



Neutral Citation Number: [2021] EWHC 1990 (Admin)

Case No: CO/5492/2017

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

Birmingham Civil Justice Centre

Date: 15/07/2021

Before :

THE HONOURABLE MR JUSTICE MORRIS

Between :

**THE QUEEN (on the application of
BIRMINGHAM CITY COUNCIL)**

Claimant

- and -

LONDON BOROUGH OF CROYDON

Defendant

- and -

YG

**First Interested
Party**

- and -

**SECRETARY OF STATE FOR THE HOME
DEPARTMENT**

**Second
Interested Party**

Christine Cooper (instructed by **Birmingham City Council Legal Services**) for the **Claimant**

Joshua Swirsky (instructed by **London Borough of Croydon Legal Services**) for the
Defendant

Antonia Benfield (instructed by **Bhatia Best, Solicitors**) for the **First Interested Party**

The Second Interested Party did not appear

Hearing dates: 4 and 5 February 2021

Approved Judgment

Mr Justice Morris :

Introduction

1. By these proceedings for judicial review, the Court is asked to determine the extent of the duties owed by the defendant, the London Borough of Croydon (“Croydon”) to an unaccompanied asylum seeking child, YG, and the consequences that flow from any failure to fulfil those duties.
2. The claim was commenced by YG on 24 November 2017. However pursuant to an order of Swift J made on 8 April 2019, Birmingham City Council (“Birmingham”) was substituted as the claimant, in place of YG. YG became an interested party. The second interested party is the Secretary of State for the Home Department (“the Secretary of State” or “the Home Office”).
3. YG claimed asylum as a child, but was treated by the Secretary of State as an adult because she considered her to be over 18 years old. At that point YG was placed in adult accommodation, first in Southwark, and then in Birmingham. YG then sought appropriate accommodation and support under the Children Act 1989 (“CA 1989”). Birmingham agreed to accommodate her on a without prejudice basis, but maintained that Croydon was the responsible authority. Once Birmingham was substituted as the claimant, the essential dispute became one between the two local authorities.

The Facts

4. YG is an Eritrean national. She is now aged 20. She entered the UK on 26 October 2017 as an unaccompanied asylum seeker. On the same day, she presented herself at the Home Office at Lunar House in Croydon for the purpose of claiming asylum. She claimed that her date of birth was 10 October 2000 and thus that she was 17 years old.
5. At the time there was in operation a joint working protocol (“the Protocol”) between Croydon and the UK Visas and Immigration Department of the Home Office (“UKVI”). Under the Protocol, a duty social worker from Croydon is present in the Home Office asylum screening unit at Lunar House during normal working hours. On 26 October 2017, the duty social worker from Croydon was Mr Paul James.

The asylum screening interview: 26 October 2017

6. On that day, the Home Office conducted an asylum screening interview with the duty social worker from Croydon in attendance, acting as the “Appropriate Adult” for YG. The Home Office caseworker reached a decision as to YG’s age on the basis of her physical appearance and demeanour. The Home Office has subsequently asserted that the duty social worker agreed with that age assessment.

The IS.97M letter

7. On the same day the Home Office issued a formal letter on standard form IS.97M. It was signed by a chief immigration officer. The IS.97M letter has the box ticked which states “*Your physical appearance/demeanour very strongly suggests that you are significantly over 18 years, of age.” (emphasis added)*. However the letter starts as follows: “*Dear Miss [YG] Eritrea 10 October 1999*”, thus suggesting that YG’s

date of birth was 10 October 1999. (This is not stated to be an estimated or assessed date of birth). That date of birth made her just 18 years and 16 days old at that time. The inconsistency between these two statements of her age, and whether Mr James was aware of it, are at the heart of the dispute in this case.

8. The IS.97M letter goes on to state:

“In the absence of credible documentary evidence to the contrary, the Secretary of State does not accept that you are a child and from this point therefore you will be treated as an adult applicant for asylum....

The Home Office’s determination of your age does not prevent you from approaching a local authority’s Children’s Services department with a view to them undertaking their own assessment of your age. If the Children’s Services assessment concludes that you are a child and the Home Office is provided with sufficient evidence of this, the Home Office’s determination of your age will be reviewed.”

(emphasis added)

9. The Home Office processed YG’s asylum claim on the basis that she was an adult. Initially she was moved to accommodation within the London Borough of Southwark where she remained for a number of days. She was then moved on to accommodation at 3 Stone Road in Birmingham. Croydon did not take any action itself in relation to YG. Mr James has no recollection of YG.

Events between 22 and 30 November 2017

22 November 2017

10. At 4:44pm on 22 November 2017 Bhatia Best, acting for YG, wrote to Birmingham seeking agreement that YG be treated as a putative child and provided with interim support pending a review of her entitlement to services under the CA 1989. Birmingham was given until 5pm the next day to confirm that they would take those steps.

23 November 2017

11. At 9:33am on 23 November 2017 Mr Bradley of Birmingham Children’s Trust (acting on behalf of Birmingham) sent an email to the Home Office asking whether YG’s age had been assessed by a local authority. At 10:52am the Home Office replied to Mr Bradley, in the following terms:

“Notes on our system suggest that this applicant is a disputed minor. She was issued with an IS.97M we currently have her on our system with a DOB of 10/10/1999. This applicant was fingerprinted when she was encountered in Italy on 07/04/2017. She claimed asylum in its Italy 17/04/2017. It looked like YG claimed DOB was 10/10/2000. This applicant

was spoken to in the presence of Croydon Social Services duty social worker who agreed that she was **significantly over** the age of 18.” (**emphasis added**)

At 1:18pm Birmingham responded to Bhatia Best stating that “*Birmingham has information that your client [YG] has been age assessed by Croydon to be an adult*” and on that basis Birmingham did not accept responsibility for YG. Birmingham suggested that YG be referred back to Croydon to challenge the age assessment decision.

12. At 1:40pm Birmingham sent an email to Croydon providing YG’s name and other references and requested confirmation of whether Croydon had undertaken an age assessment and a copy of any such assessment. At 2:09pm Bhatia Best replied to Birmingham stating that YG’s age had only been assessed by the Home Office and that Croydon had not conducted an assessment. At 5:24pm Birmingham emailed the Third Country Unit (“TCU”) at the Home Office, requesting details of the social worker who had been present at YG’s screening interview.

24 November 2017

13. At 9am Mr Luke of Bhatia Best sent an email to Croydon asking whether it had conducted an age assessment. He did not think it had done so, but another local authority was saying that Croydon had completed an age assessment. Rather Mr Luke thought that they were referring to a Home Office assessment and not an age assessment, because YG was only in Croydon’s area for attending the Home Office. He suggested that Croydon might be made an interested party in YG’s claim for judicial review. At 12:20pm Birmingham called Croydon on the telephone to request a response to previous emails. Croydon said that YG was not known on their database and that they were unable to provide a contact for the asylum team within children’s services. At 1:07pm Birmingham decided internally that it would provide YG with accommodation on a temporary basis, pending further enquiries with Croydon.
14. At 1:46pm Croydon responded to Birmingham stating that it had “no trace” of YG on their system. At 1:48pm Birmingham replied, asking how it was possible that there was no record of YG when the Home Office had confirmed the involvement of a duty social worker. After further emails, Croydon gave Birmingham a telephone number for the “duty UASC” at Croydon.
15. During the afternoon YG was accommodated in supported accommodation suitable for 16 to 17-year-olds. By email at 3:47pm Croydon informed Bhatia Best that YG “has not been Age Assessed by Croydon”.
16. On that date YG’s claim for judicial review against Birmingham was issued, together with an application for interim relief on an urgent basis. At that stage Croydon was not named as an interested party. Later that day Mrs Justice Yip made an order requiring Birmingham to respond to the claim for interim relief by 4pm on 28 November 2017.

27 November 2017

17. Mr Bradley of Birmingham Children’s Trust telephoned the “duty UASC” at Croydon and was given further information about the role of the duty social worker at the Asylum Screening Unit. Then in an email to Mr Absolon, the unit manager at Croydon, Mr Bradley explained that in that telephone call, he had been told that the duty social worker was asked for an opinion on age, but the decision was that of the Home Office and no records were kept. He had been told that “*Croydon are not accountable as no “referral” was made to Croydon by the Home Office*”. Mr Bradley argued, however, that the fact that the social worker is aware of the situation is essentially “*a referral to the social worker*”.

18. At 10:01 am, Mr Absolon at Croydon replied to Birmingham stating:

“... Where the Home Office believe someone to be a young person they are referred to us and we accommodate and age assess where relevant.

There will be times when people present at the Children’s Screening Unit who are adults, and the social worker would have a conversation with the immigration officer and then the immigration team make a decision as to whether to refer to us or process the person through their adult system.

... I’ve checked our systems and she was not referred to us and I assume YG was processed as an adult.” (emphasis added)

19. At 10:59am Birmingham replied to Mr Absolon at Croydon pointing out that the social worker was involved in the decision on age and pointing out that “*the putative child was in need in Croydon initially*”. There ensued further emails between Birmingham and Mr Absolon at Croydon in the course of the day, rehearsing their respective arguments.

28 November 2017

20. In accordance with Mrs Justice Yip’s order, Birmingham set out the information required by the Court and confirmed that YG had been provided with accommodation pending further enquiries with Croydon

30 November 2017

21. At 9:59am the Home Office (TCU) responded to Birmingham’s inquiry of 23 November (at 5:24pm). It stated again that the social worker had agreed that YG was “*significantly over the age of 18*”. Further emails were exchanged that morning in which it was confirmed by the TCU that the decision as to YG’s age was informed by the opinion of the Croydon social worker.

Subsequent events

22. Following its decision to accommodate YG, Birmingham assessed her needs and found no reason to doubt her claimed age. In such circumstances it considered it unnecessary to conduct an age assessment. Birmingham has continued to provide YG

with accommodation and support, whilst asserting that Croydon is the responsible authority. Birmingham provided services under the CA 1989 until her claimed 18th birthday on 10 October 2018. Since that date, Birmingham has provided her with services under the “leaving care provisions” of section 23C CA 1989.

23. On 7 February 2018 Birmingham wrote to Croydon, putting it on notice that it would seek reimbursement of its costs of providing YG with accommodation and related support. This claim was subsequently reiterated in a letter dated 22 March 2019, placing express reliance upon section 27 CA 1989, on the basis that “the action” required of Croydon was the indemnification of costs of support. On the same date, Birmingham sent a formal request under section 27 for Croydon to exercise any functions which Birmingham had, as the responsible authority in relation to YG. Croydon responded by detailed letter dated 25 March 2019, contending that section 27 does not apply to the present situation, for a number of reasons.

The Proceedings

24. On 9 February 2018 Birmingham filed and served acknowledgement of service. There ensued email correspondence between Birmingham and Croydon and between Birmingham and the Home Office. By consent order dated 24 July 2018 Croydon was joined as a defendant and the Secretary of State was joined as an interested party. By order dated 3 October 2018 Croydon was required to serve amended summary grounds of defence. On 11 December 2018 YG filed and served amended grounds for judicial review. Croydon subsequently served amended summary grounds of defence. On 21 March 2019 Mr James made his witness statement.
25. By order of Mr Justice Swift made on 1 April 2019 Birmingham was substituted for YG as the Claimant and was granted permission to apply for judicial review. On 29 April 2019 Birmingham served its grounds of claim and on 31 May 2019 Croydon filed detailed grounds of defence.

Current position

26. YG is now 20 years old and has a baby. She continues to be supported by Birmingham on a without prejudice basis pending the resolution of these proceedings. Her asylum claim is yet to be determined by the Secretary of State. A date for her substantive interview was postponed and has not yet been rescheduled.

The evidence

Mr James’ witness statement

27. In his witness statement, Mr James explains that he is an advanced social worker who has been employed by Croydon over an 11 year period. His statement continues:

“4. On the 26.10.2017, I was the assigned social worker to undertake a duty role at the Croydon Home Office at Lunar House, Wellesley Road, Croydon. I do not have any recollection of [YG]

5. *My role as duty social worker at the Home Office was to be present to receive any referrals for the Pan London Rota or for short-term Local Authority care with the London Borough of Croydon pending dispersal arrangements through the National Transfer Scheme. My assistance would be sought to act as an Appropriate Adult during the interview process for any unaccompanied children presenting to the Asylum Intake Unit and also to monitor their wellbeing during this time, such as by providing them with refreshments or ascertaining if they have any known health needs that would require immediate attention. I would facilitate the referral process for children coming into Local Authority care by communicating with the duty team in Croydon Council's Children in Care (UASC) Service...*
6. *My role was solely to be available for children presenting at the Home Office, unaccompanied and I would intervene once a person is identified to be referred to the Local Authority for services as a child under Section 20, Children Act 1989. The Home office staff would refer any adults to a separate department (Adult Team). I would not be involved in intervention for adults.*
7. *In terms of undertaking Age Assessments at the Home Office, this is not the role of the duty social worker based there, as there is no provision for this to be undertaken and for the Age Assessment to be Merton compliant or to comply with the ADCS guidelines.*
8. *I can confirm that on the 26.10.2017, I did not undertake an Age Assessment on [YG] as this is not in accordance with my role or the protocol followed for Age Assessments or the working terms with the Home Office."*
(emphasis added)

Ms Braaf's witness statement

28. Ms Lucretia Braaf is a Team Manager in the Children in Care (UASC) Service at Croydon. She was not involved with YG on 26 October 2017. She confirms that Croydon did not receive a referral from the AIU at the Home Office in respect of YG as a child under the CA 1989. She also confirms that Croydon was not requested to undertake a "Merton compliant" Age Assessment and no Age Assessment was completed by her service for YG. She then goes on to explain the arrangements under the Protocol in the following terms:

"Arrangements are made for a duty social worker to be located at the Croydon Home Office to assist with the process of receiving new referrals into our service. The role of the duty social worker at the Home Office does not include undertaking Age Assessments. It is not possible to undertake Age

Assessments at the point of the young person's initial arrival at the Home Office for the following reasons:

- i) The young person will not be in a good frame of mind to be subjected to the Age Assessment process and may not be fit and well, likely to have endured an adverse and long journey or trauma before presenting at the Home Office;*
- ii) The time it takes to undertake an Age Assessment that is Merton compliant and meets the requirements of the ADCS guidelines. It is also not feasible for this to be undertaken if the young person arrives late at the Home Office when a period of at least two full days is required for an Age Assessment to be completed;*
- iii) Preparation for the young person, which involves deciding who will act as the Appropriate Adult during the Age Assessment;*
- iv) The inability to ensure that the resources are available, to include a second Social Worker, interpreter and Appropriate Adult, within sufficient time for a Merton compliant and ADCS compliant Age Assessment to be completed.”*

The relevant legal framework

The Children Act 1989

29. Section 17 CA 1989 provides as follows

“(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—

- (a) to safeguard and promote the welfare of children within their area who are in need; and*
- (b) so far as is consistent with that duty, to promote the upbringing of such children by their families,*

by providing a range and level of services appropriate to those children's needs.”

(emphasis added)

30. Section 20 CA 1989 provides as follows:

“(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

- (a) *there being no person who has parental responsibility for him;*
- (b) *his being lost or having been abandoned; or*
- (c) *the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.*

Paragraph 1(1) of Schedule 2 to the CA 1989 further provides that ‘[e]very local authority shall take reasonable steps to identify the extent to which there are children in need within their area’ (*emphasis added*). Paragraph 3 of Schedule 2 provides that “where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of this Act at the same time as any assessment of his needs is made under” various other enactments.

31. Section 22 CA 1989, headed “General duty of local authority in relation to children looked after by them”, provides as follows:

“(1) *In this section, any reference to a child who is looked after by a local authority is a reference to a child who is*

-
- (a) *in their care; or*
- (b) *provided with accommodation by the authority in the exercise of any functions ... which are social services functions within the meaning of the Local Authority Social Services Act 1970 apart from functions under sections 17, 23B and 24B”*

32. Section 23A CA 1989, headed “The responsible authority and relevant children”, provides as follows:

“(1) *The responsible local authority shall have the functions set out in section 23B in respect of a relevant child.*

(2) *In subsection (1) “relevant child” means ... a child who –*

- (a) *is not being looked after by any local authority in England or by any local authority in Wales;*
- (b) *was, before last ceasing to be looked after, an eligible child for the purposes of paragraph 19B of Schedule 2; and*
- (c) *is aged sixteen or seventeen*

...

- (4) *In subsection (1) the “responsible local authority” is the one which last looked after the child”*

(emphasis added)

Section 23B sets out “additional functions of the responsible authority in respect of relevant children”. It is the duty of each local authority to take reasonable steps to keep in touch with a relevant child for whom they are the responsible authority, whether he is within their area or not.

33. Section 23C CA 1989 provides as follows:

“23C Continuing functions in respect of former relevant children.

- (1) *Each local authority shall have the duties provided for in this section towards—*

(a) *a person who has been a relevant child for the purposes of section 23A (and would be one if he were under eighteen), and in relation to whom they were the last responsible authority; and*

(b) *a person who was being looked after by them when he attained the age of eighteen, and immediately before ceasing to be looked after was an eligible child,*

and in this section such a person is referred to as a “former relevant child”.

...”

(emphasis added)

34. Section 27 CA 1989, entitled “Co-operation between authorities”, provides as follows:

“(1) Where it appears to a local authority that any authority mentioned in subsection (3) could, by taking any specified action, help in the exercise of any of their functions under this Part, they may request the help of that other authority specifying the action in question.

(2) An authority whose help is so requested shall comply with the request if it is compatible with their own statutory or other duties and obligations and does not unduly prejudice the discharge of any of their functions.

(3) The authorities are—

(a) any local authority;

...”

35. Section 29 CA 1989 deals with the recoupment of costs of providing services. In particular section 29(7) provides as follows:

“Where a local authority provide any accommodation under section 20(1) for a child who was (immediately before they began to look after him) ordinarily resident within the area of another local authority ... they may recover from that other authority any reasonable expenses incurred by them in providing the accommodation and maintaining him.”

The Statutory Guidance

36. The relevant statutory guidance at the time of the decision on 26 October 2017 was “*Care of unaccompanied and trafficked children: Statutory guidance for local authorities on the care of unaccompanied asylum seeking and trafficked children (July 2014)*” published by the Secretary of State for Education in July 2014 (“the Statutory Guidance”). Paragraph 7 of the Statutory Guidance defines ‘child’ as follows:

“Child: anyone who has not yet reached their 18th birthday. ‘Children’ therefore means ‘children and young people under the age of 18’ throughout this guidance. Note that, where the person’s age is in doubt, they must be treated as a child unless, and until, a case-law compliant age assessment shows the person to be an adult” (emphasis added)

37. By section 7 Local Authority Social Services Act 1970, a local authority is obliged to follow the Statutory Guidance, when considering whether an individual is a child and when dealing with an individual whose age is yet to be determined: see *R (S) v London Borough of Croydon*, cited below, at §§35 to 38.

The Protocol

38. The Protocol, taking effect from 18 October 2017, provides, inter alia, as follows:

“Protocol on Working Practices in the Asylum In-take Unit.

1. Principle of Joint Working

1.1 The parties to this protocol are the London Borough of Croydon (referred to as the “Council” hereafter) and UK Visas and Immigration (UKVI) of the Home Office. While recognising the particular statutory nature of many of the responsibilities of the Council, both parties agree to cooperate in a spirit of partnership to safeguard and promote the welfare of vulnerable children from overseas who attend the Asylum In-take Unit (AIU) in Croydon to register an asylum claim.

1.2 For the purposes of this protocol persons attending the AIU will be regarded as vulnerable children if they are or appear to be under 18 years of age and:

- (i) *they appear to be separated from both parents and are not being cared for by an adult who by law has responsibility to do so (“unaccompanied children” for the purposes of this protocol); or*
- (ii) *they are accompanied by or appear to be living with an adult. (“accompanied children” for the purposes of this protocol);).*

1.3 If there are doubts about the person’s age they should nonetheless be treated as a child (pending a full Merton Compliant Age Assessment).

2. Overall Aim

To:

- (i) identify vulnerable children at the earliest possible opportunity.
- (ii) facilitate rapid access to any safeguarding services to which they are entitled by virtue of their age and assessed needs.
- (iii) *detect and resist attempts at fraudulent access to services designed and designated for children.*

3. Scope and Working Arrangements

Unaccompanied Children

3.1 UKVI will notify the Council (through the social worker attending AIU check on the particular day) of any child who appears to be unaccompanied and not already in the care of a Local Authority.

3.2 *If the social worker establishes that the child is the responsibility of the Council arrangements will be made to take the child into the Council’s support systems for an assessment of service eligibility.*

3.3 *If it appears to the social worker that the child is the responsibility of a different Local Authority the social worker will liaise with the particular Local Authority to ensure that the child is received into their support systems for an assessment of service eligibility. The social*

worker will also make any necessary transport arrangements to enable the child to travel to the Local Authority.

- 3.4 *If there is a dispute between the Council and the other Local Authority about which has responsibility for the child and that dispute is not resolved by 4.00 p.m. on the particular day the Council shall assume temporary responsibility for the child (pending resolution of the dispute at a later stage).*
- 3.5 *Any child who arrives at AIU public door after 4.15 p.m. and appears to be in need of accommodation and assistance will be referred to the Council's Emergency Out of Hours Duty Team.*
- 3.6 *The Social Worker will also act as the "responsible adult" for the child as necessary while UKVI completes the screening process in AIU.*

...

4. Administration

- 4.1 *The Council will identify and maintain a pool of suitably qualified and trained social workers, cleared for work in safeguarding and promoting the welfare of children, to carry out the functions described in section 3 of this protocol. The Council will ensure that the work carried out by these staff members is in accordance with its internal policies.*

...

- 4.3 *At least one member of the pool of available social workers shall attend AIU each working day Monday to Friday 09:00 to until completion of process of final walk-in case check, excluding Bank Holidays and other concessionary days) to carry out the functions described in this protocol. The Council shall use its best endeavours to make available extra social workers if there is a need on a particular day.*

...”

(emphasis added)

The Home Office Policy: “Assessing Age”

39. The Home Office policy in force at the relevant time was version 1 of its internal guidance entitled “Assessing Age”. Assessing Age provided, so far as material, as follows:

“1. Introduction

1.1 Purpose of instruction

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.

This instruction should be read in conjunction with the asylum instruction (AI) Processing an asylum application from a child.

1.2 Intended audience

This instruction is intended for officers responsible for screening asylum seekers, case owners, presenting officers and senior caseworkers.

1.3 Definitions

Child - is defined as a person under the age of 18 years (this is in line with the UN Convention on the Rights of the Child and section 55 of the Borders, Citizenship and Immigration Act 2009).

Unaccompanied Asylum Seeking Child – is a child who is:

- *applying for asylum in their own right; and*
- *is separated from both parents and is not being cared for by an adult who by law has responsibility to do so.*

Claimed date of birth – *the applicant's claimed date of birth.*

Estimated date of birth – *the UK Border Agency's assessed date of birth.*

2. Assessing age - general policy

As many asylum applicants who claim to be children do not have any definitive documentary evidence to support their claimed age, a decision on their age needs to be made. Many are clearly children whilst some are very clearly adults. In other cases the position is more doubtful and a careful assessment of the applicant's age is required. All available sources of relevant information and evidence should be considered, since no single assessment technique, or

combination of techniques, is likely to determine the applicant's age with precision.

2.1 Initial age assessment

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 significantly over 18 years of age.***

Careful consideration must be given to assessing whether an applicant falls into this category as they would be considered under adult processes, and could be liable for detention.

*Before a decision is taken to assess an applicant as significantly over 18, the assessing officer's countersigning officer (who is at least a Chief Immigration Officer (CIO)/Higher Executive Officer (HEO)) must be consulted to act as a 'second pair of eyes.' They must make their own assessment of the applicant's age. If the countersigning officer also agrees to assess the applicant as significantly over 18, the applicant should be informed that their claimed age is not accepted and that their asylum claim will be processed under adult procedures. Form IS.97M should be completed, served, and **signed by the countersigning officer (CIO/HEO grade or above).***

In general, the rest of this instruction does not apply to these applicants, since they fall to be considered under adult processes. Case owners should nonetheless review decisions to treat applicants as adults, if they receive relevant new evidence.

2. *All other applicants should be afforded the benefit of the doubt and treated as children, in accordance with the **'Processing an asylum application from a child AI**, until a careful assessment of their age has been completed. This policy is designed to safeguard the welfare of children. It does not indicate final acceptance of the applicant's claimed age, which will be considered in the round when all relevant evidence has been considered, including the view of the local authority to whom unaccompanied children, or applicants who we are giving the benefit of the doubt and temporarily treating as unaccompanied children, should be referred.*

...

3. Screening

All applicants who claim to be a child should be asked for documentary evidence to help establish their age. If an applicant's claim to be a child is doubted and there is no evidence to support their claim, the screening officer should conduct an initial age assessment.

*If the screening officer considers an applicant's physical appearance / demeanour very strongly suggests that they are significantly over 18 years of age a CIO/HEO (or higher grade) must be consulted. The CIO/HEO (or higher grade) should then make their own assessment of the applicant's age. If their assessment agrees with that of the screening officer the applicant should be informed that their claimed age is not accepted and that their asylum claim will be processed under adult procedures. Form IS.97M should be completed, served, and **signed by the CIO/HEO (or higher grade)**.*

In all other cases where the claimed age has not been accepted, the applicant should be informed, in a sensitive way, that because there is insufficient information at this stage on which to make a final decision, they will be given the benefit of the doubt and will be treated as a child, until all available information is collected and a decision on their age has been made. In these situations the most pressing need will usually be to arrange accommodation. Applicants should be informed that a referral will be made to the appropriate local authority to collect them and that the local authority will make an assessment of their age and communicate that information to the Agency, at which time a final decision will be made about their age (on-site social workers are available during normal working hours at Croydon asylum screening unit). For further guidance on referring an applicant to a local authority see section 6 of the Processing an asylum application from a child AI).

...

3.4 Recording age assessment details on asylum correspondence

*In any letter to an applicant whose age is in doubt (e.g. in the reasons for refusal letter) the Agency's **estimated** date of birth must be cited, not the applicant's **claimed** date of birth. It should be accompanied by a note that states that the applicant's age is in doubt. See below for an example:*

Name: Name

Nationality: Nationality

Date of Birth: 10 April 1992 (disputed)

...

5. Local authority age assessments

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.

...”

The rest of section 5 then sets out, on the basis of the law as it stood at that time, the requirements for *local authority* age assessments.

40. In *R(BF(Eritrea)) v SSHD* [2016] EWCA Civ 1113 the Court of Appeal summarised the then position derived from the above guidance and manual, in force at the time that YG presented to Lunar House, to the effect that young people should be accepted as their claimed age unless *one* of the following criteria applied:

- A. *There is credible and clear documentary evidence that they are 18 or over.*
- B. *A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over.*
- C. *Their physical appearance / demeanour very strongly suggests that they are significantly over 18 years of age and no other credible evidence exists to the contrary.*
- D. *The individual:*
 - *prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and*
 - *only claimed to be a child after a decision had been taken on their asylum claim; and*
 - *only claimed to be a child after they had been detained; and*
 - *has not provided credible and clear documentary evidence proving their claimed age; and*
 - *does not have a Merton compliant age assessment stating they are a child; and*
 - *does not have an unchallenged court finding indicating that they are a child; and*
 - *physical appearance / demeanour very strongly suggests that they are 18 years of age or over.”* (*emphasis added*)

Appropriate adult

41. The role of an appropriate adult in a *local authority* age assessment is described at p16 of the guidance issued by the Association of Directors of Children’s Services in October 2015:

“The appropriate adult must be independent of the local authority, have the relevant skills and training to undertake their role, and be experienced in working with children and young people. They need to be clear and confident about their role, have the skills to support the child or young person in the interview(s) and challenge social workers if they feel the interview is not being conducted appropriately. An appropriate adult should advocate on behalf of the child or young person, represent their best interests and ensure that the child or young person’s welfare needs are met during the interview process. Where relevant and possible, gender issues need to be considered when making arrangements for booking the appropriate adult.”

Case law

42. In *R (S) v London Borough of Croydon* [2017] EWHC 265, the claimant claimed to be aged 15. However, as in the present case, the Home Office, in its own age assessment, considered him to be significantly over 18. He was treated as an adult and accommodated in NASS adult accommodation *in Croydon*. He remained in that accommodation. He then approached Croydon and requested accommodation and support from Croydon, who eventually accepted that *it* would carry out an age assessment (see §6 and 55). The issue was whether, *pending* completion of *Croydon’s* local authority assessment, Croydon was required to provide accommodation and support to the person (on the basis that he was a child or a putative child). At §§38 and 60, Lavender J accepted the claimant’s submission that, pursuant to paragraph 7 of the Statutory Guidance, Croydon was required to treat the claimant as a child, pending that age assessment and thus to provide him with support and accommodation on that basis.

The Parties’ cases and the issues

The Grounds

43. Birmingham’s grounds of challenge are as follows:

Ground 1: Croydon breached its duty to treat YG as a child.

Ground 2: Croydon failed to carry out a lawful assessment of YG (including an assessment of age).

Ground 3: Croydon unlawfully failed to provide YG with accommodation and support.

Ground 4: Croydon remain legally responsible for the provision of accommodation and assistance for YG until she became an adult;

Ground 5: Croydon remained responsible for the provision of accommodation and assistance for YG as a care leaver.

44. Birmingham seeks orders: (1) requiring Croydon to provide accommodation and assistance for YG as a care leaver; (2) that it is entitled to restitution from Croydon; (3) that Croydon has unlawfully refused to comply with its request made pursuant to section 27 CA 1989.

The issues

45. The parties are not agreed as to the formulation of the relevant issues. Birmingham identifies the following six questions
- (1) What role did the Duty Social Worker play on 26 October 2017 when YG made her asylum claim?
 - (2) What duties did Croydon owe to YG on 26 October 2017?
 - (3) Has Croydon discharged such duties as it had, at some point *since* 26 October 2017?
 - (4) In the light of the answers to questions (1) to (3), what duties does Birmingham owe to YG?
 - (5) What are the consequences for YG's ongoing accommodation and assistance?
 - (6) In principle, should Croydon make recompense for any failure to fulfil its duty to YG?
46. On the other hand, Croydon contends that there are only three relevant questions
- (1) Was Croydon in breach of duty on 26 October 2017?
 - (2) If it was, did Croydon continue to be in breach thereafter?
 - (3) What are the consequences of any breach by Croydon?
47. In my judgment, the issues can be stated as follows:
- (1) On 26 October 2017 what duties did Croydon owe to YG and was Croydon in breach of those duties? [*Birmingham's questions (1) and (2), and Croydon's question (1)*]
 - (2) What continuing duties did Croydon and/or Birmingham owe to YG up to the age of 18? [*Birmingham's questions (3) and (4), and Croydon's questions (2) and, in part, (3)*]
 - (3) What duties did Croydon and/or Birmingham owe to YG once she attained 18? [*Birmingham's question (5) and part of Croydon's question (3)*]

- (4) Does Birmingham have a claim against Croydon for reimbursement of its costs of accommodating and supporting YG? [*Birmingham's question (6), and part of Croydon's question (3)*]

Issue (1): Croydon's duties as at 26 October 2017

Birmingham's case

48. Birmingham submits that on 26 October 2017 Croydon came under duties under section 17 and 20 CA 1989 to assess YG's needs, to carry out a lawful age assessment, and to provide accommodation.
49. Mr James' role at the interview on that date was to identify vulnerable children and facilitate their reception into local authority care (even where there is a dispute about their age). Mr James knew that YG claimed to be a vulnerable child. The primary responsibility of assessing a person's entitlement to services under the CA 1989 is placed on local authorities. Mr James was present and he *knew* that the Home Office considered YG to be only 16 days beyond her 18th birthday, and on that basis, he *knew* that a full age assessment was required before she could be treated as an adult. The Home Office's decision to accommodate YG in adult accommodation was an unlawful decision.
50. Croydon became subject to duties to YG as soon as it was aware that she was a putative child in need in its area. The section 20 duty applies to a child in need "who appears to" require accommodation. Croydon was affixed with that knowledge from Mr James' attendance at the interview and it was required to treat her as a child until a lawful assessment established that she was an adult – her age was "in doubt": see paragraph 7 of the Statutory Guidance and *R (S) v LB Croydon*, supra, at §§31-32 and 33-36. The duty social worker at Lunar House is the "eyes and ears" of Croydon's children services. Ms Cooper submitted that the duty upon Croydon would arise where a social worker comes across a child begging in the street and even if the child is about to cross over the street to another local authority area. Physical presence is all that is required to trigger the duty to assess.
51. Age assessment is not a precursor to a section 17 duty. There is a duty to provide services to a putative child, pending assessment. *R(S) v LB Croydon* applies and there is no material difference between the facts of that case and those of the present case. Croydon was under a duty, at the very least, to receive YG as a putative child and to provide her with accommodation because she fulfilled the criteria under section 20(1) CA 1989.
52. As to whether Croydon had in fact carried out any age assessment, Mr James' acquiescence in the Home Office assessment must have required him to consider whether or not he agreed that she was an adult. However Birmingham contends that Croydon has not carried out a lawful assessment of YG's age and so was required to treat her as a child. The CA 1989 duties fall upon the local authority in whose area the UASC is physically present when he or she makes a claim.

YG's case

53. YG now supports Birmingham's case, submitting that Croydon acted unlawfully on 26 October 2017 in failing to discharge its statutory duties to YG under CA 1989. YG should have been taken into Croydon's care on 26 October and provided with support and accommodation under CA 1989.
54. At the time Croydon, through Mr James, was well aware that the Home Office disputed YG's age, that she was claiming to be a child in Croydon's area and that she was a putative child in need and that she had not been age assessed by any other local authority. Critically Croydon was aware that the child had been assessed by the Home Office to be "just over 18 years of age". Further Mr James himself expressed an opinion on her age which contributed to the Home Office's decision. Thus, it should have been obvious YG was a putative child and that an age assessment was required, pursuant to its duty under paragraph 1(1) of Schedule 2 to CA 1989. Having seen the narrow margin by which YG exceeded 18 years, Mr James should have concluded that there was "doubt" and said that Croydon needed to conduct an age assessment.
55. The Home Office assessment here was unlawful, because it could not be said that YG was "significantly over" the age of 18 in view of the finding of the date of birth as 10 October 1999.
56. As to Croydon's contentions, in order for a child to be within the area of the local authority, there is no requirement for the child to be spending considerable periods of time in the area. Secondly, Croydon cannot contend that the assessment made on 26 October 2017 was a Home Office assessment for asylum purposes only. A local authority owes separate statutory duties under the CA 1989 not owed by the Home Office. Croydon was required to come to their own independent decision on what was required to safeguard YG at that time. YG should have been taken into Croydon's care, for support and accommodation to be provided pending a decision on age by Croydon.
57. In any event, it should have been apparent to any reasonable local authority that YG was not someone who was obviously an adult, and thus did not fall into the category of clear cases where no full assessment of age was required. On this basis too, Croydon should have taken her into their care pending a full Merton age assessment. It was not permissible for Croydon to ignore the fact that YG had presented as a child and was not clearly and obviously an adult.
58. Further there is no requirement for there to be a referral by the Home Office to the local authority, before the latter is under a duty to assess the putative child. Croydon was aware of YG's claimed age and the dispute. Whilst Croydon does not owe a duty to every child present within their area, where, as here, Croydon is aware that a person is in their area and claiming to be a child in need, then the duty to assess and support arises. The Protocol cannot override Croydon's statutory duties.

Croydon's case

Overall submission

59. Croydon submits that it did not breach any duty under CA 1989 on 26 October 2017. The Home Office was entitled to carry out its initial assessment. This led to YG

being treated as an adult. She then applied for services to Birmingham as she was entitled to do, and as the IS.97M advised that she could do. As far as Croydon was aware, the Home Office had no doubts about its conclusion. The Home Office had followed its own guidance and had come to a lawful decision.

60. If the Home Office had concluded, in its initial assessment, that YG was a child and then referred her to Croydon, Croydon would have been under a duty to assess her needs. However the Home Office did not refer her to YG as a putative child. Rather the Home Office assessed her as an adult.

The structure of responsibility and the Protocol

61. Croydon made detailed submissions on the different functions served by the Home Office age assessment (in the context of the Secretary of State's duties to safeguard and promote the welfare of children under section 55 Borders, Citizenship and Immigration Act 2009 ("section 55")) and by local authority age assessment (in the context of duties under CA 1989) and on the practical background to, and purposes and effect of, the Protocol and on the role of the duty social worker at Lunar House. In particular Mr. Swirsky referred to the process of "referral" by the Home Office to the local authority only where the former considered the individual to be a child or at least had doubts that he or she might be. It is not the function of the duty social worker to carry out any form of age assessment at the Home Office stage. If it were, it would wholly undermine the practical working of the Protocol.

This case: the events of 26 October 2017

62. As to what happened on 26 October 2017, first, there was an IS.97M which stated that YG was significantly over 18 and thus an adult. That was the Home Office's decision. On that basis YG was referred to NASS accommodation. There is the oddity of the stated date of birth of 10 October 1999. That was likely to have been an error made by the Home Office. However there is no evidence that Mr James ever saw the IS.97M or the date of birth nor that he was aware of any "doubt" as to YG's age. Unless Mr James, and thus Croydon, were aware that there was "doubt" as to her age, and as YG was not referred to Croydon by the Home Office, Croydon was under no duty to assess her age, nor under any other duty under CA 1989.
63. On the evidence, an IS.97M was lawfully made when YG attended. It was signed by a senior officer. Regardless of the oddity of the estimated date of birth, the consequences are that she was treated as an adult for the purposes of the asylum claim and was accommodated as an adult at Barry House. The Home Office made an apparently lawful decision that a senior officer was in no doubt that she was an adult. YG still had the right to approach the local authority children's services as pointed out expressly in the IS.97M. Whether or not Mr James was present in his role as an appropriate adult makes no difference to that decision. This is not a case of "doubt" where, under the Protocol, the Home Office refers the case to Croydon.
64. Mr James was present for the interview in the *capacity of an appropriate adult*, pursuant to the terms of the Protocol, because YG claimed to be an unaccompanied child. On the facts, it is a matter of dispute as to whether Mr James took part in the initial assessment by the Home Office to any extent beyond being an appropriate adult. Mr James says that his role was not to carry out an age assessment.

Birmingham's contention that Mr James did take part is based wholly on the Home Office email on 23 November 2017 (at paragraph 11 above). This is an internal Home Office note. Croydon contends that it is impossible to know whether the author had any first hand knowledge of the assessment. That email shows that Mr James played a passive role only in the assessment and decision as to YG's age. The evidence suggesting that Mr James was involved in the Home Office's decision is too vague to be relied upon. He personally has no recollection of YG. If he had, unusually, taken part in the Home Office's assessment, it is more likely he would have remembered it. In judicial review, and in the absence of challenge by way of cross-examination, the facts in the defendant's evidence must be assumed to be correct: *R (Westech College) v Secretary of State for the Home Department* [2011] EWHC 1484 Admin at §27. Given the paucity of the evidence relied upon by Birmingham, the Court should assume that Croydon's evidence (direct evidence from Mr James) is correct.

65. In any event, the evidence of the internal notes of the Home Office is not evidence that Mr James concurred in the date of birth or in the terminology of the IS.97M at all. Such evidence as there is is that he had agreed with the Home Office assessment that YG was clearly an adult.
66. The case is distinguishable from *R (S) v Croydon*. In that case, S, having been initially assessed as an adult, remained physically in Croydon's area and positively approached Croydon and requested accommodation as a child. The trigger for Croydon's obligation to accommodate S as a child pending age assessment was Croydon agreeing to carry out an age assessment. In the present case, by contrast, YG did not approach Croydon or otherwise seek services from it, and YG was dispersed to adult accommodation, not in Croydon, but in Birmingham.
67. The suggestion that because Mr James was physically present when the Home Office conducted *its* initial assessment, he, as representative of Croydon, should have stepped in and contradicted the Home Office decision would lead to administrative chaos. It would also mean that no purpose would be served by the Home Office initial assessment.

Discussion and analysis

(1) The Home Office initial assessment, local authority age assessment and the Protocol and the structure of responsibility

68. It is essential to distinguish the role and function of the Home Office, on the one hand, and those of a local authority, when presented with a person claiming to be a child, and, in that context, the purpose of an age assessment carried out by each of them.

Home Office age assessment

69. Taking the Home Office first, in the context of her powers and duties relating to immigration control and asylum seekers, the Secretary of State (through her immigration officers) may be required to determine whether a person is a child or an adult. This is of particular relevance where immigration officers are considering whether to detain a person. To this end, the Home Office will carry out its own age assessment, in accordance with its policy "Assessing Age" (set out in paragraph 39

above). The policy is addressed, inter alia, to officers responsible for screening asylum seekers. Under this policy, where there is little evidence to support a person's claimed age, immigration officers carry out an "initial age assessment". It is done at the same time as the asylum screening interview and it must be signed off by a second, senior, immigration officer. The initial assessment is based on physical appearance and demeanour; it is distinct from (and likely to be prior in time to) a local authority age assessment. It is not done to assist a local authority in the discharge of the latter's duties under CA 1989. It serves the different purpose of compliance with the Secretary of State's obligations under section 55 of the 2009 Act .

70. There are three possible outcomes to any Home Office initial assessment:
- (1) A clear finding that the person is a child. In that event, the matter is referred to the appropriate local authority. (In the case of an assessment carried out at Lunar House, that authority is Croydon. Under the special arrangements under the Protocol, the duty social worker is present and receives that referral there and then).
 - (2) A clear finding that the person is an adult. As at October 2017, that was a finding that the person is "significantly over 18 years of age". An IS.97M is issued and the person is dispersed to NASS accommodation. However, as stated in the IS.97M, that decision is without prejudice to the person's right to ask the local authority to conduct its own full age assessment (see below)
 - (3) A conclusion that there is *doubt* as to whether the person is a child or an adult. In such a case, under the Home Office policy, the person is given the benefit of that doubt and the matter is referred to the appropriate local authority to collect the person and to conduct a local authority age assessment. (The special position of the duty social worker present at the *Croydon* asylum screening unit is specifically pointed out in the policy).
71. A Home Office age assessment is not determinative. Only a local authority can make a definitive decision on age, on the basis of a Merton compliant age assessment

Local authority age assessment

72. Turning to the position of local authorities, they have duties to provide accommodation and support to children in their area under CA 1989. Section 17 in combination with paragraph 1(1) and 3 of Schedule 2, imposes a duty upon a local authority to assess the needs of any child in its area who appears to be in need. There is no specific statutory duty to carry out an age assessment. Rather the duty is a *Tameside* duty of inquiry: in order to decide whether it has a duty to assess a child's needs, it must take reasonable steps to investigate whether the person is in fact a child: *R (KA) v London Borough of Croydon* [2017] EWHC 1723 (Admin) at §31. Where there is doubt as to a person's age, the local authority must carry out an age assessment prior to carrying out an assessment of needs under section 17.
73. If a local authority discovers a child in need in its area, or someone claims to be a child, then it must either accept the person as a child, or if it doubts the claim, it must carry out an age assessment. A local authority cannot simply adopt a Home Office assessment. It must make its own decision. There are two forms of local authority

age assessment: first, a “Merton compliant” age assessment, which is a detailed and rigorous process, and in particular, regards reliance upon physical appearance as fragile; and secondly, a “short form” assessment, which is a more brief, but nevertheless still a formal inquiry. A short form assessment must be carried out by *two* local authority personnel and is properly recorded in a document which is provided to the person in question.

74. Pending completion of a local authority age assessment, a person seeking local authority support and accommodation as a child, must, in the meantime, be treated by the local authority as a child: see paragraph 7 of the Guidance, as applied in *R (S) v LB Croydon* above. So, where the Home Office initially assess the person as an adult and the person, by then in adult accommodation, approaches the local authority for provision of services as a child, then, pending a *local authority* age assessment, the local authority in question is bound to treat the person as a child in the meantime. However in my judgment, that does not mean that, in the present case, the mere presence of the duty social worker at the Home Office’s ASU interview at Lunar House on 26 October 2017 was such that *Croydon* was bound to proceed to a local authority age assessment of YG, and to treat her, in the meantime, as a child. In the present case, the relevant *approach* by YG for support as a child was made to Birmingham, and not to Croydon, at a time when YG was physically in Birmingham’s area. *R(S)* is not authority for the proposition that a local authority is under a duty to provide support to every person physically in its area claiming to be a child, pending a local authority age assessment. I accept Croydon’s submissions that *R(S)* is distinguishable: paragraph 66 above.

The position in principle: The Protocol: its purpose and contents

75. The Protocol is a specific arrangement made between Croydon and the Home Office, dealing with asylum seeking children and arising from the physical location within Croydon of the Home Office asylum screening unit at Lunar House. Its purpose is to make practical and efficient working arrangements between these two bodies. Nevertheless the structure of statutory powers and duties of each body remains as I have described above: initial assessment and triage by the Home Office, resulting in dispersal to adult accommodation or, in cases where there is at least *doubt* that the person may be a child, referral to the local authority, which in the case of Lunar House, is Croydon: see Protocol, clauses 1.3 and 3.1. Clause 3.1 makes clear that, in line with the procedure set out in “Assessing Age”, it is the function of *the Home Office* to notify Croydon of any *child*. That notification to Croydon is done “through the social worker attending” Lunar House on the day in question.
76. Once that notification is made, Croydon then decides whether the putative child is the responsibility of another authority or, rather, to take responsibility itself: see clauses 3.2 to 3.4. If Croydon has doubt as to whether the person is a child, it will proceed to carry out a Merton compliant local authority age assessment. It is clear that Croydon’s role under the Protocol is to receive a child, or putative child, referred to it by the Home Office *after* the Home Office’s initial assessment. Overall its role is to provide emergency overnight services, to provide social workers to act as appropriate adults and to provide a suitable pool of qualified social workers, one of whom is to be on site at all material times. The thinking behind the Protocol is to make for a seamless process for those who are definitely children and those who may doubtfully

be children so that they can immediately be taken under the wing of the local authority (instead of being given an address and told to go there).

The role of the duty social worker under the Protocol

77. The duty social worker from Croydon present at Lunar House under the terms of the Protocol carries out distinct roles. First, he or she acts as the de facto recipient of the notification and referral by the Home Office of the child or putative child, following the Home Office initial assessment, and to that end enables the child immediately to be taken under the local authority's wing and to assist in the provision of immediate support (rather than leaving the child physically to find Croydon's children services). Secondly, and - as made clear in clause 3.6 of the Protocol - distinctly, the duty social worker also acts as the "responsible adult" for the child whilst the Home Office carries out the screening process at Lunar House. The reference to "child" must include a reference to any person *claiming* to be a child, because at that stage no decision will have been made.

Conclusions on the position in principle

78. I accept Mr Swirsky's contention that it is no part of the function of the duty social worker, present at Lunar House under the Protocol, to make some form of preliminary age assessment at the stage of the *Home Office's* initial age assessment or to participate in, or add to, the Home Office's triage function as established under "Assessing Age". The consequence of Birmingham's argument would be that the duty social worker would have to make his own age assessment in every case where the person *claimed* to be a child; but the Home Office concluded, in accordance with the established procedure "Assessing Age" that the person is "significantly over 18". Such a conclusion is contrary to the framework of statutory responsibility and contrary to the purpose and logic of the Protocol. It would render the Home Office initial assessment redundant and is fundamentally at odds both with the separate functions of the Home Office and the local authority and with the basis upon which the Protocol has been established. Moreover it might lead to the termination of the sensible practical arrangements made by the Protocol - either by the Home Office, as it would interfere with its own system, or by Croydon because of the burden it would place upon it. Secondly, in practical terms, any such assessment by the duty social worker could not be "Merton compliant", which, as Ms Braaf explains, takes days; and it could not be "short form" local authority age assessment, because that requires the presence of two social workers. At that initial stage, the duty social worker has no role nor duty to carry out or in any way participate in an assessment of age.
79. I conclude therefore that, in principle, where the Home Office concludes, pursuant to an initial assessment under "Assessing Age" that the person in question is significantly over 18 and thus an adult, Croydon is under no duty towards that person, either under statute, statutory guidance or the Protocol, under CA 1989 at the time to assess that person's needs, to provide accommodation or support or to carry out a local authority age assessment. Croydon *may* subsequently become subject to such duties if that person subsequently *approaches* Croydon asking it to undertake a local authority age assessment. But, unlike the position in *R(S)*, that did not happen in the present case.

80. The duty social worker attending at the interview under the Protocol is not intended to be present in order to carry out any form of age assessment or to take the young person into local authority custody in any circumstances other than when there was a clear referral by the Home Office under its “Assessing Age” procedure.
81. If Birmingham’s approach were correct, it would mean that in every case at Lunar House where the immigration officials were clearly satisfied that the young person was significantly over 18, (and indeed the duty social worker was equally so satisfied), nonetheless the Home Office could not act upon that decision and the duty social worker would be required to call in a second duty social worker and there and then (or later) do a “short form” assessment. It seems to me that the absence of a second social worker present on site demonstrates clearly that it is no part of the function of the social worker under the Protocol to carry out any form of age assessment.
82. On the other hand, where the Home Office concludes, pursuant to its initial assessment, that the person is a child or that there are doubts (i.e. it is not certain that he or she is “significantly over” 18) the position is adequately safeguarded by the “Assessing Age” guidelines and procedure. In such a case the matter is then referred to the duty social worker, acting for Croydon, who in turn refers the matter to the proper procedures undertaken by the local authority. There is, of course, in that instance no need for a second social worker to be present.

(2) The facts of the present case and the events of 26 October 2017

83. In the present case, the clarity of the foregoing principles might be said to be clouded by the evidence as to what happened in fact at Lunar House on 26 October 2017. The question is whether the effect of those facts was such as to impose upon Croydon a duty towards YG under CA 1989. The particular questions are whether, on the facts, the Home Office did have “doubts” as to YG’s age, such as to require, under “Assessing Age” and the Protocol an immediate reference to Croydon and, even if it did, whether Croydon (through Mr James) was aware of those doubts. In my judgment, the arguments of Birmingham and YG on Issue (1) are all predicated on the contention that, as a matter of fact, both the Home Office and Mr James considered that YG was only just 18 and thus knew that there were such “doubts”.
84. The starting point is the IS.97M letter. An IS.97M letter is a standard form letter used by the Home Office specifically, and only, where it concludes that the asylum claimant is to be treated as an adult. In particular, under “Assessing Age”, an IS.97M letter is to be sent where the person is assessed, under that policy, as being “significantly over 18”. The standard form contains a number of “optional” boxes to be ticked, setting out alternative reasons for the Home Office’s conclusion (tracking the criteria identified in *BF(Eritrea)* set out in paragraph 40 above). One of those boxes is “appearance/demeanour suggesting significantly over 18”. Where, on the other hand, age is found to be “in doubt”, then under “Assessing Age” (paragraph 3.4) a separate and different letter is to be sent (with the estimated date to be stated as “disputed”). By definition, an IS.97M letter should not record an estimated date of birth that is disputed.
85. In the present case, an IS.97M was signed by a chief immigration officer dated 26 October 2017, with the “significantly over 18” box ticked. On its face and in the light

of the entire text of the letter itself, this is a clear decision by the Home Office that YG was to be treated as an adult. Thus, there is no basis for YG to have been referred to Croydon, under “Assessing Age” and the Protocol.

86. The only possible doubt arises from the words (set out at paragraph 7 above) apparently stating a date of birth as “10 October 1999”. If that is an estimated date of birth, it would have made YG only 18 years and 16 days old at the time, and thus, not “significantly over 18” so as to be treated as an adult. As Mr Swirsky accepted, the inclusion of this date of birth was either done in error or if accurately representing the Home Office view at the time, renders the decision that YG was an adult unlawful i.e. there would have been no basis for the conclusion that she was “significantly over 18”.
87. Apart from the IS.97M itself, the evidence as to what transpired at the screening interview of YG on 26 October 2017 is slim. Mr James’s evidence is that he was present on the day, but he has no recollection of YG. He says that he did not undertake any age assessment of her, as it was no part of his role under the Protocol. The evidence of Mr James’ participation relied upon by Birmingham is that contained in the Home Office email to Mr Bradley at 10:52am on 23 November 2017, which in turn refers to “notes on our system”; set out in paragraph 11 above. Those notes appear to refer to a date of birth of 10 October 1999. However they also state that Mr James, the duty social worker, “agreed that she was *significantly over* the age of 18” i.e. agreed with an initial assessment that YG was an adult. There is no evidence that Mr James positively agreed with YG’s date of birth being 10 October 1999, nor agreed that there was doubt as to her age. Nor is there any direct evidence that Mr James ever saw the IS.97M letter. But even if he did see it, there is no evidence that he picked up on the date of birth in that letter, or that he was aware of anything other than that YG had been assessed as significantly over 18. Indeed apart from the reference to that date in the IS.97M, there is no evidence that she was assessed as anything other than significantly over 18 and thus an adult. In circumstances where precisely what happened at the screening interview on that date is of central importance to the outcome of the case, Birmingham (and YG) could have sought to cross-examine Mr James, but did not do so. In these circumstances, and in line with the approach in the *Westech* case, I proceed on the basis that Mr James’ evidence is correct.
88. If, on the one hand, the inclusion of the date of birth was simply an error, then the Home Office initial assessment was that YG was clearly an adult, and it was no part of Mr James’s function as the duty social worker to contradict that decision. On that basis, YG was not referred to Croydon and Croydon had no duties under CA 1989 as at 26 October 2017. What is more, even if Birmingham were correct that Mr James was himself under a duty to carry out some form of independent “short form” age assessment at the time, there is absolutely no evidence to suggest that Mr James did anything other than agree with the “significantly over” assessment; if he had done such a “short form” assessment, then he would have reached the same conclusion that YG was an adult.
89. If, on the other hand, the date of birth in the IS.97M was not in error and thus the Home Office assessed YG as being only 18 years and 16 days old, then the Home Office had doubt as to whether she was a child, and *should have* referred YG to Croydon. However, first, the Home Office did not refer YG to Croydon. Secondly,

there is no evidence that Mr James himself was ever aware of any Home Office doubt or indeed ever saw the date of birth on the IS.97M. Thirdly, such evidence as there is, provided by the Home Office internal note, contradicts any such suggestion. It is not evidence that Mr James concurred in that date of birth or was aware of any doubt. Rather it confirms that he agreed with the Home Office assessment that YG was clearly an adult.

90. On the basis of the evidence before the Court, I conclude that the inclusion of the date of birth in the IS.97M was done in error and that the Home Office did assess YG as an adult. This is supported by (a) the fact that an IS.97M was issued (b) the remaining terms of the IS.97M; (c) the terms of the Home Office internal note. On this basis, the Home Office had no “doubt” about YG’s age, it was not under a duty to refer, and did not refer, YG to Croydon to undertake its own age assessment. It follows that Croydon was under no duty to assess YG’s needs, nor to treat her as a putative child, pending age assessment. As at 26 October 2017, Croydon was under no relevant duties under CA 1989.
91. Even if, contrary to my conclusion above, the inclusion of the date of birth in the IS.97M form does indicate that the Home Office had “doubts” and did not consider YG to be very significantly over 18, then on that basis the Home Office *should* have referred YG to Croydon for local authority age assessment. However, even on that basis, it did not give rise to any duty upon Croydon under CA 1989 as at 26 October 2017. First, the Home Office did not in fact refer YG to Croydon. Secondly, I find that Croydon (through Mr James) was not aware of those doubts and any consequential duty to assess YG’s needs and did not know that that decision was unlawful.

Conclusion on Issue (1)

92. For these reasons, I conclude that Croydon was neither subject to, nor in breach of, any duty under sections 17 and 20 CA 1989, nor under any duty to treat YG as a putative child, on 26 October 2017.
93. It follows that the remaining issues do not fall for determination and Birmingham’s claim for judicial review fails. Nevertheless for the sake of completeness, in the following paragraphs I address, in relatively brief terms, the remaining issues, each of which proceeds on the contrary assumption that Croydon was subject to CA 1989 duties as at 26 October 2017.

Issues (2) to (4)

Issue (2): The duties of Croydon and of Birmingham whilst YG was a child

Birmingham’s case

94. Birmingham submits, first, that, once subject to duties under CA 1989, Croydon remained subject to them until they were discharged. Croydon did not discharge them, either by making a determination that YG was not a child or not in need, nor by transferring YG to another local authority under the national transfer scheme. Absent discharge in that way, the local authority’s duty continues even where the child in question is no longer physically present in the area: *R (Liverpool City Council) v*

London Borough of Hillingdon and AK [2009] EWCA Civ 43 (“the *Liverpool* case”). Further YG would not have been accommodated by the Home Office outside Croydon’s area if Croydon had fulfilled its obligation to her, and a local authority cannot discharge its section 20 duty by relying on its own unlawful act: see *R (HA) v London Borough of Hillingdon* [2012] EWHC 291 (Admin) at §21.

95. As regards the duty upon Birmingham, once YG had moved into its area, since the duty remained upon Croydon, in principle Birmingham was not under a duty to provide support, save as a safety net for so long as Croydon was refusing to comply with its continuing duties. In oral submission, Ms Cooper accepted that Birmingham did have a concurrent duty once YG was in its area and it had received Bhatia Best’s letter of 22 November 2017. Its duty was to provide accommodation until such time as Croydon provided accommodation. However, once a Court directs the authority first under the duty (“authority A”) to comply with its ongoing duties, the authority second under the duty (“authority B”) would be under no concurrent duty. If Croydon had fulfilled its duty, Birmingham would have been discharged. This solution imposed ongoing duties on authority A. To impose continuing duties on Birmingham (authority B) would be to reward the unlawful actions of authority A.

Croydon’s case

96. Croydon submits that once YG presented to Birmingham in its area, Birmingham became responsible for all duties to her under the CA 1989. The balance of the case authority establishes that the basis of any duty under section 17 is physical presence in the area: see *R(AM) v London Borough of Havering* [2015] EWHC 1004 Admin at §33(xii). The *Liverpool* case does not establish the proposition that once the child moves to the area of another local authority which authority is under a duty under the CA 1989, the first authority in whose area the child had lived remains under a continuing duty. Even where authority A behaves unlawfully, authority B remains under a concurrent duty: see *A v Leicester City Council and London Borough of Hillingdon* [2009] EWHC 2351 (Admin) at §§49, 55 and 56 -57.

Discussion and analysis

97. If I had held that Croydon was under CA 1989 duties towards YG as at 26 October 2017, I would have held that Croydon had not fulfilled, and thus had not discharged, those duties. However I would have held that, once YG was within its area, Birmingham *also* owed her concurrent duties under CA 1989. Birmingham has not been able to explain the basis upon which it is said that Croydon had an overriding duty and that Birmingham no longer had or was discharged from its concurrent duty.
98. The *Liverpool* case is authority for the proposition that a local authority (authority A) cannot discharge a section 20 duty by relying on its own unlawful act. However the final decision in that case (that authority A remained responsible *to the exclusion* of authority B) was based on a concession made in argument by authority A (see Dyson LJ at §39). Dyson LJ himself expressed no views of his own, and Rix LJ (at §43) went out of his way to express reservations about the concession that authority B was not under a concurrent duty. Further, in *A v Leicester*, (in which the then recently decided *Liverpool* case was cited) it was held that both authorities could be the subject of concurrent duties.

99. On the question of the meaning of “within their area”, in my judgment, on the balance of case authority, a “simple geographical test” of physical presence in the relevant areas applies: see *R (AM) v LB Havering*, supra at §33(xii), citing *R (Stewart) v London Borough of Wandsworth* [2001] EWHC 709 (Admin) at §§23, 28 and declining to follow *R(HA) v London Borough of Hillingdon*, supra, (an interim relief case).

Issue (3): Duties once YG attained 18

Birmingham’s case

100. Birmingham submits that, once YG turned 18, Croydon owed duties to her under the leaving care provisions of section 23C CA 1989. The words “looked after” in section 23C(1)(b) include a person to whom the section 20 duty had been owed by an authority immediately before their 18th birthday, but was not in fact looked after as a result of the unlawful conduct of that authority. Section 23C extends to the local authority who was *under a duty* to provide accommodation as at their 18th birthday. If the leaving care duties bite only on the local authority that was actually looking after the child immediately before their 18th birthday, an authority ordered to provide interim relief would bear the burden of the leaving care provisions, if that person turned 18 before the matter was concluded. In cases such as the present that would lead to interim relief applications becoming more contentious and reduce the prospect of pragmatic decisions being taken, such as Birmingham took in this case.
101. Further section 22(1)(b) CA 1989 provides that a child is “looked after” by a local authority which provides the child with accommodation. Where a local authority is in breach of its duty to provide accommodation, that local authority is deemed to have “looked after” the child: see *R (TG) v London Borough of Lambeth* [2011] EWCA Civ 526 at §43 and *A v Leicester*, supra, at §53. Because Birmingham was not looking after YG in its own right (because it was under no concurrent duty), it cannot have been the authority which “last looked after” YG. *A v Leicester* at §53 supports this proposition because there the judge construed words “provided with” as including a “duty to provide with”.

Croydon’s case

102. Croydon submits that the local authority with the leaving care duties under section 23C is Birmingham. It was the last responsible authority under section 23C(1)(a). It was the authority which “last looked after” YG when she attained the age of 18. Even if Croydon had been under a duty to YG until she was 18, it had never “looked after” YG. Birmingham had clearly “looked after” YG and was the authority which “last” looked after her.

Discussion and analysis

103. This question is not easy to resolve and, given that, in the light of my conclusion on Issue (1), the issue does not arise for determination, my conclusions are in short form. Birmingham’s case is based on section 23C(1)(b) (i.e. looked after when attaining age 18); and not under section 23C(1)(a) (not “looked after” at all at 16 to 18, but last responsible authority). I accept that, in principle and in certain circumstances, a person might be “looked after” under section 22(1)(b) by an authority, which has a

duty to do so, but has not in fact done so: see *R(TG) v Lambeth* and *A v Leicester* above. Nevertheless, as I would have concluded above under Issue (2) that, even if Croydon was under a duty, Birmingham remained under at least a concurrent duty, I would have concluded that the leaving care duties were imposed on the authority by which YG was actually “looked after”. On that basis, that authority, as a matter of fact and legal duty, is and was Birmingham. If however, contrary to my “conclusion” on Issue (2), Birmingham was not (but Croydon was) under a duty up to the point immediately before YG attained 18, then accommodation provided by Birmingham would not have been provided “in the exercise of [its] functions” (section 22(1(a))). Thus Birmingham would not have been the authority by whom YG was “looked after”. Further, on the basis that a duty to provide accommodation is sufficient, then Croydon would have been that authority and would have been responsible under the leaving care provisions.

Issue (4): Restitution and section 27 CA 1989

Birmingham’s case

104. Birmingham submits that Croydon should make recompense to Birmingham for breach of its duties towards YG. In evidence, Birmingham maintains that if Croydon had complied with its obligations to YG at the time that YG was in its area, Birmingham would not have incurred the costs of supporting YG and the related legal costs and, moreover, YG’s costs would also have been avoided. It seeks to recover the expenditure it has incurred in supporting YG on two bases.
105. First, it makes a claim in restitution for unjust enrichment. It relies upon the recent decision in *Surrey County Council v NHS Lincolnshire Clinical Commissioning Group* [2020] EWHC 3550 (QB) at §§115 to 121 where the court upheld a claim for restitution by a local authority, which had provided care, against the local NHS commissioning group, where the latter, in breach of duty, had unlawfully failed to provide care. It also relies upon observations in *A v Leicester* at §§19 and 37. As in the *Surrey* case (§§122 to 128), in order to rely upon a “change of position” defence, Croydon would have needed to plead and prove its case. Following the judgment in the *Surrey* case, Croydon could and should have put in evidence to support such a defence. It has not done so, and the defence is not available.
106. Secondly, it relies upon section 27 CA 1989, contending that the financial assistance it had requested of Croydon, by its letters of 22 March 2019, constituted a request for “help in the exercise of [its] functions” within the meaning of that section.

Croydon’s case

107. Croydon resists the claim for reimbursement. As regards the claim for restitution, first, the case of *Surrey* is to be distinguished, because here both parties were subject to the same duties. Secondly, there has been no unjust enrichment here: Croydon has not saved any costs and Birmingham has received funding. Thirdly, as Birmingham has not filed any evidence of the sums it seeks and Croydon has not filed any evidence on how any saved expenditure has been applied elsewhere to support a change of position defence, the claim should be remitted for trial on the evidence, including a trial on a change of position defence. Croydon was not aware that it had to put forward evidence on change of position at the liability stage. As regards

section 27 CA 1989, as a matter of construction of this section and taking account of section 29, it has no application to a request for payment of money from another local authority.

Discussion and analysis

108. First, this claim only arises on the hypothesis that Birmingham was discharged from its duties i.e. it was not under duties, if Croydon had complied with its duties. It does not arise if, as I would have held in answer to Issue (2), Birmingham remained under concurrent duties towards YG. Secondly, I would have concluded, on the basis of the judgment in *Surrey* that, in principle, a claim in restitution would have been available to Birmingham. Thirdly, however, I would have directed a trial of that claim, allowing not only Birmingham to adduce evidence of quantum, but also allowing Croydon to adduce evidence to support a change of position defence. The decision in *Surrey* is relatively recent and came late in the day and I would not have shut out Croydon from putting forward a change of position defence. Finally, a claim under section 27 would have been bound to fail. In my judgment, a request for financial reimbursement is not a request for assistance falling within the meaning of section 27. If it were, section 29(7) CA 1989 would be redundant.

Conclusions

109. In the light of my conclusion at paragraph 92 above, Birmingham's claim that Croydon was in breach of duties owed to YG under CA 1989 as at 26 October 2017 or at any time thereafter fails and its claim for judicial review is dismissed. I will hear the parties on matters consequential to this conclusion.
110. Finally I am grateful to counsel and solicitors for the helpful manner in which this case has been conducted, not least in the circumstances of the Covid-19 pandemic.