009] 1 WLR 2557. Sir Richard Buxton agreed with Blake J that it was not arguable that the Secretary of State had acted unreasonably in proceeding on the basis that the appellant was over 18, and he refused permission to apply for judicial review on that wider ground. A subsequent oral application by the appellant to widen the grounds of challenge was refused by Arden LJ. His substantive claim was dismissed by the full court for reasons given in a*

judgment by Arden LJ, with which Davis LJ and Baron J agreed: [2012] EWCA Civ 1383."

124. In summary, therefore, AA was not permitted by Blake J to advance a claim for judicial review based on the Secretary of State having acted in breach of policy (presumably EIG Chapter 55 rather than EIG Chapter 55 and the *'Assessing Age'* guidance, as in the present case), described by Lord Toulson at [15] as *"the wider ground"*, but was given permission to appeal by the single judge (Sir Richard Buxton) on the narrow ground that the lawfulness of AA's detention should be assessed on the basis that AA was a child *"whatever the understanding at the time"*. It was that issue (and only that issue) which was considered by the Court of Appeal and, subsequently, the Supreme Court. As to the latter, this is borne out by looking at the submissions made by Mr Knafler QC on behalf of AA (recorded at [45]) and considering Lord Toulson's conclusions at [47] and [48], as follows:

> *"47 In order to safeguard and promote the welfare of children the Secretary of State has to establish proper systems for arriving at a reliable assessment of a person's age. That is not an easy matter, as experience shows. The arrangements made by the Secretary of State under section 55 include the published policies referred to above: Every Child Matters, EIG 59.9.3.1 and Assessing Age.*
>
> *48 The instructions in Assessing Age are detailed and careful. In my judgment the guidance complies with the Secretary of State's obligation under section 55(1), applying its natural and ordinary meaning. In this respect, the reasoning set out in the passage quoted at para 24 above is persuasive. Further, on the facts of this case there is no basis for finding that there was a failure by any official to follow that guidance. It follows that there was no breach of section 55 and therefore that the exercise of the detention power under paragraph 16 was not unlawful."*

125. Lord Toulson's focus was clearly on the narrower ground rather than *"the wider ground"* for which AA had been refused permission to bring judicial review proceedings and to appeal. That is, indeed, why he noted in [48] that *"on the facts of this case there is no basis for finding that there was a failure by any official to follow that guidance"*. That this is the position is also borne out by what Lord Toulson had to say concerning ***AAM***, the decision of Lang J to which I have previously referred. Lord Toulson explained in relation to this case as follows:

> *"28 ... The claim was for damages for false imprisonment and breach of article 5 of the European Convention on Human Rights. The defendant conceded that the detention had been unlawful because immigration officers had wrongly applied a presumption that an asylum seeker who arrived clandestinely should be detained, but it disputed other grounds on which the claimant alleged that his detention was unlawful. The judgment was concerned with that dispute, which was thought to have a potential bearing on the assessment of compensation. The case bears*

some resemblances to the present case but there were also factual differences.

...

30 The immigration officer gave evidence before Lang J. The judge found that the decision to detain was unlawful because the immigration officer failed to ask herself the right questions or to take reasonable steps to acquaint herself with the information needed to make her decision. She did not know the requirements of a Merton-compliant assessment. A later re-assessment by social services concluded that the appellant was 17. At the trial it was accepted as a fact that he was 15 and that the way in which the first assessment had been carried out was defective.

31 As to the proper interpretation of the policy set out in EIG paragraph 55.9.3.1, Lang J accepted the defendant's submission that it was not to be read as imposing a pre-condition that a Merton-compliant age assessment had been carried out. Rather, an immigration officer was required to make an independent evaluation and exercise his judgment in deciding whether or not the criteria in the paragraph were met. On the judge's findings, the immigration officer lacked the training to have done so and failed the test. Her factual findings were sufficient to justify the conclusion that the decision to detain was unlawful.

32 However, Lang J went on to consider a further argument based on section 55. The argument in short was that since the claimant was under 18 and his welfare had not been taken into account when making the decision to detain, his detention was therefore in breach of section 55. It is not entirely clear whether this part of her judgment was intended to be read in the light of the factual findings which she had already made or was intended to apply whether or not the immigration officer had approached the matter properly in terms of the guidance in EIG 55.9.3.1."

Lord Toulson went on later to say this at [50]:

"50 The judgment in AAM was right on the facts as Lang J found them, but if and insofar as her judgment amounted to holding that any detention under paragraph 16 of a child in the mistaken but reasonable belief that he was over 18 would ipso facto involve a breach of section 55, I would disapprove that part of the judgment."

126. Lord Toulson was, therefore, as I understand it, saying that insofar as Lang J decided that there had been a breach of policy on the part of the Secretary of State, her decision was right, but that if and insofar as Lang J decided the narrow point which had been before the Court of Appeal in ***AA*** and was before the Supreme Court in the same case, her decision was wrong. On that basis, given that, as I say, the case before me is a case which entails an allegation that the Defendant acted in breach of *policy* in detaining the Claimant on 17 July 2012, and not an allegation that the Defendant was in breach of Section

55 of the 2009 Act, it does not seem to me that Mr Hansen's reliance on ***AA*** really helps the Defendant.

127. I return now to what it seems to me is the critical question which arises in relation to the second period of detention, namely the question of what is required by the *'Assessing Age'* guidance in Section 5. As I have previously explained, this requires me to construe the words used in Section 5, a process which (like any construction exercise) entails ascertaining the natural and ordinary meaning of those words viewed from an objective standpoint. For this reason, I say straightaway that I do not consider that I am given any assistance from answers given by Miss Finlayson and Miss Helbling to questions directed at their (necessarily subjective) understanding of what the *'Assessing Age'* guidance means and, therefore, requires. That evidence is only relevant to the question whether, in the case of the Claimant, the Defendant acted inappropriately in deciding to detain the Claimant when knowing that the *'Assessing Age'* guidance was not being properly followed or, perhaps, being reckless as to whether that guidance was being properly followed. I am quite clear, however, that the evidence in this case is a long way from establishing any such thing. I am perfectly clear that Miss Finlayson and Miss Helbling genuinely believed that what they did in the Claimant's case was in compliance with the *'Assessing Age'* guidance, even though, as I have already indicated, in my view, that was not actually the case because the *'Assessing Age'* guidance requires more than the *'Age Assessment Results'* document to have been provided to the Defendant by Kent CS, albeit that a full *Merton*-compliant age assessment was also not essential.

128. I can state my reasons for reaching the conclusion which I have reached relatively shortly as my reasoning is very simple. It is that, looking at the structure of paragraph 5.3, the *'Assessing Age'* guidance must be contemplating that something less than a full Merton-compliant age assessment document can suffice. On that basis, Miss Luh's submission fails, although, as I say, it does not follow that the *'Age Assessment Results'* document provided to the Defendant by Kent CS in the present case is sufficient. Paragraph 5.3 starts by stating that *"Case owners should request a full copy of the local authority's age assessment and confirmation from the local authority that it has been carried out in compliance with the guidelines in the Merton case"*. If matters stopped there, there would be no doubt that only a full Merton-compliant age assessment document will do. However, matters do not stop there. Instead, after a reference to ***A & WK*** and to Collins J saying in that case that *"Only if the full report is available can it be seen whether there are any apparent flaws in it and whether it is truly Merton compliant"*, the paragraph goes on to say this (as always, the emphasis is in the original):

> *"Case owners should discuss with the relevant local authority and obtain in writing,* ***at the very least*** *their assessment conclusion, the reasons on which their conclusion is based and an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case."*

This seems to me to make it abundantly clear that the guidance contemplates that something less than a full *Merton*-compliant age assessment document will be sufficient. If the position were otherwise, then, I fail to see why there would be any need for this paragraph at all: matters would simply rest with the statement earlier on, supported by the ***A & WK*** case dictum, that a full *Merton*-compliant age assessment document is needed. In addition, the words in bold ("*at the very least"*) make absolutely no sense if the position is that nothing less than a full *Merton*-compliant age assessment document will suffice.

129. This conclusion is sufficient to dispose of Miss Luh's submission that a full *Merton*-compliant age assessment document is needed, and nothing short of that. It does not, however, resolve the question of whether the *'Age Assessment Results'* document provided to the Defendant by Kent CS in the present case is sufficient for the purposes of the *'Assessing Age'* guidance. That requires me to consider what is actually required and not merely what is not required. My answer to this question is that, as the paragraph set out above itself states, what is required from the local authority (here, Kent CS) is, first, *"their assessment conclusion"*, secondly *"the reasons on which their conclusion is based"*, and thirdly *"an assurance that their assessment complies with the local authority's assessment policy and the guidelines in the Merton case"*.

130. The question, then, is whether these three requirements were satisfied in the case of the *'Age Assessment Results'* document in the present case. In my judgment, they were not, with the consequence that the Claimant's claim succeeds despite the fact that I have rejected the submission that nothing less than a full *Merton*-compliant age assessment document is sufficient. There is no difficulty in relation to the first and third requirements: in the case of the third requirement, not only because of the reference to Merton in the note at the foot of the page, but also because in the covering letter from Kent CS dated 17 July 2012 it was stated that the *"Assessment was a full assessment as required by 'Merton'"*. The difficulty arises in relation to the second requirement, namely that there should *"reasons on which their conclusion is based"*. I consider that Miss Luh is right in her submission that merely placing a *"Y"* or an *"N"* next to a list of ***Merton*** factors on a *pro forma* does not entail the giving of *"reasons on which"* Kent CS's *"conclusion is based"* in circumstances where nowhere else in the *'Age Assessment Results'* document is there anything which could properly be described as specific to the Claimant.

131. To take an example, although there is a *"Y"* next to *"Family and social history"*, there is nothing to tell the reader (specifically, the Defendant and, even more specifically, Miss Helbling) what in that history has led the assessor(s) to reach the conclusion that the Claimant was an adult. The same apples to each of the factors against which a *"Y"* appears: what, for example, in relation to *"Education"* caused the assessor(s) to conclude that the Claimant was 18 – was it the fact that he claimed to have started school too early? Nothing is stated. There is no way, therefore, of the Defendant knowing whether what was described as being a *Merton*-compliant assessment had

actually been undertaken. On that basis, it seems to me that the Defendant was in no position to make any independent evaluation as to whether what Kent CS was saying about having performed such an assessment was correct. Accordingly, it seems to me that what the Defendant was provided with in this case was inadequate and not what the *'Assessing Age'* guidance requires. I reject Mr Hansen's argument that the *"reasonable interpretation"*, as he put it, is that the conclusions reached in relation to the various factors as regards *this* Claimant were that he was an adult, and that that is all that is needed for the purposes of the *'Assessing Age'* guidance. There is a difference between stating a conclusion (including in relation to the individual factors), on the one hand, and giving the reasons for that conclusion (including in relation to the individual factors), on the other. Mr Hansen's argument focuses on the former but does not, in my view, really engage with the latter.

132. As Stanley Burnton J put it in ***Merton*** at [47], *"a statement of the decision of the local authority"* is not the same as stating *"the reasons for its decision"*. Further, it seems to me that there is additional support for the position which I have taken to be found on the facts of ***FZ***. In that case, as explained by Sir Anthony May P at [12], the two social workers who performed the age assessment carefully recorded his interview answers and gave their own impressions arising from those answers, recording their conclusions as follows:

"FZ's overall physical appearance and general demeanour indicate that he is older than his claimed age. He has mature features and spoke assertively and confidently. Although he says he has documents in Iran to verify his age and date of birth claim he is unable to produce them and therefore they cannot be given any weight in this age assessment. The age and date of birth that he gave were inconsistent with each other and can be given little weight. He was unable to provide sufficient dates to support his version of events. While he could name how many days it had been since he left Iran he was unable to say when this was. Since he was able to name his birth date it is thought that he would be able to name the dates of when significant events happened such as when he left his home country. He couldn't say when he started or finished school and he was only able to estimate ages for his family despite the fact that he said that he's always known his own age. It is thought that if he grew up being told his age then he would also know his siblings' ages and be able to give more accurate answers. He gave little information regarding how he used to occupy his time, saying he watched his father working but that he himself had very little responsibility. It was considered by the social workers that he was deliberately being vague and playing down his role within the family in order to make himself appear younger. Therefore taking the above into consideration we have assessed the young person to be 17+ years old with an assessed DOB: 28/12/1991."

However, in the form which was handed to the claimant in that case (the person who was age-assessed), things were put in what Sir Anthony May P described as *"rather shorter terms"*, as follows:

"Conclusion

Based on the information provided and in our professional judgment we believe that FZ is not the age he claimed as stated below. His overall physical appearance and general demeanour indicate that he is older than his claimed age. He brings no documentation to verify his age or claimed date of birth. He was unable to provide sufficient time frames or dates to support his age claim. Therefore taking the above into consideration we have assessed the young person to be 17+ years old with an assessed DOB: 28/12/1991."

133. As made clear at [21], the first issue in that case concerned the need for the claimant to have been given *"a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him"*. At [22], Sir Anthony May P explained that, in the judgment of the Court of Appeal, *"the procedure adopted in the present case did not achieve this element of the Merton requirements"*. In that context, it was clearly considered that it was not sufficient that the assessors' conclusions were simply presented to the claimant, after the assessors had returned from their retirement when they considered their decision, *"without first giving him the opportunity to deal with the adverse points"*. Significantly for present purposes, Sir Anthony May P went on to say that, furthermore, *"the conclusions were not expressed with sufficient detail to explain all the main adverse points which the fuller document showed had influenced the decision"*. That was, as I understand it, a reference to the contrast between the (fuller) assessors' record of their conclusions, as set out in the longer passage above, on the one hand, and the form in *"rather shorter terms"* which was handed to the claimant, on the other. Whilst the former document gave the assessors' reasons in some detail, the latter did not and, as such, seems to me to have been not unlike the *'Age Assessment Results'* document in the present case. Although I should not be taken as suggesting that the (fuller) assessors' record of their conclusions in ***FZ*** (as set out at [12]) would suffice for a full *Merton*-compliant age assessment such as those which ultimately were produced in the case of the Claimant, it does nevertheless seem to me that a document like that, which set out reasons specific to the claimant in that case, is the type of document which is contemplated by the *"at the very least"* wording in the *'Assessing Age'* guidance set out in paragraph 128 above - although I do not mean at all to suggest that the assessors' record of their conclusions in ***FZ*** (as set out at [12]) should be regarded as being some sort of model or precedent.

134. I should mention in this context, before moving on, that, when giving me her list of typing corrections and *"other obvious errors"* in response to my sending out of this judgment in draft, Miss Luh (who appeared in ***FZ***) made the point that what I have described above as the (fuller) assessors' record of their conclusions was not seen by FZ until the *full* age assessment was made available to him later. Whilst that is right, it nevertheless appears that the assessors made the (fuller) record of their conclusions at the time that FZ was interviewed. I say this because, having looked again at ***FZ***, I note that, at [10], Sir Anthony May P refers to the London boroughs of Croydon and Hillingdon having produced their own *"Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers"*, and to that *"useful short document"* having attached to it *"an eight-page form divided into sections with detailed*

suggestions of the topics which an age assessment interview might address and spaces for recording the answers". He then notes in the same paragraph that this was the form which was used in the interview in ***FZ*** and that the last page of the form was *"constructed to enable the interviewers to record their conclusions and reasons"*, before going on to state at [12] that the assessors, apparently contemporaneously, *"carefully recorded"* FZ's *"answers"* and *"recorded their conclusions"* in the (fuller) manner then set out (albeit that what they gave FZ was their *"rather shorter"* conclusion).

135. I might add that I am not dissuaded from the conclusion which I have reached as to what the *'Assessing Age'* guidance requires by the fact that it is a conclusion for which neither Miss Luh nor Mr Hansen was arguing. I have to construe the *'Assessing Age'* guidance in accordance with what I consider is its right meaning. If, in undertaking the process of construction, the *objective* process of construction, I arrive at a result which neither party advances, it seems to me that that is of no consequence even if it causes me to pause and consider whether my conclusion is the right one (something which I have, of course, done). Nor does it seem to me that I should be put off from the conclusion which I have reached by the fact that, when I raised with Mr Hansen the possibility that what the policy requires is something between a full *Merton*-compliant age assessment and the *'Age Assessment Results'* document provided to the Defendant in this case, his response was that it would be too burdensome for a local authority such as Kent CS to have to produce a document which did more than the *'Age Assessment Results'* document, bearing in mind that a full *Merton*-compliant age assessment document has also, and in any event, to be prepared (at least in due course, based on my construction of the *'Assessing Age'* guidance). I do not see why it would be too burdensome to have to prepare a document which, by reference to the *Merton* factors in the *'Age Assessment Results'* document, states relatively brief reasons why, in relation to the particular person who has been age-assessed, the conclusion which has been reached has been arrived at. Those reasons need to be sufficient to enable the reader (the Defendant as well as the individual who has been age-assessed) to understand what, specifically, has led to the conclusion arrived at. These must, after all, be reasons which the assessors have already formulated, probably in some sort of note form, since otherwise it is difficult to see how it can be properly said that a *Merton*-compliant age assessment has been performed and completed. I do not, therefore, accept that it would be too burdensome to do what I have in mind. Nor would it be over-burdensome for the document to contain information concerning the matters identified in paragraph 109(1)-(4) above. Nor, I might add, am I remotely persuaded by Mr Hansen's point that a full *Merton*-compliant age assessment takes time to prepare (the standard form for Kent CS asks the reason why the *"core assessment"* has not been completed within 35 days), and so to have to prepare the type of document I have decided is required by the *'Assessing Age'* guidance whilst at the same time striving to prepare the full document is asking too much of local authority personnel. The fact is that the Defendant has to have a document which allows it to be appreciated what the reasons are for the conclusion reached in the age assessment process. If that means that two documents, one shorter than the other, have to be prepared at the same time or in relatively close proximity to

each other, then, so be it. I do not accept that this consideration is such as to justify the construction of the *'Assessing Age'* guidance argued for by Mr Hansen.

136. In the circumstances, the Claimant's claim in relation to the second period of detention must succeed, the Defendant having failed to comply with its own *'Assessing Age'* guidance (and so EIG Chapter 55 which states that such guidance is to be followed) when deciding to detain the Claimant on 17 July 2012 and having continued to fail to comply when deciding whether to continue the detention at the various reviews which took place thereafter – and this not being a case in which either the first or the third bullet points in paragraph 55.9.3.1 of EIG Chapter 55 is applicable (*"credible and clear documentary evidence that [the individual is] 18 years of age or over"* and *"physical appearance/demeanour **very** strongly indicates that [the individual is] **significantly** over 18 years of age and no other credible evidence exists to the contrary"*). As a result, the Claimant's detention was unlawful since there was no lawful basis on which the Defendant could treat the Claimant as an adult as at 17 July 2012. The Claimant should have been regarded as an *"unaccompanied minor"* within the meaning of Article 2(h) of the Dublin II Regulations. Therefore, under Article 6, it was the responsibility of the UK to examine his application for asylum. As such, the Defendant had no entitlement to give removal directions under paragraph 16(2) of Schedule 2 to the 1971 Act, and there was no power to detain, with the effect that the detention was unlawful (and in breach of Article 5(1) of the ECHR). (As I understand it, Miss Luh accepts that, in the circumstances, there is no need for her to press the Claimant's ***Hardial Singh*** claim).

137. I am not prepared in what is already a lengthy judgment to make it longer still by dealing with a submission made by Miss Luh for the first time in her reply submissions (and briefly mentioned in her very helpful written closing submissions which were provided to me after her reply submissions had been made), namely that, if I were to hold that something less than a full *Merton*-compliant age assessment document suffices for the purposes of the *'Assessing Age'* guidance, then that guidance is itself unlawful. This was not a case which Mr Hansen had any opportunity of addressing. Nor is it a case which was fully argued before me. Nor is it a case which, based on the conclusion which I have reached in relation to the second period of detention, improves the Claimant's position before me: he has won in relation to the second period of detention in its entirety and on the basis that the *'Assessing Age'* guidance did not permit the Defendant to do what was done. I do not need, therefore, to go further, and I decline to do so.

138. I should, however, deal with one point which, were I considering the lawfulness of the *'Assessing Age'* guidance, would need to have been addressed in that context but which Miss Luh also relies on in relation to the construction issue and the issue of whether what the Defendant did in the case of the Claimant was lawful or not. This is Miss Luh's submission that there is, as the *'Assessing Age'* guidance itself makes clear (consistent with authority: for example, ***J***, ***AAM***, ***Durani*** and ***HXT***, all cases to which I have previously referred in this particular context), an independent obligation on the part of the

Defendant's immigration officials *"to apply their mind to whether or not the age assessment in question complied with the Merton principles"* (as Walker J put it in ***Durani*** at [90]). Miss Luh relies on this independent obligation in support of her submission that the *'Assessing Age'* guidance can only be contemplating that the Defendant has a full *Merton*-compliant age assessment document and that the *'Age Assessment Results'* document provided to the Defendant by Kent CS in the present case was not sufficient. She submits that the Defendant (specifically, Miss Helbling and Miss Finlayson) could not have discharged that independent duty without a full *Merton*-compliant age assessment document. Therefore, she submits, the *'Assessing Age'* guidance cannot be saying that something less than a full *Merton*-compliant age assessment document will suffice, and it follows also that the Defendant must have acted unlawfully in not performing the independent duty *"to apply their mind to whether or not the age assessment in question complied with the Merton principles"*.

139. Although it is not necessary for me to determine the lawfulness of the guidance, as I say a point only very belatedly raised by Miss Luh, since it is sufficient that I have decided that the *'Assessing Age'* guidance (whether itself lawful or not) was not followed in the present case, I should nevertheless explain in relation to Miss Luh's first point, directed at the meaning to be given to the *'Assessing Age'* guidance, that it does not seem to me that the existence of the independent duty demands the construction which Miss Luh urges on me. I acknowledge that the existence of the independent duty on the Defendant does amount to a further reason why Mr Hansen's submission that the *'Age Assessment Results'* document in the present case cannot be right. It does not follow, however, that the independent duty is only capable of being discharged if a full *Merton*-compliant age assessment document is before the Defendant. It seems to me that the Defendant would be able adequately to discharge the independent duty if the local authority were to provide the Defendant with the type of document which I have decided the *'Assessing Age'* guidance requires in the *"at very least"* wording in paragraph 5.3 which I have been considering, namely a document which, by reference to the ***Merton*** factors in the *'Age Assessment Results'* document, states relatively brief reasons why, in relation to the particular person who has been age-assessed, the conclusion which has been reached has been arrived at. That same document could also provide information concerning the matters identified in paragraph 109 above, so again enabling the Defendant to be satisfied that there is substance in the assurance from the local authority that the age assessment carried out was *Merton*-compliant. (If I am right about this, then, this is also the answer to Miss Luh's point that the *'Assessing Age'* guidance is itself unlawful. However, as I say, this is a point which was not explored before me in any detail, and it may be that Miss Luh would have had other reasons for arguing that the *'Assessing Age'* guidance was unlawful had this been a point which had been raised earlier and developed in submission (by both sides).)

140. Lastly, although this is an aspect which flows from the last, Miss Luh submits that the evidence in the present case, specifically the evidence given by Miss Helbling and Miss Finlayson, demonstrates that they were unaware of the independent duty, which was on them, to apply their mind to whether or not

the age assessment in question complied with the ***Merton*** principles. She submits that they simply relied on Kent CS's assurance that the age assessment carried out was *Merton*-compliant. Indeed, Miss Luh submits that, since the *'Age Assessment Results'* document only refers to the document representing a *"summary of a more in-depth assessment conducted with the intent to comply with both 'Merton Judgements'"*, and not to a *Merton*-compliant age assessment having actually been carried out, it should have been apparent to Miss Helbling and Miss Finlayson that Kent CS was merely intending, in the future, to carry out a *Merton*-compliant age assessment and that, therefore, no such age assessment had to date been carried out. That is a submission which, it seems to me, is unrealistic given that, in Kent CS's covering letter dated 17 July 2012, it was expressly stated that *"The Assessment was a full assessment required by 'Merton'"*, referring quite obviously to something which had already happened. Miss Helbling was in no doubt in her evidence before me that her understanding was that an age assessment had already been performed, and I accept that evidence.

141. More generally, having reviewed the evidence given by Miss Helbling and Miss Finlayson with care, I reject Miss Luh's submission that Miss Helbling and Miss Finlayson were unaware of the independent duty. Miss Helbling frankly agreed that she had not herself read the ***Merton*** judgment, but she referred to the fact that the principles laid down in that case were the subject of training which she had undergone. Asked by Miss Luh to outline what she understood those principles to be, it was clear that she did, indeed, have an appropriate understanding of them, including the various points set out in paragraph 109 above. It is right to say, as Miss Luh points out, that Miss Helbling went on to state that *"if they tell me that the assessment is Merton compliant, I trust them"*. However, she was then immediately asked by Miss Luh whether *"if Social Services tell you that the assessment is Merton-compliant and the individual is an adult, that is enough?"*, and Miss Helbling's answer to that question was *"No – I expect a list of the things they have covered"*. She went on to refer to the fact that in the present case Kent CS sent a fax and the *'Age Assessment Results'* document referred to it being strongly suggested that the Claimant was an adult. She said that that *"suggests to me good quality"*, referring to the quality of the age assessment which had been carried out. She then referred to the *"examples used"*, a reference to the factors with a *"Y"* next to them, and said that she would have looked *"at that and considered they [Kent CS] have looked at al these and they consider that they strongly believe that"* the Claimant *"was an adult"*. She added that, as far as she was concerned, *"a lot of information"* had been given and she believed that *"they had done an in-depth age assessment"*. She then said that she trusted Kent CS as *"professionals"* and that she did *"not need to know what in appearance or education"* (taking examples of the ***Merton*** factors) *"they have considered in their decision that he was an adult"*. In my assessment, this is evidence which demonstrates that Miss Helbling, who was the person who made the relevant decision on 17 July 2012, was aware of her independent duty to consider what Kent CS had provided her with. I, therefore, reject Miss Luh's submission that Miss Helbling simply relied on Kent CS having stated that a *Merton*-compliant age assessment had been undertaken.

142. I accept, however, that, in line with my conclusion concerning what the *'Assessing Age'* guidance requires, specifically that the *'Age Assessment Results'* document was not sufficient, Miss Helbling should be taken as not having adequately discharged the independent duty on her, and therefore that this is an additional reason why the detention on 17 July 2012 was unlawful, consistent with the approach adopted in ***J***, ***AAM***, ***Durani*** and ***HXT***. However, that is not because she was unaware of the existence of that duty nor because she did not try to discharge the duty. More specifically, in relation to the first of the matters set out in paragraph 109 above, that, when asked about the fact that the *'Age Assessment Results'* document was only signed by one person, alongside the printed words, *"Name of Social Worker/Assessor"*, rather than two, Miss Helbling's answer was that *"they generally have the name of the person who filled in the form and there was no reason to believe that there not two social workers"* involved in the age assessment which had been performed. That was an explanation which seems to me to make considerable sense. Likewise, as to the fifth matter set out in paragraph 109, it is clear from what Miss Helbling said in evidence that she appreciated that the Claimant's physical appearance and demeanour is not a determinative factor and that she took into account the fact that the *'Age Assessment Results'* document referred to a range of other factors in addition to physical appearance and demeanour. Nevertheless, as to the other matters identified in paragraph 109, matters which Miss Luh submits should have been asked about because they are not apparent from the face of the *'Age Assessment Results'* document, it seems to me that these probably are matters which, strictly speaking, Miss Helbling was not entitled merely to assume had been properly dealt with by Kent CS because of Kent CS's assurance that things had been done in a *Merton*-compliant way and because of the absence of any indication in the *'Age Assessment Results'* document to the contrary.

143. As for Miss Finlayson, who carried out the 24-hour detention review, it is fair to say that she seemed less attuned to the existence of the independent duty on the Defendant than Miss Helbling was, her evidence being that age-assessment was a *"judgment call"* by the local authority which had carried it out and that *"I am not there to judge the quality of the Merton assessment"*. She did, however, go on to say that *"If I had concerns, I would action those concerns and we have the facility to make a judgment call – we would need to see the child to make that call - I use that as an example if I was unhappy"*. She did seem, therefore, to appreciate that it was not appropriate to accept a local authority's age-assessment completely without question. That said, what was clear from Miss Finlayson's evidence is that, in carrying out the 24-hour detention review, her focus was really on whether there had been any change in the course of the twenty-four hours since Miss Helbling had authorised the Claimant's detention, and she did not revisit the *'Age Assessment Results'* document. In these circumstances, whilst I regard Miss Finlayson's evidence in relation to the *'Age Assessment Results'* document and age assessment generally, as being less persuasive than that given by Miss Helbling, I am not able to accept Miss Luh's submission (in paragraph 68(xi) of her written closing submissions) that Miss Finlayson's evidence *"reveals a true scale of the gross incompetence/wholesale (and very worrying) misunderstanding of what the policies say (given she is the manager of the team who deals with*

unaccompanied minors, including age disputes and has been since 2002)". I do not accept that there was gross incompetence or wholesale misunderstanding on Miss Finlayson's part; nor do I accept that, even if there was, that extends to Miss Helbling, the person who made the relevant decision to detain the Claimant on 17 July 2012. I make it clear that I also do not accept that, as suggested in Miss Luh's oral closing submissions, there was a *"flagrant breach of policy"* on the part of the Defendant in this case and that the Defendant's *"system"* has been demonstrated in the evidence in this case to be *"highhanded and oppressive"*. I consider that Miss Luh's submissions are substantially overstated in relation to this aspect.

The Claimant's alternative case: 26 July onwards

144. This leaves the Claimant's alternative case that, even if the detention starting on 17 July 2012 was lawful, the detention became unlawful on 26 July 2012, or more realistically on 27 July 2012 since that (not before, as I shall explain) is when copies of the relevant documents were provided to the Defendant in an email on that day from the detention centre, because the Defendant was thereafter in possession of what Miss Luh submits was sufficient new information supporting the Claimant's claim that he was 16 rather than 18 as Kent CS had assessed him to be. These documents consisted of the Claimant's birth certificate, his national identity card and his secondary school certificate.

145. Miss Luh points out, as I have previously mentioned, that actually the relevant GCID - Case Record Sheet has an entry for 20 July 2012, three days after the Claimant's detention in the detention centre, which records that an officer at that centre had telephoned to say that the Claimant *"is still claiming to be 16 years old and has obtained photocopies of two identification documents which he believes when translated will prove he's a minor"*. That entry then states *"Copies faxed to Kent LIT"*. The same record, again as previously pointed out, states in the next entry (again for 20 July 2012), as follows: *"Copies of ID documents received at KRT and faxed to NAIU/TCU"*. There is, however, an oddity about this because, besides these references, there is nothing to show that these documents were actually faxed to the Defendant before 27 July 2012. If they had been, then, surely there would be a fax not only from the detention centre to the KRT but from the KRT to NAIU/TCU. The fact that there are no such faxes makes me doubt that the references in the record sheet can be accurate. Furthermore, if the documents had been provided to the Defendant by the Claimant on 20 July 2012, then, it is difficult to see why, in the email from the detention centre to the Defendant on 27 July 2012, the writer would have referred to having only been provided with the documents by the Claimant *"today"* and, in doing so, make no mention of having already received the documents 7 days earlier or of having actually received the documents not on 27 July 2012 but on 20 July 2012. In the circumstances, and despite Miss Luh asking that I reconsider the position when sending me her list of corrections and *"obvious errors"*, I find that the relevant documents were not actually received by the Defendant until 27 July 2012.

146. Miss Luh also points out that the GCID - Case Record Sheet has an entry for 27 July 2012, which refers to a telephone call being received from *"the Duty*

Social Worker", presumably at Kent CS, *"asking if a decision has been made on this subjects [sic] case and if the UKBA think that the documents produced by the subject are genuine"*. The same note records that Kent CS were told that *"the case is due to be reviewed 30/07/2012"*. It then goes on to say this: *"I have spoke [sic] to the Case Owner in this case and she has told me that they would only accept original documents as evidence of a persons [sic] age"*. This seems to me to provide further support for the conclusion that the documents were only provided to the Defendant on 27 July 2012 since I would have expected Kent CS to have made contact about the documents earlier than this if the documents had, in fact, been received by the Defendant a week before.

147. The *'Detention Review'* document disclosed by the Defendant actually shows that the review referred to in the record sheet was carried out on 1 August 2012. Detention was maintained without any reference to the documents which had been received on 27 July 2012. This is despite the fact that in the meantime, on 31 July 2012, Maxwell Gillott had written to the Defendant, specifically Tracy Nicholls at the Dublin/Third Country Unit, in a letter described as a *"Pre-Action Protocol Letter"* and marked as *"Extremely Urgent"*. In that letter, among other things, Maxwell Gillott referred to the copy documents which had been sent on 27 July 2012 (indeed the letter enclosed further copies) and informed the Defendant that translations were being obtained, whilst pointing out, presumably by reference to those documents or at least one of them, that *"The interpreter we instructed has confirmed that this translates as 21/9/1995"*. Three days later, on 3 August 2012, Maxwell Gillott sent Tracy Nicholls translations, confirming that the documents showed a date of birth in 1995, specifically 21 September 1995. Subsequently, on 6 August 2012, Kent CS agreed to re-assess the Claimant's age, and Maxwell Gillott told the Defendant (again Tracy Nicholls) this the same day, whilst also stating that the Claimant intended to commence judicial review proceedings. Despite this, on 7 August 2012, the date of the next review, no mention is made in the entry on the *'Detention Review'* document.

148. In these circumstances, Miss Luh submits that the Defendant clearly needed to review the position taken by the Defendant on the Claimant's age on 17 July 2012. The more so, Miss Luh submits, once Maxwell Gillott had told the Defendant that Kent CS had stated that a re-assessment would be undertaken, since that demonstrated that Kent CS itself recognised the need to revisit the age assessment which had previously been undertaken. Miss Luh submits that this was required by the Defendant's own *'Assessing Age'* guidance (in particular, Section 6 and paragraph 8.2). What the Defendant was not entitled to do, explains Miss Luh, was simply dismiss or ignore the evidence provided to it for consideration in support of a review of the Claimant's age. There was a public law duty under ***Tameside*** on the Defendant to make the necessary inquiries of the evidence so as to arrive at an informed decision as to the lawfulness or otherwise of the Claimant's continued detention. Therefore, for the detention reviews carried out after 27 July 2012 to make no mention of the Defendant putting its independent mind to the material relevance of the documents produced, and for the Defendant in these proceedings not to adduce any evidence from the individual(s) who carried out the reviews (Mr Baker did

not himself do so), is not good enough. The more so, submits Miss Luh, given that the Dublin II Regulations' hierarchy of criteria (specifically Article 2(h) and Article 6) plainly required such proper inquiries to be made, bearing in mind that evidence had, on the face of it, emerged to suggest that the Claimant may no longer be removable to Italy and so no longer fell within a category of persons who can be subject to a power to detain.

149. Against this, Mr Hansen points out that, on 7 August 2012, Blair J had refused permission to apply for judicial review on the basis that the application was premature since *"the defendant must have a proper opportunity to reach a decision on the age issue"*. He makes the point that, although that is not a determination which is binding on me, nevertheless it demonstrates that the criticism which the Claimant makes of the Defendant is unfair. Mr Hansen submits that, in circumstances where the Defendant had only been provided with translations of the relevant documents on 3 August 2012, there was nothing wrong about the Defendant not releasing the Claimant from detention until 10 August 2012, a week later and judicial review proceedings having been commenced in the meantime with a further hearing (a renewed application for permission to bring judicial review proceedings) having been listed for 13 August 2012.

150. I shall state my conclusions in relation to this matter briefly. First, as I have already made clear, I find as a fact that it was not until 27 July 2012 that copies of the relevant documents (copies rather than originals) were provided to the Defendant, and those were copies which were not accompanied by any translation. In these circumstances, I reject the Claimant's case that the Defendant's continued detention of the Claimant before 27 July 2012 was unlawful. Secondly, although Miss Luh rightly highlights the fact that Miss Helbling, Miss Finlayson and Mr Baker seemed to contemplate that the Defendant could itself take steps to arrange for translations, I am satisfied that it was not unreasonable of the Defendant to await translations from the Claimant, translations which in the event were provided by Maxwell Gillott on 3 August 2012, only a few days later; had no such translations been forthcoming from Maxwell Gillott, then, it would not have been appropriate for the Defendant simply to do nothing about arranging translations itself for any prolonged period, but in the present case translations were received from Maxwell Gillott within a matter of just a few days after the Defendant had received the documents. Although I find it odd that the *'Detention Review'* document makes no reference to the documents which had been produced by the Claimant in the 1 August 2012 entry, and I am clear that whoever carried out that review ought to have given consideration to the documents, nevertheless I consider that the Defendant was entitled to wait for translations, whether to be provided by the Claimant or internally (even though there is no evidence in this case that translations were actually sought internally). However, and this is my third point, having received the translations on 3 August 2012, I am clear that it was incumbent on the Defendant then to review the documents and consider, as part of the next review, which took place on 7 August 2012, whether, in the light of those documents (and the translations with which the Defendant had been provided), detention could lawfully be maintained. That was all the more the case given that, the day before the

review, Maxwell Gillott had informed the Defendant that Kent CS had agreed to re-assess the Claimant's age, and at the same time had stated that the Claimant intended to commence judicial review proceedings. It is striking that, in such circumstances, the *'Detention Review'* document makes no mention of any of this. It should have done because the review on 7 August 2012 should have taken account of the documents which by this stage the Defendant had had in its possession for about eleven days. The *'Assessing Age'* guidance is clear, in Section 6, that *"evidence that may be submitted in support of an applicant's claimed age … should be considered alongside a local authority age assessment"* and given also that paragraph 8.2 requires that *"Case owners will normally need to review a decision on age if they later receive relevant new evidence"*, yet there appears to have been no such consideration given at all to the documents in the present case. In particular, in line with paragraph 6.2, the Defendant appears to have wholly failed to consider why, in the present case, the Claimant's birth certificate should not *"be acceptable proof of the applicant's age"*. The absence of any evidence of consideration of the documents seems to me to mean that the Defendant's continued detention of the Claimant after 7 August 2012 was unlawful. On that basis, and by way of conclusion, if I had decided that the detention was lawful on 17 July 2012, I would nevertheless have decided that it became unlawful on 7 August 2012, with the result that the claim for unlawful detention would have succeeded in respect of the period between 7 and 10 August 2012.

Exemplary and aggravated damages

151. Although I am not at this stage dealing with assessment of damages, the parties are nevertheless agreed that I should make any appropriate findings of fact which would support the Claimant's claims for aggravated and exemplary damages.

152. In considering this aspect, I have had regard to the guidance given by Lord Woolf, MR in ***Thompson v Commissioner of Police of the Metropolis*** [1998] QB 498, at pages 516B-D and 516G-517B, as follows:

> *"(8) If the case is one in which aggravated damages are claimed and could be appropriately awarded, the nature of aggravated damages should be explained to the jury. Such damages can be awarded where there are aggravating features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award. Aggravating features can include humiliating circumstances at the time of arrest or any conduct of those responsible for the arrest or the prosecution which shows that they had behaved in a high handed, insulting, malicious or oppressive manner either in relation to the arrest or imprisonment or in conducting the prosecution. Aggravating features can also include the way the litigation and trial are conducted. …*
>
> *…*
>
> *(12) Finally the jury should be told in a case where exemplary damages are claimed and the judge considers that there is evidence to support such*

a claim, that though it is not normally possible to award damages with the object of punishing the defendant, exceptionally this is possible where there has been conduct, including oppressive or arbitrary behaviour, by police officers which deserves the exceptional remedy of exemplary damages. It should be explained to the jury: (a) that if the jury are awarding aggravated damages these damages will have already provided compensation for the injury suffered by the plaintiff as a result of the oppressive and insulting behaviour of the police officer and, inevitably, a measure of punishment from the defendant's point of view; (b) that exemplary damages should be awarded if, but only if, they consider that the compensation awarded by way of basic and aggravated damages is in the circumstances an inadequate punishment for the defendants; (c) that an award of exemplary damages is in effect a windfall for the plaintiff and, where damages will be payable out of police funds, the sum awarded may not be available to be expended by the police in a way which would benefit the public (this guidance would not be appropriate if the claim were to be met by insurers); (d) that the sum awarded by way of exemplary damages should be sufficient to mark the jury's disapproval of the oppressive or arbitrary behaviour but should be no more than is required for this purpose."

153. I also take into account the following summary of the position in relation to exemplary damages given by Thomas LJ (as he then was) in ***Abdillaahi Muuse v Secretary of State for the Home Department*** [2010] EWCA Civ 453:

> *"69 A number of authorities were cited as being helpful in determining how Lord Devlin's summary of the legal position should be refined including **Holden v Chief Constable of Lancashire** [1987] QB 380 and **AB v South West Water** [1993] QB 507. In the first case, Purchas LJ considered that, although Lord Devlin used the words 'oppressive, arbitrary or unconstitutional' disjunctively, it was not enough that the action be simply unconstitutional; there had to be an improper use of "constitutional or executive power". In the second, Sir Thomas Bingham MR (at page 529) after pointing out that Lord Devlin's phrase ought not to be subject to minute textual analysis as it was a judgment, not a statute, considered that there was no doubt what Lord Devlin was talking about:*
>
> *'It was gross misuse of power, involving tortious conduct by agents of the government'.*
>
> *70 Lord Devlin's phrase 'oppressive, arbitrary or unconstitutional' must be read, as was made clear by Lord Hutton in **Kuddus v Chief Constable of Leicestershire** [2001] UKHL 29, [2002] AC 122 at paragraph 89, in the light of Lord Devlin's further view at page 1128:*
>
> *'In a case in which exemplary damages are appropriate, a jury should be directed that if, but only if, the sum which they have in mind to award as compensation (which may, of course, be a sum aggravated by*

the way in which the defendant has behaved to the plaintiff) is inadequate to punish him for his outrageous conduct, to mark their disapproval of such conduct and to deter him from repeating it, then it can award some larger sum.'

As Lord Hutton observed, the conduct had to be 'outrageous' and to be such that it called for exemplary damages to mark disapproval, to deter and to vindicate the strength of the law.

71 In my view, the guidance given by Sir Thomas Bingham MR and Lord Hutton is sufficient. There is no need for this to be qualified by further looking for malice, fraud, insolence cruelty or similar specific conduct. There is no authority that supports Dr McGregor's view to this effect."

In the same case, Thomas LJ went on to say this:

"75 The decision to make an award of exemplary damages was moreover a good example of the type of case referred to by Lord Devlin in Rookes v Barnard at page 1223 where its effect will serve 'a valuable purpose in restraining the arbitrary and outrageous use of executive power'. There has been no Parliamentary or other enquiry into Mr Muuse's case. No Minister or senior official has been held accountable. We were not told of any internal or other enquiry conducted by the Permanent Secretary or Head of the Immigration Directorate (or as it now is the UK Border Agency). The only way in which the misconduct of the Home Office has been exposed to public view and his rights vindicated is by the action in the High Court."

154. With these considerations in mind, I ask myself whether there are factual findings in the present case which are relevant to the question of whether an award of aggravated damages should be made, in other words whether there are aggravating features about the case which would result in the Claimant not receiving sufficient compensation were he to receive only *"basic"* damages. I stress, however, that I am not at this stage deciding whether aggravated damages should actually be awarded in this case because assessment of damages is to take place later. I am merely, as I say, considering whether there are factual findings which are appropriate in the light of the evidence which I have heard.

155. In considering this question, a matter which was not the subject of particularly detailed submissions before me, I have had regard to the matters set out in the Particulars of Claim at paragraph 74, as follows:

"(i) Any false imprisonment and/or unlawful detention is unconstitutional and necessitates consideration of aggravated damages and exemplary damages.

(ii) The Claimant was a child at all material times and there were no 'most exceptional circumstances' in which his detention on 2 July 2012 and/or 17 July 2012 can be said to be constitutional and/ or lawful.

(iii) The Claimant was handcuffed as a child with the use of unlawful and/or unreasonable force on two occasions on 2 July 2012 and on 17 July 2012.

(iv) The Claimant was not given adequate (or at all) medical treatment and care in detention at all material times.

(v) During his detention, the Claimant's development was impeded because he was detained in adult facilities that were unsuitable for unaccompanied children and he was deprived of the care and emotional support he needed.

(vi) At all material times during the 1st period of detention, the Defendant failed to provide an appropriate adult to the Claimant when he was fingerprinted, booked-in and when a 'Children's Current Circumstances' interview was carried out with the Claimant.

(vii) He was not provided with an interpreter in person and had to conduct his communications with the Defendant via telephone interpreter in the absence of an appropriate adult.

(viii) The Defendant carried out an interview with the Claimant about his 'current circumstances' in the absence of an appropriate adult before referring him for child welfare services with Kent County Council. This interview was unreasonable and/ or unnecessary for determining the Claimant's need for safety and care as an unaccompanied child asylum-seeker.

(ix) At all material times during the 2nd period of detention, the Defendant required the Claimant to take showers in a communal shower area with adults.

(x) During at least part of the 2nd period of detention, the Defendant required the Claimant to share a room with an adult male and

(xi) The loss of liberty caused the Claimant to suffer anxiety, distress, insomnia and nightmares.

(xii) The Claimant was unable to explain his problems to staff because of the absence of interpreters."

156. Taking these matters in turn:

(1) I need say nothing further about (i) and (ii): I have already explained that I agree that there was unlawful detention both on 2 July 2012 and thereafter in the period from 17 July to 10 August 2012. Whether that justifies an award of exemplary or aggravated damages is a different question, however, and not one which I am presently considering. However, I would have thought that the fact of the unlawful detentions in and of themselves would be unlikely to justify the award of exemplary or aggravated damages.

(2) As to (iii), the Claimant's evidence in paragraphs 4 and 12 of his witness statement is that he was handcuffed when he was taken, in the first case, to the police station on 2 July 2012, having been arrested by Kent Police (paragraph 4), and, in the second case, that he was handcuffed when he was taken to Dover Immigration Removal Centre on 17 July 2012. The Claimant was not cross-examined about this. Nor was any contrary evidence called by the Defendant. In the circumstances, I find as a fact that what the Claimant says happened did actually happen, whilst noting that the Claimant does not say that he was handcuffed when, on 2 July 2012, he was conveyed from Folkestone Police Station to the Kent Response Team. Whilst he was in immigration detention on 2 July 2012, therefore, there is no evidence that he was placed in handcuffs. (Although in the Particulars of Claim, a case is put forward which alleges assault and battery by dint of the Claimant having been handcuffed on 2 and 17 July 2012, this is not an issue which was addressed in Miss Luh's skeleton and it was only very briefly mentioned in her oral closing submissions. The first time that Miss Luh sought to develop the assault and battery case was when she provided her list of typing errors and *"obvious errors"* having received the judgment in draft. This was not satisfactory and was something to which Mr Hansen objected. I am not prepared, in the circumstances, to find in this judgment that there was assault and battery. It is a matter which will need to be deferred to the assessment of damages stage, as I indicated would be the case in the draft judgment which I circulated. However, I should say that there is no basis at all for such an allegation succeeding in relation to 2 July 2012, in view of my finding that the Claimant was not handcuffed by the Defendant on that date – a finding reached by reference to the Claimant's own witness statement.)

(3) As to (iv), I am unable to make any findings that the Claimant was given inadequate medical treatment and care *"in detention at all material times"*. The Claimant does not, in his witness statement, state that he was in need of medical attention on 2 July 2012 whilst in the Defendant's detention, although there is a complaint in paragraph 4 of his witness statement that, whilst in police custody, and so presumably also when formally in immigration detention after 16.00 hours on 2 July 2012, he was not offered any food or drink – something which he accepts he did receive after his arrival at the Kent Response Team. As to the Claimant's time in detention after 17 July 2012, the Claimant says in paragraph 22 of his witness statement that he did not see a doctor whilst he was in the detention centre although one morning he did receive a letter (in English) offering an appointment with a doctor which he missed because he could not read the letter in time to make the appointment, and he complains that he was not feeling well in the previous paragraph. I find that that was the case as a matter of fact, given that there was no challenge to this evidence. However, I am in no position at this stage to make a finding as to whether medical care should have been provided as I was provided at trial with no evidence on that question either way, and I was not addressed by either Miss Luh or Mr Hansen on this issue. Again, the first time that Miss Luh sought to develop this aspect of the Claimant's case was when she provided her list of typing errors and *"obvious errors"* having received the

judgment in draft. In doing so, she cited Rules 33 and 34 of the Detention Centre Rules 2001/238. Mr Hansen has, however, had no proper opportunity to deal with what Miss Luh has had to say, and I do not regard it as appropriate, in such circumstances, that I should make a determination on this issue. It is, therefore, another matter which will need to be deferred to the assessment of damages stage.

(4) As to (v), again I am in no position to make a finding that the Claimant's development was impeded during his time in detention, by which is presumably meant the period of detention starting on 17 July 2012 and ending on 10 August 2012, since no evidence was adduced before me on this question. As a matter of fact the Claimant was a minor during this period, as was subsequently established in April 2013. The consequences of this in terms of the Claimant's development and the suitability or otherwise of the facilities in which he was held are, however, matters in relation to which I make no finding.

(5) As to (vi), I find that the Claimant did not have an appropriate adult when he was fingerprinted, booked-in and interviewed on 2 July 2012: in paragraph 5 of his witness statement, the Claimant states that *"There was no one else in the interview with me"*. This is evidence which was not challenged by the Defendant. Although he does not say whether there was an appropriate adult with him when he was fingerprinted and booked-in, that seems probable.

(6) As to (vii), the same applies to the question of whether the Claimant had an interpreter in person, as opposed to over the telephone, on 2 July 2012: in paragraph 5 of his witness statement, the Claimant states that *"An interpreter was … provided by telephone"*. Again the Defendant did not challenge this evidence.

(7) As to (viii), I repeat that I find that the Claimant was interviewed on 2 July 2012 in the absence of an appropriate adult. I have already stated my conclusion that the interview which took place between 18.35 hours and 18.55 hours was unnecessary for determining the Claimant's need for safety and care as an unaccompanied child asylum-seeker. It probably follows that the interview was unreasonable, but it is sufficient that I have decided that it was unnecessary.

(8) As to (ix), the Claimant's (unchallenged) evidence, in paragraph 23 of his witness statement, was that during the period of detention from 17 July 2012 to 10 August 2012 he had to shower in a communal shower area with adults. I so find.

(9) As to (x), the Claimant's (again unchallenged) evidence, in paragraph 14 of his witness statement, was that for one night during the period of detention from 17 July 2012 to 10 August 2012 he shared a room with an adult male. I so find.

(10) As to (xi), the Claimant's (once again unchallenged) evidence, in paragraph 19 of his witness statement, was that during the period of

detention from 17 July 2012 to 10 August 2012 he had nightmares and that he would wake up at night, and that he felt sad and depressed. I so find.

(11) As to (xii), the Claimant's evidence, in paragraph 21 of his witness statement, was that during the period of detention from 17 July 2012 to 10 August 2012 he did not feel able to tell the officers in the detention centre about how he was feeling because he found them intimidating and they spoke different languages to Farsi, and that a fellow detention centre detainee had to interpret for him in the absence of an interpreter. Again, this evidence was not challenged and I find that the position was as the Claimant described.

157. I also have regard to what is stated in paragraph [75]:

"Further the Claimant will rely in support of his claims for aggravated and exemplary damages upon the conduct and attitude of the Defendant to the litigation and in the. proceedings, including the Defendant's failure to apologise to the Claimant; seek to justify the aforesaid conduct; and the extent to which the Defendant put forward a contrary factual account and seeks to impugn the Claimant's sincerity and honesty in relation to the matters herein pleaded."

158. As to what is alleged in paragraph 75, I am not aware that the Claimant has ever received an apology from the Defendant for anything done in relation to him by the Defendant. Accordingly, I find that he has not received such an apology. In circumstances where the Defendant has not sought to challenge any of the evidence given by the Claimant in his witness statement, clearly the second part of paragraph 75 is of no application. In relation to the *"conduct and attitude of the Defendant to the litigation and in the proceedings"* more generally, this is a vague allegation which, without elaboration from Miss Luh, is not easy to evaluate. I struggle, based on what I know, to see that there is anything in the Defendant's conduct in, or attitude to, this litigation which is relevant to the question of whether aggravated damages or exemplary damages should be awarded, save possibly in relation to the aspect addressed in the next paragraph. In the circumstances, however, as I made clear in the judgment which I circulated in draft, this is a matter in relation to which I would, if necessary, allow further submissions to be made. I am not prepared to deal with points made for the first time by Miss Luh when she provided her list of typing errors and *"obvious errors"* having received the judgment in draft. These are matters which will need to be addressed at the assessment of damages stage. That said, I have already made findings in relation to the evidence given by Miss Whall, Miss Finlayson and Miss Helbling. As I say, I reject the suggestion, in particular, that any of these witnesses adopted a high-handed approach, whether in giving evidence or in their handling of the Claimant's case. I consider that this applies in relation both to what happened on 2 July 2012 and on 17 July 2012. As to the former, I reject the submission made by Miss Luh that the Defendant has maintained an outrageous or arbitrary (or other relevant to aggravated or exemplary damages) approach to the handling of child entrants in the wake of ***AN and FA***. I consider that the Defendant (specifically, in the present case, Miss Whall) was mistaken in not

referring the Claimant to Kent CS after booking-in, and in apparently thinking that it was lawful subsequently to interview the Claimant notwithstanding ***AN and FA***, but I do not consider that what was done was done knowing or intending to disregard ***AN and FA***. I say again also that I am clear that Miss Finlayson and Miss Helbling genuinely believed that what they did in the Claimant's case was in compliance with the *'Assessing Age'* guidance.

159. As to the position in relation to the documents provided by the Claimant to the Defendant, and the period of unlawful detention which I would have determined that there was, in the period from 7 to 10 August 2012, had I not decided that the entirety of the second period of detention was unlawful, I am not in a position to make any relevant findings other than to repeat that I find it surprising that the Defendant did not adduce evidence from anybody who actually carried out the detention reviews, explaining why the documents are not mentioned in the *'Detention Review'* record, and to repeat also that the documents ought to have been taken into account. Beyond this, I do not presently feel able to go.

160. The above represents the extent of the factual findings which, at least at this stage, I regard it as appropriate to make in relation to the aggravated and exemplary damages issues. It will be for another occasion for it to be determined whether, in the light of those factual findings, aggravated and/or exemplary damages ought actually to be awarded to the Claimant. I refrain from expressing any view on this (ultimate) question because I would not want to appear to prejudge the issue, having not yet heard detailed submissions in relation to damages of any sort (whether basic, aggravated or exemplary).

Conclusion

161. In conclusion, therefore:

(1) in relation to the first period of detention, I am satisfied that the Claimant was unlawfully detained after completion of the booking-in process, starting at 17.50 hours and ending at 19.10 hours; and

(2) in relation to the second period of detention, I am satisfied that the Claimant was unlawfully detained throughout, namely from 17 July to 10 August 2012.

Declarations to this effect are, accordingly, appropriately made.

162. In accordance with the agreement of the parties, there will need to be a subsequent assessment of damages, unless, of course, the parties can reach agreement in relation to that issue.