Neutral Citation Number: [2024] EWHC 427 (Admin)

Case No: AC-2023-LON-001587

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 February 2024

Before :

JONATHAN MOFFETT KC, SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

THE KING	**Claimant**
on the application of	
AOJ	
- and –	
LONDON BOROUGH OF ISLINGTON	**Defendant**

- -
- -

Amanda Weston KC, Ollie Persey and Josephine Fathers (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Hilton Harrop-Griffiths (instructed by **London Borough of Islington Legal Services**) for the **Defendant**

Hearing date: 1 February 2024

- -

Approved Judgment

This judgment was handed down remotely at 10.30am on 28th February 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

JONATHAN MOFFETT KC –
SITTING AS A DEPUTY HIGH COURT JUDGE

Jonathan Moffett KC, sitting as a Deputy High Court Judge:

INTRODUCTION

1. By this claim for judicial review, the Claimant seeks to challenge a decision of the Defendant ("the Council"), taken on 5 April 2023, declining to undertake an education, health and care needs assessment ("an EHC needs assessment") of the Claimant under s 36 of the Children and Families Act 2014 ("the 2014 Act").

2. Permission to apply for judicial review was granted by David Pittaway KC, sitting as a Deputy High Court Judge, by way of an order dated 11 August 2023.

3. Mr Pittaway granted the Claimant anonymity under CPR 39.2(4) and/or CPR 3.1(2), until further order of the Court, and directed that any report or publication of these proceedings must not directly or indirectly identify the Claimant. He also directed that the Claimant should be referred to by the letters "AOJ", and made an order under CPR 5.4C to the effect that a person who is not a party to the claim may obtain a copy of a statement of case, judgment or order in the claim only if the relevant document has been anonymised. At the outset of the hearing I canvassed with the parties the question whether those orders should continue in force. Neither party asked for them to be discharged or varied and, in view of the fact that the Claimant is a refugee who says that he is a child with special educational needs, I considered that it was appropriate that Mr Pittaway's orders should remain in force. Accordingly, any report of these proceedings or this judgment must not directly or indirectly identify the Claimant.

4. In brief, the factual context for the claim is as follows. The Claimant is an Afghan national who arrived in the United Kingdom, and claimed asylum, in March 2022. The Claimant says that he was born on 20 February 2006, and that at all material times he was aged under 18. Nevertheless, the Home Office decided that the Claimant was an adult and, while it was considering his application for asylum, placed him in accommodation in the Council's area. In October 2022, the Council was asked to assess the Claimant's age for the purpose of determining whether he was a child (i.e. a person aged under 18) to whom the Council may have been required to provide accommodation under s 20(1) of the Children Act 1989 ("the 1989 Act"). On 27 October 2022, the Council carried out a brief assessment of the Claimant's age and, in a letter of the same date, it set out its conclusion that the Claimant was in his mid-twenties. As a result, the Council decided that the Claimant was not a child within the meaning of the 1989 Act, and he was for that reason not entitled to the provision of accommodation under that Act.

5. Subsequently, in January 2023, the Council was asked to undertake an EHC needs assessment of the Claimant. For that purpose, the Council was asked to undertake a comprehensive assessment of the Claimant's age in order to decide whether he was a young person (i.e. a person over compulsory school age but under 25 years old) to whom the duty to undertake an EHC needs assessment applies. The Council responded by way of a letter dated 5 April 2023, in which, in reliance on the decision taken on 27 October 2022, it expressed the view that the Claimant was aged approximately 10 years older than his claimed age (i.e. at that time approximately 27 years old) and, as a result, the duty to undertake an EHC needs assessment was not engaged.

6. In September 2023, the Claimant voluntarily left the Council's area, and he has no present intention of returning.

7. As set out in his statement of facts and grounds, the Claimant advances one ground of challenge, to the effect that the Council has "unlawfully failed to undertake a lawful inquiry to ascertain the Claimant's age as a condition precedent to the discharge of its duties under Part 3 [of the 2014 Act]". The Claimant argues that the Council's decision of 5 April 2023 was unlawful because it had not, before reaching its decision, carried out a comprehensive assessment of the Claimant's age. In granting permission to apply for judicial review, Mr Pittaway KC referred to the fact that the Claimant contends that this claim raises a novel and important point. The Council denies that it has acted unlawfully; it has throughout maintained the position that it was not necessary to carry out a comprehensive age assessment of the Claimant. However, the Council's primary argument is that this claim is now academic and that the Court should therefore decline to determine it.

PROCEDURAL MATTERS

8. At the hearing, there were two outstanding applications by the Claimant to rely on evidence. First, an application to rely on evidence in reply to the evidence filed by the Council, in form of a second witness statement from the Claimant and a witness statement from Joshua Singer, who is a Children's Advisor in the Age Dispute Project at the Refugee Council. Hilton Harrop-Griffiths, who appeared for the Council, did not oppose this application, and I considered that the witness statements in question included evidence that was potentially relevant to the issues. I therefore decided to admit them.

9. Secondly, an application to rely on an expert report dated 28 July 2023 from Alice Rogers, a psychologist. This application was made on 8 August 2023, before permission to apply for judicial review was granted. At the outset of the hearing, Amanda Weston KC, who appeared for the Claimant along with Ollie Persey and Josephine Fathers, indicated that she was not pursuing this application, and therefore I made no order on it.

10. In addition to the Claimant's second witness statement and the witness statement of Mr Singer to which I have referred above, the witness evidence adduced on behalf of the Claimant comprises the Claimant's first witness statement and three witness statements from the Claimant's solicitor, Camilla Burton of Irwin Mitchell LLP. The witness evidence adduced on behalf of the Council comprises a witness statement of Kate Kennedy, a practice manager in the Council's Children's Services Department; a witness statement of Steven Meiklem, a senior social worker in the Council's Children's Services Department; and a witness statement of Gabrielle Couchman, an Unaccompanied Asylum-Seeking Child project manager and specialist advisor employed by the Council. In addition to those witness statements, the Court was provided with an agreed bundle that included relevant contemporaneous documentation.

THE RELEVANT LEGISLATIVE FRAMEWORK

(1) The 2014 Act

11. In broad terms, Part 3 of the 2014 Act makes provision for the assessment of children and young persons who may have special educational needs; for the drawing up of an education, health and care plan ("an EHC plan") for certain children and young persons who are assessed to have special educational needs; and for the provision of education to children and young persons in respect of whom an EHC plan is in place.

12. The functions provided for by Part 3 of the 2014 Act are exercisable in relation to a child or a young person. The 2014 Act does not itself define "child", but s 83(7) of the 2014 Act provides that the Education Act 1996 ("the 1996 Act") and the preceding provisions of Part 3 of the 2014 Act are to be read as if those provisions were contained in the 1996 Act. Accordingly, the definition of "child" provided for by the 1996 Act applies for the purposes of Part 3 of the 2014 Act. Section 579(1) of the 1996 Act defines a "child" as "a person who is not over compulsory school age". Section 83(1) of the 2014 Act defines "young person" as "a person over compulsory school age but under 25".

13. Section 8 of the 1996 Act makes provision for when an individual is of compulsory school age. Again, by virtue of s 83(7) of the 2014 Act, s 8 of the 1996 Act applies for the purposes of Part 3 of the 2014 Act. The point at which an individual reaches compulsory school age or ceases to be of compulsory school age varies according to the particular circumstances of the case (including the date on which the individual was born), but for the purposes of this case it suffices to say that, in broad terms, an individual is of compulsory school age if he or she is aged between five and 15. Accordingly, and again in broad terms, a person is a "young person" for the purposes of Part 3 of the 2014 Act if he or she is aged between 16 and 24.

14. In the present case, there is no suggestion that the Claimant was at any material time aged under 16; even on his case, he was aged 16 when he arrived in the United Kingdom. Accordingly, for simplicity, in the summary of the relevant legislative framework below I set out the position in relation to young persons only.

15. By virtue of s 20(1) of the 2014 Act, a young person has special educational needs if he or she has a learning difficulty or disability (as defined by s 20(2)) which calls for special educational provision to be made for him or her. Insofar as is relevant for present purposes, s 20(1) of the 2014 Act provides that "special educational provision" means educational provision that is additional to, or different from, that made generally for others of the same age in mainstream schools or post-16 institutions.

16. Section 22 of the 2014 Act provides that a local authority in England must exercise its functions with a view to securing that it identifies all the young people in its area who have or may have special educational needs, and all the young people in its area who have a disability.

17. Section 36 of the 2014 Act makes provision for EHC needs assessments. Insofar as is relevant, s 36 provides as follows.

"**36 Assessment of education, health and care needs**

(1) A request for a local authority in England to secure an EHC needs assessment for a child or young person may be made to the authority by the child's parent, the young person or a person acting on behalf of a school or post-16 institution.

(2) An 'EHC needs assessment' is an assessment of the educational, health care and social care needs of a child or young person.

(3) When a request is made to a local authority under subsection (1), or a local authority otherwise becomes responsible for a child or young person, the authority must determine whether it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(4) In making a determination under subsection (3), the local authority must consult the child's parent or the young person.

(5) Where the local authority determines that it is not necessary for special educational provision to be made for the child or young person in accordance with an EHC plan it must notify the child's parent or the young person—

(a) of the reasons for that determination, and

(b) that accordingly it has decided not to secure an EHC needs assessment for the child or young person.

(6) Subsection (7) applies where—

(a) no EHC plan is maintained for the child or young person,

(b) the child or young person has not been assessed under this section or section 71 during the previous six months, and

(c) the local authority determines that it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(7) The authority must notify the child's parent or the young person—

(a) that it is considering securing an EHC needs assessment for the child or young person, and

(b) that the parent or young person has the right to—

(i) express views to the authority (orally or in writing), and

(ii) submit evidence to the authority.

(8) The local authority must secure an EHC needs assessment for the child or young person if, after having regard to any views expressed and evidence submitted under subsection (7), the authority is of the opinion that—

(a) the child or young person has or may have special educational needs, and

(b) it may be necessary for special educational provision to be made for the child or young person in accordance with an EHC plan.

(9) After an EHC needs assessment has been carried out, the local authority must notify the child's parent or the young person of—

(a) the outcome of the assessment,

(b) whether it proposes to secure that an EHC plan is prepared for the child or young person, and

(c) the reasons for that decision.

…"

18. Accordingly, where a local authority receives a request for an EHC needs assessment in respect of a young person, the local authority must decide whether it may be necessary for special educational provision to be made for that young person under an EHC plan. If the local authority determines that it is not so necessary, it is not required to undertake an EHC needs assessment. If the local authority determine that it may be necessary for special educational provision to be made for the young person, it must seek the young person's views and it must, having regard to those views, ask itself whether the young person has or may have special educational needs, and whether it may be necessary for special educational provision to be made for the young person in accordance with an EHC plan. If the local authority answers that question in the affirmative, it must secure an EHC needs assessment for the young person.

19. Further provision in relation to the consideration of a request for an EHC needs assessment is made by the Special Educational Needs and Disability Regulations 2014 (SI 2014 No 1530), made under s 36(11) of the 2014 Act. Neither party suggested that those regulations were relevant to the issues arising in this case.

20. Section 37(1) of the 2014 Act provides that where, in the light of an EHC needs assessment, it is necessary for special educational provision to be made for a young person in accordance with an EHC plan, the relevant local authority must secure that an EHC plan is prepared for the young person, and it must maintain that plan. Under s 46(1) of the 2014 Act, a local authority may continue to maintain an EHC plan for a young person until the end of the academic year during which the young person attains the age of 25.

(2) The 1989 Act

21. Both parties rely on case law that relates to the duties imposed on local authorities by the 1989 Act. It is not necessary to set out the relevant provisions of the 1989 Act; for the purposes of this case it suffices to note that s 17(1) of the 1989 Act imposes on every local authority a general duty to safeguard and promote the welfare of children within their area who are in need by providing a range and level of services appropriate to those children's needs, and s 20(1) imposes on every local authority a duty to provide accommodation for any child in need within their area who appears to it to require accommodation as a result of certain specified circumstances. For the purposes of these duties, "child" means a person under the age of 18 (see s 105(1) of the 1989 Act). Accordingly, "child" has a different meaning for the purposes of the 1989 Act from that which it has for the purposes of Part 3 of the 2014 Act.

22. Although in most cases there is no dispute as to whether an individual is a child for the purposes of the 1989 Act, there are some cases in which it is necessary for a local authority to determine whether an individual who requests accommodation and support under the 1989 Act is a child. Such cases arise particularly in the context of individuals who come to the United Kingdom to claim asylum, who may arrive in the United Kingdom without any documentary evidence as to their age, and in relation to whom there may be a dispute as to their age.

23. For present purposes, it is necessary to mention two points that have arisen out of the case law on the determination of age in the context of the 1989 Act. First, there is a considerable body of case law relating to the manner in which a local authority should go about assessing the age of an individual in the context of the 1989 Act. This case law begins with the decision of Stanley Burnton J in *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280. That decision, and the case law that has followed it, has given rise to the terminology of a *"Merton*-compliant" age assessment. It appears that, where that terminology is used, it is generally used to describe the type of comprehensive age assessment exercise to which Ms Weston referred in her submissions, and it appears that the phrase has been used in this sense in this case.

24. However, as Swift J explained in *R (HAM) v Brent London Borough Council* [2022] EWHC 1924 (Admin), [2022] PTSR 1779, paragraphs 23-34, the terminology of a "*Merton*-compliant" age assessment is inapposite; the *Merton* case does not prescribe the form that an age assessment must take in all cases, or even in all cases of a particular type; what is required in a particular case depends on the specific circumstances of that case. In particular, as is apparent from the *Merton* case itself, the most relevant public law duties that are engaged in respect of age assessments in the context of the 1989 Act are the duty to undertake reasonable investigations (the so-called '*Tameside* duty of inquiry', after *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014, HL, 1065 *per* Lord Diplock) and the duty to act in a procedurally fair manner. What each of those duties requires may vary according to the circumstances.

25. Secondly, in *R (A) v Croydon London Borough Council* [2009] UKSC 8, [2009] 1 WLR 2557, the Supreme Court decided that the question whether an individual is a child for the purposes of s 20(1) of the 1989 Act is an issue of precedent fact and therefore, if there is a relevant dispute as to an individual's age, it is ultimately for the Court to determine whether the individual is a child (although in practice, claims raising such an issue of precedent fact are commonly transferred to the Upper

Tribunal). At certain points in their arguments, both parties suggested that the question whether an individual is a "young person" for the purposes of Part 2 of the 2014 is also an issue of precedent fact that would ultimately fall for determination by the Court. However, in the end both parties agreed that it was not necessary to decide this point, and they made no detailed submissions on it.

THE RELEVANT FACTUAL BACKGROUND

26. Save in relation to the obvious disagreement as to the Claimant's age, there is no real dispute between the parties as to the material facts.

27. The Claimant is an Afghan national. He says that he was born in the Logara province of Afghanistan, where he lived with his family. He did not celebrate his birthday in Afghanistan, which he says is common in Afghan culture, but his parents told him that he was born on 20 February 2006, and he has at all material times maintained that that is his date of birth.

28. The Claimant says that, from the age of 13, he worked selling ice cream from a cart, which involved physical labour outdoors, apart from in the winter months, when he would work as a manual labourer in construction. When the Taliban returned to power in Afghanistan in August 2021, the Claimant feared for his safety, and the Claimant's father arranged with a trafficker that the Claimant would be taken to the United Kingdom. The Claimant has given an account of his journey via Iran and Turkey to Greece, and then through Europe, Serbia and Switzerland to the United Kingdom. The Claimant eventually arrived in the United Kingdom by boat from France, in March 2022.

29. It appears that, on his arrival in the United Kingdom, the Claimant was detained by the Home Office, at which point he claimed asylum. A Home Office letter dated 24 March 2022 records that the Claimant told the Home Office that his date of birth was 20 June 2006, but that two Home Office officials had assessed that his physical appearance and demeanour very strongly suggested that he was significantly over 18 years old, and that he would therefore be treated as an adult for the purposes of his asylum claim.

30. The Home Office record of the screening interview with the Claimant that took place on 29 March 2022 appears to record that, when asked, the Claimant gave his date of birth as 20 June 1993. However, it seems to me that this is unlikely to be correct; it appears more likely that the date of 20 June 1993 is the date of birth that was attributed to the Claimant by the Home Office, as that is the date that appears on subsequent correspondence from the Home Office.

31. The record of the screening interview records the Claimant as having said that he was single, but it also refers to him having said that he wished to bring his son to the United Kingdom. In his witness statements, the Claimant says that in his screening interview he did not mention having a son. He explains that the interpreter who was present during his screening interview spoke a different dialect of Pashto to that which the Claimant speaks, and that the interpreter may have misunderstood a reference by the Claimant to his nephews as a reference to his son. The record of the screening interview also states that the Claimant said that he did not have a passport, and that he had lost his identity document during his journey. The Claimant has in his

witness statement explained that this was a reference to his tazkira, an Afghan identity document. He explains that he lost his tazkira at some point during his journey to the United Kingdom, but that his father later sent him a photograph of it.

32. The Claimant was granted immigration bail on 31 March 2022, and on 27 May 2022 he was informed by the Home Office that he would be provided with subsistence and accommodation support until his application for asylum was determined. It appears that the Claimant was subsequently provided with accommodation in the Council's area, where he resided until September 2023.

33. Mr Singer first met the Claimant at the Claimant's accommodation on 14 October 2022, as a result of the Claimant having telephoned a Refugee Council advice line and explained that he was a 16 year old who was inappropriately being treated as an adult by the Home Office. Mr Singer has given a detailed account of his interview with the Claimant on 14 October 2022, as a result of which Mr Singer considered that the Claimant presented as a 16 year old child.

34. On 17 October 2022, Mr Singer wrote to the Council asking that the Council assess whether the Claimant was a child in need for the purposes of the 1989 Act. As a result, on 19 October 2022, the Council arranged for the Claimant to come to the Department's offices for what is referred to as a "welfare check".

35. In order to explain what a welfare check is, it is necessary to refer to the Council's Age Assessment Guidance ("the Islington Guidance"). The Islington Guidance explains that it is "an internal document for the purposes of guiding practice and procedures in relation to queries of age, age assessments and determinations", and it is clear that it is directed at the assessment of age for the purposes of the 1989 Act. Insofar as is relevant for present purposes, the Guidance states as follows (emphasis and typographical errors in original).

> "**Adult asylum hotel referrals**
>
> Where a claimed child is currently residing in an adult asylum hotel in the local authority area and the Local Authority is notified there is a requirement for a local authority to assess the age of this claimed child and accommodate as needed. This claimed child would have been given an adult date of birth at the port of entry to have been eligible for this accommodation. In some rare cases the claimed child may have never given a minor date of birth at port of entry.
>
> …
>
> For many reasons, it is entirely possible that a claimed child could have been wrongly age assessed as an adult at port of entry. Therefore, the processes below are essential in ensuring the claimed child is assessed correctly and treated as a child if determined so.
>
> **a) When a referral is received**
>
> The CSCT team will notify children services of new referrals, the age assessment rota should be followed to ensure timely allocation to a team to

progress this assessment. The hotel and child should be contacted to arrange a welfare check at our premises. The welfare assessment can only be undertaken by trained social workers and should only be undertaken at our premises.

b) Welfare check

This welfare check should be conducted with 24-48 hours of the referral being received. The check can be completed by 1 trained social worker and without an appropriate adult present, but it should have strong managerial oversight and the manager's observations should also be included. **In all circumstances an interpreter is required for this meeting and their details should be recorded on the form.**

This welfare check and form is the same used for all new UASC referrals to our service and covers basic personal, health and safeguarding information. This welfare form should be uploaded on file and also shared with placements if we determine they are a child or further assessment is needed.

Following this welfare check, a discussion with a manager is required to determine the following actions:

- Determine they are clearly a child or marginal so as to apply benefit of the doubt and therefore no further enquiry of age is required. In this circumstance a pro forma should be completed to the Home Office outlining this and request to change their DOB in line with their claimed age. This child should become Looked After under s.20 Childrens Act 1989.

- Or, determine that an enquiry as to age assessment is required and undertake plans to start this process.

- Or, determine that the claimed child looks significantly older, **25 years + or 7 years or more** than their claimed age and as such a refusal to assess determination will be made. A letter outlining this decision will be provided alongside supporting agencies' details to challenge this decision if the claimed child wishes. This must be authorised by senior management.

e) Outcome

If the claimed child is determined to be a child, with or without benefit of the doubt applied the Home Office should be notified of this by completion of the Pro Forma and if not completed already the child should be Looked After under s.20 Childrens Act 1989.

> If the claimed child requires a further assessment of age because this assessment is inconclusive, and benefit of the doubt cannot be applied to conclude they are a child, a full age assessment should be arranged following the process set out in this document. In the interim, this claimed child should be treated as a child and should become Looked After under s.20 Childrens Act 1989.
>
> If the claimed child is determined to be an adult, and after senior management have also agreed this decision, they should be referred back to the asylum hotel from which they were referred from. This claimed child must have a letter outlining our decision, their right to challenge this decision and signpositing to supporting agencies. This must be read out to them via the interpreter also. Please ensure the assessment and notes are clearly recorded on file."

36. On 19 October 2022, the Claimant was met by Rochelle Watson, a practice manager, and Sasha Massey-White, a social worker, who had the assistance of an interpreter. According to the notes recorded on the Council's electronic record system, the Claimant was unwell, and therefore Ms Watson and Ms Massey-White decided not to proceed with the welfare check on that day. An internal e-mail apparently sent by Ms Watson later that day states that "[w]e believe [the Claimant] is an adult and once the welfare check is completed he will be presented with a rejection letter as we will not complete an age assessment on him – for this reason".

37. The welfare check was rearranged for 27 October 2022, when the Claimant again attended the Council's offices. On this occasion he was seen initially by Mr Meiklem, who was assisted by an interpreter. There is a note of Mr Meiklem's interview that was apparently completed by Mr Meiklem himself. The note records that the Claimant told Mr Meiklem that his date of birth was 20 February 2006 and that he was 16 years old. It appears that the Claimant showed Mr Meiklem and the interpreter a photograph of what the Claimant said was his tazkira that was stored on his mobile phone. The note records that the interpreter told Mr Meiklem that the tazkira in the photograph stated that it had been issued in 2018, and gave the Claimant's age at that time as 12 years old, which would be consistent with the Claimant's claimed date of birth.

38. In his witness statement, the Claimant states that it was him who raised the issue of his age during the welfare check, but he was told that the purpose of the meeting was not to speak about his age and that the social workers could not assist him in relation to his age, as it was not their job to ask the Claimant about it. Nevertheless, the Claimant states that he showed a photograph of his tazkira to everyone at the meeting.

39. In his witness statement, Mr Meiklem states that he considered that the Claimant's "appearance was overwhelmingly that of an adult" and that the Claimant was "significantly older than his claimed age". Mr Meiklem refers to what he describes as ageing in the Claimant's facial features, and goes on to say that the Claimant "resembled someone in their thirties". Mr Meiklem states that, "applying the benefit of the doubt, I assessed [the Claimant] to be late twenties", although he also refers to the Claimant's assessed age as being "around late twenties to thirties". Mr Meiklem

concludes his witness statement as follows: "[i]t is not my opinion that he is in his mid-twenties or younger than 25 years old".

40. After Mr Meiklem's interview with the Claimant, the Claimant was seen by Ms Kennedy in the presence of Mr Meiklem. In her witness statement, Ms Kennedy states that, in her opinion, the Claimant's appearance "overwhelmingly suggested that he was an adult". She states that "[e]ven when providing the benefit of the doubt, I believed he was 28-30 years old", and that she and Mr Meiklem "were both of the view that [the Claimant] was clearly an adult and aged 28, however he could well be considerably older and in his 30s".

41. It appears that, after the Claimant was seen by Mr Meiklem and Ms Kennedy, the Claimant was presented with a letter, dated 27 October 2022 and signed by Ms Kennedy, headed "determination of age". The letter referred to the welfare check undertaken by Mr Meiklem, and continued as follows (emphasis in original):

> "…during this welfare assessment you were viewed by the duty social worker to present as significantly older than your claimed age. It is the duty social worker's opinion that your appearance and demeanour overwhelmingly suggest that you are an adult in your mid-twenties. In this same meeting you were also seen briefly by the duty manager Kate Kennedy who has significant experience in age assessments. She also observed you to be significantly older than your claimed age and in your mid-twenties.
>
> While you have provided a photography of your Tazkira on your mobile phone, it is of poor quality and Tazkira's are often forged. We have not been able to authenticate this and are not accepting as a genuine source of identification.
>
> Therefore, in light of this clear and obvious observation it is not the intention of Islington Children Services to undertake an assessment of age and it is our view that you should remain being treated as an adult…."

42. I note that the reference in this letter to the Claimant being assessed as being in his "mid-twenties" is reflected in the notes on the Council's electronic record system, which refers to "the overwhelming presentation of [the Claimant] as an adult in his mid-20s".

43. In their witness statements, Ms Kennedy and Mr Meiklem explain that the Council applies a threshold of "25 years or older" when deciding whether to conduct an age assessment, i.e. the Council will not conduct an age assessment if at a welfare check the relevant social worker and manager consider that the individual has the appearance of someone aged 25 or older. In this respect, Ms Kennedy and Mr Meiklem's witness evidence is consistent with the Islington Guidance. They say that the reference to "mid-twenties" in the letter of 27 October 2022 is a reference to this 25 years or older threshold.

44. Ms Weston accepted that, notwithstanding the references in the contemporaneous documentation to the Claimant being in his "mid-twenties", she could not go behind the witness evidence of Mr Meiklem and Ms Kennedy, and she therefore accepted that, on 27 October 2022, the Council concluded that the Claimant was at least 28 years old, and that he could well be older. Nevertheless, it is unfortunate that the letter of 27 October 2022 was phrased in the way that it was; in my view, it is not accurate to describe a person who has been assessed to be at least 28 years old as being in his "mid-twenties".

45. However, Ms Weston makes the point that the assessment of the Claimant's age that was undertaken by Mr Meiklem and Ms Kennedy involved only a cursory assessment of the Claimant's physical appearance, and that it did not involve the type of comprehensive exercise to which some of the case law on age assessments in the context of the 1989 Act refers. Ms Weston characterised the exercise that was undertaken as the type of exercise that would be carried out in a case in which a decision-maker considers that it is obvious that the individual in question is aged 18 or over. Mr Harrop-Griffiths did not dispute this characterisation of the exercise that was carried out on 27 October 2022; indeed, it appears to be exactly the type of exercise that the Islington Guidance envisages.

46. On 19 October 2022, the Council had contacted the Home Office seeking further information about the Claimant's case, but the Home Office did not reply until 6 November 2022. Accordingly, the information provided by the Home Office was not available to Mr Meiklem or Ms Kennedy when they reached their decision as to the Claimant's age on 27 October 2022. The Home Office stated that, on arrival in the United Kingdom, the Claimant claimed that his date of birth was 10 February 2007, something that the Claimant disputes, but that the Home Office had attributed to the Claimant a date of birth of 20 June 1993. The Home Office provided a copy of the record of the screening interview to which I have referred above.

47. Mr Singer continued to assist the Claimant, and in due course he referred the Claimant's case to Ms Burton. On 13 January 2023, Ms Burton wrote a letter before claim challenging what was said to be the Council's failure to conduct any, or any lawful, age assessment. The letter asked that the Council set aside its assessment, made on 27 October 2022, that the Claimant is an adult, and accept the Claimant's claimed date of birth, or that it undertake a "*Merton*-compliant" age assessment of the Claimant.

48. A lawyer in the Council's legal services department, Humera Qureshi, replied to the letter before claim on 18 January 2023. Insofar as is relevant, that letter included the following statements:

> "…This is an obvious case where your client's demeanour strongly suggests he is in his mid 20s. The Proposed Defendant does not believe that your client is the age he claims ie 20/2/2006. His countenance and physical appearance are overwhelmingly that of an adult male and definitely not that of a child aged 16.
>
> …

> Kindly note the Proposed Defendant has made its own decision that this is not a case of doubt where an assessment of age needs to be undertaken….
>
> …
>
> following this check and in agreement with previous observations by the managers who saw him on the 19/10 a decision was made to refuse to age assess him as he looked significantly older, 25+. The Proposed Claimant was therefore seen by two Practice Manager and a senior social worker who were all in agreement."

49. It appears that, although Ms Burton wished to take matters further on behalf of the Claimant, the Legal Aid Agency declined to provide funding and, as a result, no challenge to the Council's decision of 27 October 2022 was ever brought. Ms Weston made clear that the Claimant was not, as part of the present claim, seeking to challenge the decision of 27 October 2022.

50. On 25 January 2023, Mr Singer sent an e-mail to Ms Couchman. He referred to the fact that the Council had made a decision on 27 October 2022 not to carry out an age assessment of the Claimant on the basis that, in the Council's view, his "appearance and demeanour overwhelmingly suggest that he is an adult in his mid-twenties", but that the Claimant did not accept this. Mr Singer referred to s 22 of the 2014 Act, and stated that it is clear that the Claimant may have special educational needs. He stated that the decision that the Claimant was in his mid-twenties was insufficiently precise, and did not preclude the Claimant being a young person for the purposes of the 2014 Act. Accordingly, Mr Singer asked the Council to undertake a comprehensive age assessment of the Claimant, to be followed by an EHC needs assessment and, if necessary, the production of an EHC plan for the Claimant.

51. When he sent his e-mail of 25 January 2023, Mr Singer did not know, and he could not reasonably have been expected to know, that in fact the Council had on 27 October 2022 decided that the Claimant was at least 28 years old. Mr Singer's request appears to be predicated on the understandable reasoning that the Council had decided that the Claimant was in his mid-twenties, that mid-twenties was broad enough to encompass an age of (for example) 24, and that if the Claimant were treated as being aged 24, he would be a young person for the purposes of the 2014 Act.

52. Ms Couchman replied to Mr Singer on 3 February 2023. She referred to the fact that the Council had received a letter before claim in relation to the Claimant, and asked that Ms Qureshi, as the Council's lawyer, be included in any correspondence. Later that day, Ms Qureshi responded to Mr Singer, stating that the Council had already been communicating with the Claimant's lawyers, who had invoked the Pre-Action Protocol for Judicial Review. She stated that the Claimant "has been assessed to be an adult by [the Council] and [the Council] has no duties towards him under the Education Act 1996 or Children and Families Act 2014 with respect to assessing him or providing him with an EHCP".

53. On 22 March 2023, Ms Burton sent a further letter before claim to the Council. The letter alleged that the Council had failed to comply with its duties under ss 22 and 36

of the 2014 Act because of what she described as an unreasonable and unlawful refusal to "precisely assess the Claimant's age by undertaking a full, *Merton*-compliant age assessment of the Claimant", in particular because: (a) the fact that the Council had on 27 October 2022 concluded that the Claimant was in his mid-twenties did not preclude the possibility that the Claimant was a young person for the purposes of the 2014 Act; (b) the Council was aware that the Claimant is unable to read or write in any language, and therefore he may have special educational needs and it may be necessary for provision to be made to meet those needs; and (c) the Council was aware that because the Claimant had experienced trauma, he may require therapeutic support in order to access education. The letter referred to Ms Qureshi's e-mail of 3 February 2023, which it referred to as constituting a refusal to undertake an age assessment and an EHC needs assessment of the Claimant. The letter alleged that "the Defendant is under a duty to accurately and precisely establish the Claimant's age as a precedent fact for exercising its powers under Part 3 of the [2014 Act]". On that basis, the letter requested that Council conduct a "*Merton*-compliant" age assessment; subject to the findings of that age assessment, conduct an EHC assessment; and, if required, prepare an EHC plan for the Claimant.

54. The Council replied to the letter before claim by a letter dated 5 April 2023, which was sent on behalf of the Council's Interim Director of Law and Governance and appears to have been written by Ms Qureshi. The substantive text of that letter is as follows (for ease of reference, I have inserted paragraph numbers in square brackets).

> "[1] Following the welfare visit, it was clear to the duty social worker and duty manager that the Claimant is not his claimed age of 20/2/2006 and applying benefit of the doubt likely to be in his mid/late 20s and possibly older than this.
>
> [2] I am instructed that the Tazkira (which did not have a date of birth recorded on) but referred to him being 12 in 2018 cannot be a credible document, and it would make him 16 on arrival when overwhelmingly he appears to be a mature adult. It is further unclear as to why his date of birth stated to be 20/2/2006 is not recorded on his Tazkira if he does indeed know it. This adds further to the issues regarding the credibility of the document. It also observed in the screening interview with the Home Office that in question 1.7 he is asked if he has any evidence to confirm his identity to which he replies 'I lost this during my journey'. Therefore, it is not evident at the time of his arrival to the UK whether the Claimant did have this copy of the Tazkira shown to the Defendant, therefore the Defendant further questions the authenticity of this document and how and when it was obtained.
>
> [3] Furthermore, the information shared by the Claimant in the screening interview which closely resembles the information shared with the Defendant for instance in respect to his journey in the Welfare Check by the Authority, further states the following concerning information:
>
> [4] Q. 1.21 where the Claimant states compelling reasons for children who are not his own to be granted leave in the UK, and names his nephews ages 8 and 6 years old respectively and his desire to bring them over. From the welfare check the Claimant claims to only have one brother and given

> the ages of his nephews, this indicates his brother is likely to be in his mid twenties onwards, giving futher concern as to [the Claimant's] age in the context of his brothers.
>
> [5] Q.3.6 where the Claimant states '…I want to bring my son to the UK…I do not want to bring my son to those countries'
>
> [6] Q.4.1 'I have travelled to the UK because I want to be educated and to bring my son to the UK to be educated too'.
>
> [7] It is further evident that the Claimant claimed to be a minor of 15 years old at port of entry providing a different date of birth, that of 10/2/2007, meaning that he would have just turned 15 years old having had his screening interview on 29/3/2022. It remains unclear if he appears to know his date of birth as indicated, why he has provided a completely different date of birth and year of birth to the Home Office and this further invalidates the copy of the Tazkira produced by the Claimant. Notwithstanding the fact that the Home Office made a poignant decision at point of entry that the Claimant was not then a 15 year old child but indeed a 28 year old male. This view was independently shared within the welfare check undertaken by the Defendant.
>
> [8] In summary, the observations of the Claimant in line with information he has shared with the Home Office and in the welfare check overwhelming indicate a high level of maturity of the Claimant and strongly indicates he is of an age around 10 years older than he claims to be.
>
> [9] The Defendant local authority will not be providing him with any support services under the Children Act 1989 or accept responsibility for him and will vehemently contest his claimed age if proceedings are invoked."

55. At the relevant time, the Claimant claimed to be 17 years old, and therefore the reference to the Claimant being of an age that is "around 10 years older than he claims to be" would appear to be a reference to the Claimant being "around 27 years old".

56. It appears that there was no further correspondence between the Claimant's representatives and the Council before the claim was filed and issued on 23 May 2023. Thereafter, as I have explained above, permission to apply for judicial review was granted by Mr Pittaway KC on 11 August 2023.

57. On 8 September 2023, the Claimant moved to the area of Birmingham City Council ("Birmingham") and, apart from a period of four days in September 2023 when he briefly returned to London, he has not been resident or present in the Council's area since then. It appears that, since September 2023, if any local authority were to have any responsibilities to the Claimant, it would be Birmingham. There is no suggestion, and there is certainly no evidence, that the Claimant might have any intention of returning to the Council's area in the future, or of seeking from the Council any support or services in the future. At the hearing, Ms Weston told me that the Claimant

has not sought an EHC needs assessment from Birmingham, albeit she indicated that such a request may be made once this litigation is concluded. It might be thought that this delay in approaching Birmingham is somewhat surprising, given the fact that there is an issue as to whether the Claimant is young enough to qualify for an EHC needs assessment and the fact that, whatever view one takes as to the Claimant's age, he is inevitably getting older by the day.

58. On 25 September 2023, the claim was stayed for a period of two months, by way of a consent order approved by Roger Ter Haar KC, sitting as a Deputy High Court Judge. As I understand the position, the parties were prompted to seek a stay by the Claimant's move to Birmingham and a temporary deterioration in the Claimant's mental health, which was considered to affect his ability to give instructions.

59. It appears that, on 22 October 2023, the Claimant was granted refugee status by the Home Office.

THE PARTIES' ARGUMENTS

(1) The Claimant

60. In section 3.1 of the claim form, the decision in respect of which judicial review was sought was stated to be "the Defendant's ongoing failure to adequately assess the Claimant's age". However, section 3.2 identified the date of the decision under challenge as 5 April 2023, and paragraph 41 of the Claimant's statement of facts and grounds referred to the Council's "new position" as being set out in its response of 6 April 2023 (which can only have been a reference to the 5 April 2023 letter; I assume that the reference to 6 April 2023 was a typographical error). In addition, the Claimant's skeleton argument referred to the fact that the Claimant was seeking a quashing order, which implied that he was challenging a specific decision.

61. Accordingly, at the hearing, I asked Ms Weston to confirm whether the Claimant's position was that he was challenging an ongoing failure by the Council, or whether he was in fact challenging a decision set out in the letter from the Council dated 5 April 2023. Ms Weston confirmed that the challenge was to a decision set out in the letter of 5 April 2023. I note that, by the time that the claim was brought, any challenge to any decision set out in Ms Qureshi's e-mail of 3 February 2023 (or Ms Couchman's e-mail of the same date) would have been out of time.

62. I have set out above the Claimant's single ground of challenge to the decision of 5 April 2023: he contends that the Council unlawfully failed to undertake a lawful inquiry to ascertain his age as a condition precedent to the discharge of its duties under Part 3 of the 2014 Act. The ground was articulated similarly in the Claimant's skeleton argument and in Ms Weston's oral submissions. In my view, the various points made by Ms Weston in support of that ground of challenge may be gathered together as follows.

63. First, the question whether an individual is a child or young person is a condition precedent to a local authority having duties in respect of that individual under Part 3 of the 2014 Act. As I understood the way that Ms Weston put it in oral argument, the

starting point is s 36(1) of the 2014 Act. She accepted that, if a local authority receives a request for an EHC needs assessment in respect of an individual who is said to be a child or young person within the meaning of Part 3 of the 2014 Act, but the local authority decides that the relevant individual is not in fact a child or young person, the request is not one that falls within s 36(1), and the local authority is not required to take the steps that the remaining subsections of s 36 would otherwise require it to take.

64. Secondly, Ms Weston accepted that there is no threshold of "obviousness" that is implicit in s 36(1) of the 2014 Act. In particular, she accepted that the references to a child or young person in s 36(1) could not be interpreted as referring to "a person who is not obviously not a child or young person", or similar. Indeed, it was the Claimant's position that s 36(1) raises a question of objective fact that, if necessary, could be determined by a court as an issue of precedent fact (by analogy with the *A* case to which I have referred above).

65. Thirdly, when taking a decision as to whether the individual to whom a purported request under s 36(1) relates is a child or young person, a local authority is required to adopt a materially similar approach to that which is to be adopted when assessing whether an individual is a child for the purposes of the 1989 Act. In essence, Ms Weston argued that the case law that has developed in the context of age assessment for the purposes of the 1989 Act applies by analogy to an assessment of age for the purpose of deciding whether an individual is a young person for the purposes of the 2014 Act.

66. Fourthly, the case law in relation to age assessment in the context of the 1989 Act is based on two underlying conventional public law principles: the duty to act in a procedurally fair manner, and the so-called *Tameside* duty to make reasonable inquiries. In this respect, Ms Weston referred to *HAM*, paragraphs 31-32 *per* Swift J.

67. Fifthly, the case law in relation to age assessment under the 1989 Act establishes that an assessment of an individual's age by reference solely to his or her physical appearance should be undertaken only in obvious cases. Ms Weston referred to paragraph 10 of the *HAM* case, where Swift J summarised what Stanley Burnton J had said in paragraph 27 of *Merton*. In the *Merton* case, having considered guidelines issued by the Royal College of Paediatricians in 1999 ("the RCP Guidelines"), Stanley Burton J noted "the impossibility of any decision-maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16-20". Ms Weston also referred to *R (AM) v Solihull Metropolitan Borough Council* [2012] UKUT 00118 (IAC), paragraph 15, where Mr Ockelton (Vice President of the Upper Tribunal (Immigration and Asylum Chamber)) and Upper Tribunal Judge Lane stated that "we think that almost all evidence of physical characteristics is likely to be of very limited value". Ms Weston developed this point by reference to the Islington Guidance, and the fact that it provides that it is only in cases in which an assessment of physical appearance suggests that an individual is at least seven years older than 18 that a decision-maker should proceed on the basis of an assessment of physical appearance alone. Ms Weston referred to a range of seven years as the "grey area".

68. Sixthly, where, on assessment of physical appearance alone, an individual is considered to be of an age that falls within Ms Weston's grey area, the local authority

is required to undertake a comprehensive assessment of age that incorporates the type of investigations referred to by Stanley Burnton J in the *Merton* case, paragraph 37, and by HHJ Thornton QC in *R (AS) v Croydon London Borough Council* [2011] EWHC 2091 (Admin), paragraph 19. Although Ms Weston did not suggest that either of these authorities set out a prescriptive list of what is required, she argued that they gave at least an indication of what was required, including appropriate procedural protections and a consideration of matters such as the individual's general background, family circumstances and history, educational background, and credibility.

69. Seventhly, on 27 October 2022, the Council had reached a conclusion as to the Claimant's age that was based solely on an assessment of the Claimant's physical appearance. Whilst the conclusion that the Claimant was in his mid-twenties or at least 28 years old was not in Ms Weston's grey area for the purpose of an assessment as to whether the Claimant was a child within the meaning of the 1989 Act, she emphasised that Mr Meiklem and Ms Kennedy had treated the Claimant's case as an "obvious case". Ms Weston suggested that if Mr Meiklem and Ms Kennedy had been concerned with a threshold age of 24, and not 18, they may well have decided to do a fuller assessment.

70. Eighthly, an equivalent grey area applies in the context of an assessment as to whether an individual is a young person for the purpose of the Part 3 of the 2014. Accordingly, because the age of 28 fell within the band of seven years either side of 24, the Council's decision as to the Claimant's age fell within the relevant grey area. In this respect, Ms Weston emphasised the materially different questions that she said fell to be asked in the different contexts: in October 2022, the question for the Council was whether the Claimant was aged 17 or under; in April 2023, the question was whether the Claimant was aged 24 or under. Her argument was that the answer to the first question was not an answer to the second question.

71. Ninthly, because the Council's October 2022 decision as to the Claimant's age fell within the grey area, and that decision had been reached on the basis of only a brief assessment of the Claimant's physical appearance, the Council was not entitled to rely solely or primarily on it to determine that the Claimant was not a young person for the purpose of Part 3 of the 2014 Act. Accordingly, before the Council could decide that the Claimant was not a young person, it was required to go further and conduct a comprehensive age assessment. Ms Weston argued that the legal error could be characterised in a number of ways: either the Council was required to undertake a comprehensive age assessment by virtue of its *Tameside* duty of inquiry, or by not undertaking a comprehensive age assessment the Council had taken its decision pursuant to an unfair procedure, or the Council was required to undertake a comprehensive age assessment in order to ensure that it took into account all relevant considerations.

72. Nevertheless, Ms Weston confirmed that the Claimant's case does not rest on any specific feature of the Council's letter of 5 April 2023. In particular, the Claimant does not argue that (save insofar as is necessarily implicit in the Claimant's sole ground of challenge) the letter of 5 April 2023 reveals any conventional public law error in the Council's decision-making, such as a failure to take into account relevant considerations, irrationality, a failure to give adequate reasons, or procedural unfairness.

73. Although Ms Weston was critical of the decision as to the Claimant's age that was reached on 27 October 2022, she accepted that it had not been challenged and that it is now no longer open to the Claimant to challenge it. Accordingly, she accepted that in April 2023 the Council was entitled to take into account the fact that in October 2022 two social workers had concluded that the Claimant was at least 28 years old, albeit she said that the Council was also required to take into account the circumstances in which that conclusion was reached. Her argument was that the Council could not simply rely on the 27 October 2022 decision without more.

74. Ms Weston did not contend that in April 2023 the Council had in any material respect been provided with any new or different information compared to that which had been considered by Mr Meiklem and Ms Kennedy on 27 October 2022. On this basis, she distinguished the Claimant's case from that which confronted Julian Knowles J in *R (F) v Manchester City Council* [2019] EWHC 2998 (Admin), in which it was contended that it was irrational for the defendant local authority not to undertake a fresh age assessment of the Claimant in the light of new evidence.

75. Ms Weston made it clear that, in light of the fact that the Claimant is now living in Birmingham's area, the only remedy now sought by the Claimant is an order quashing the Council's decision of 5 April 2023 (or a declaration that the decision was unlawful). Accordingly, the Claimant has abandoned his claim (set out in section 8 of the claim form and paragraph 47 of the statement of facts and grounds) for a mandatory order requiring the Council to undertake a "*Merton*-compliant" age assessment.

(2) The Council

76. For the Council, Mr Harrop-Griffiths' primary point was that the claim is academic, and that the Court should not determine it. At the outset of the hearing I indicated that I wished to hear all of the arguments before reaching a view as to whether the claim is academic and, if so, whether I should nevertheless exercise my discretion to decide it. I summarise the arguments on these points below.

77. On the substantive ground of challenge, Mr Harrop-Griffiths's essential argument was that, on 27 October 2022, the Council had decided that the Claimant was at least 28 years old. Mr Harrop-Griffiths accepted that the Council was faced with a different question in April 2023, but he argued that the Council was entitled to give the same answer to that question. The key issue was whether the Council was under a duty to do more by way of investigation in April 2023. In this respect, Mr Harrop-Griffiths relied on Swift J's comments in paragraph 33 of the *HAM* case, to the effect that a decision-maker will need to decide as an investigation of age progresses whether information reasonably required for the investigation has been identified, or whether further (and, if so, what) steps are required to obtain information that is reasonably required. Mr Harrop-Griffiths also referred to passages in *HAM* in which Swift J cautioned against assumptions that there is a single category of "short form" or "abbreviated" age assessment that necessarily will or will not be permissible (see paragraphs 25-30).

78. Mr Harrop-Griffiths accepted that in April 2023 the Council had to take into account what had been done by way of age assessment on 27 October 2022, and how that

decision was reached, but he contended that having taken those matters into account it was not irrational for the Council not to do more.

79. As to Ms Weston's reliance on the so-called grey area, Mr Harrop-Griffiths had two responses. First, he relied on paragraphs 28 to 30 of the *HAM* case, where Swift J held that whether a local authority's conclusion as to whether an individual is a child allowed for a "margin of error" is logically irrelevant to the questions whether the local authority complied with its *Tameside* duty to make reasonable inquiries or whether the local authority acted fairly. Secondly, Mr Harrop-Griffiths was minded to accept Ms Weston's argument that the case law on the assessment of age in the context of the 1989 Act could be read across to an assessment of age in the context of the 2014 Act. However, insofar as that case law suggests that there is a duty to go beyond a brief assessment of physical characteristics in a case in which such an assessment leads to a conclusion that an individual's age fell within a grey area, he pointed out that the decision reached on 27 October 2022 was taken on the basis that the benefit of the doubt had been given to the Claimant, and therefore a grey area had already been accounted for in the Council's decision-making. As such, argued Mr Harrop-Griffiths, this was a case which was "well clear" of the grey area.

IS THE CLAIM ACADEMIC?

80. As noted above, the Council's primary argument is that this claim is academic, and that I should not determine it. In this respect, Mr Harrop-Griffiths points to the fact that the Claimant has voluntarily left the Council's area and has no intention of returning, and therefore there is no longer any question of the Council undertaking an EHC needs assessment in respect of the Claimant or, indeed, of providing any other services or support the provision of which might turn on the Claimant's age. Mr Harrop-Griffiths points out that, insofar as the Claimant may still wish to request an EHC needs assessment, that request would have to be made to Birmingham, and it would be for Birmingham to decide how to respond to that request, and in doing so it would not be bound by anything that the Council had said or done.

81. In this respect, Mr Harrop-Griffiths referred to *R (SB) v Royal Borough of Kensington and Chelsea* [2023] EWCA Civ 924. That case involved a challenge to an age assessment in the context of the 1989 Act, and the facts were somewhat different to the present case. The defendant local authority had assessed the claimant as being at least 25 years old. Subsequent to that decision, the claimant moved to the area of another local authority, and that second local authority carried out its own age assessment and concluded that the claimant was in fact a child. As a result, the second local authority provided him with appropriate support. Although at first instance Bennathan J had quashed the defendant's age assessment decision, he had not granted an order requiring the defendant to undertake a fresh assessment. By the time that the appeal reached the Court of Appeal, the claimant was, even on his own case, an adult.

82. In those circumstances, Elisabeth Laing LJ (with whom Falk LJ and Sir Launcelot Henderson agreed) held that there was no longer any live dispute between the claimant and the defendant, and there were three main reasons why it was very unlikely that a quashing of the defendant's decision would have any practical impact (see paragraph 78). First, the claimant was never looked after by the defendant, and therefore there was no risk of him invoking, as against the defendant, any of the leaving care duties that are owed by local authorities to looked after children.

Secondly, the second local authority's age assessment did not bind the defendant, and therefore the claimant could not rely on it to ask the defendant to exercise the discretion that it would have had to provide support if a court had determined that the claimant was aged under 18. Thirdly, any status that the claimant might have had as a care leaver would not distort the defendant's duties under the Housing Act 1996 should the claimant subsequently present to the defendant as homeless. In those circumstances, Elisabeth Laing LJ concluded that "[p]utting things at their very highest, there is no more than a remote possibility of a potential future dispute between [the claimant] and [the defendant] to which the Decision might be indirectly relevant" (paragraph 78).

83. Mr Harrop-Griffiths submitted that, although the facts of the *SB* case were different, as a matter of substance it is very similar to the Claimant's case. He pointed out that the Claimant now seeks only a quashing order, and does not seek any order that would require the Council to take a fresh decision as to whether to undertake an EHC needs assessment of the Claimant; the Claimant was never looked after by the Council, and there is therefore no prospect of the Council owing any leaving care duties to the Claimant; and none of the Council's decisions would be binding on Birmingham. Mr Harrop-Griffiths accepts that, if it were not quashed, the Council's decision of 5 April 2023 could be taken into account by Birmingham if it were to consider whether to undertake an EHC needs assessment, but he dismissed the prospect of that having any material effect as fanciful, particularly in circumstances in which the Claimant has so far not even requested an EHC needs assessment from Birmingham. Mr Harrop-Griffiths emphasised that, if in due course Birmingham were to take a decision that the Claimant considered to be unlawful, the Claimant would have the opportunity to challenge that decision. Indeed, Mr Harrop-Griffiths suggested that, on any such challenge he could ask the court to determine his age as an issue of precedent fact (again by analogy with the *A* case).

84. On behalf of the Claimant, I understood Ms Weston to accept that there is no longer a live dispute as between the Claimant and the Council as to the Claimant's age; the Claimant is no longer asking the Council to assess his age for the purpose of deciding whether to undertake an EHC needs assessment. Further, Ms Weston did not suggest that the Claimant would or might in the future seek from the Council any other services or support the provision of which might turn on the Claimant's age. Ms Weston also accepted that Birmingham would not be bound by any of the Council's decisions.

85. The only point that Ms Weston advanced when submitting that the claim was not academic was to the effect that the Claimant would derive some advantage if the decision of 5 April 2023 were to be quashed. Ms Weston argued that, if that decision remained in place, the Claimant would be "on the back foot" in relation to Birmingham because, if he were to request an EHC needs assessment from Birmingham, it might take the same approach as the Council did, and rely solely or primarily on the Council's decision of 27 October 2022.

86. On this aspect of the case, the starting point is the decision of the House of Lords in *R v Secretary of State for the Home Department, ex p Salem* [1999] 1 AC 450. In that case, there was no longer a live issue between the parties by the time that the appeal reached the House of Lords. Lord Slynn (with whom the rest of their Lordships agreed) accepted that the appeal was academic, and that the only questions were

whether the House nevertheless had a discretion to hear it, and whether it should exercise any such discretion. In that context, Lord Slynn distinguished the approach that had been adopted in the private law context, and held that in the public law context the House of Lords had a discretion to hear an academic appeal (see page 456G-H).

87. In reaching that conclusion, Lord Slynn referred to two authorities that had arisen in the private law context and two authorities that had arisen in the public law context. In those authorities, what was decided to be an academic case was described in a range of different ways. In *Sun Life Assurance Co of Canada v Jervis* [1944] AC 111, 113-114, Viscount Simon LC referred to the appeal as one in which "there is no issue before us to be decided between the parties"; as raising only "an academic question, the answer to which cannot affect the respondent in any way"; and as involving "a legal conundrum which the appellants hope to get decided in their favour without in any way affecting the position between the parties". Viscount Simon LC held that "it is an essential quality of an appeal fit to be disposed of by this House that there should exist between the parties a matter in actual controversy which the House undertakes to decide as a living issue". In *Ainsbury v Millington* [1987] 1 WLR 379, 381A-B, Lord Bridge referred to the appeal as one in which "neither party can have any interest at all in the outcome of the appeal". In *R v Board of Visitors of Dartmoor Prison, ex p Smith* [1987] QB 106, 115, Ralph Gibson LJ referred to the appeal as one in which the claimant was "rightly to be regarded as having no interest in the outcome". In *R v Secretary of State for the Home Department, ex p Abdi* [1996] 1 WLR 298, 302F-G, Lord Slynn referred to the appeal as one in which "the outcome…will not directly affect the applicants". In *ex p Salem* itself, Lord Slynn referred to the appeal as one in which "there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se" (see page 456G-H).

88. It is clear that none of these authorities purported to define the circumstances in which a case is academic; the passages I have cited merely describe why, on the particular facts of each case, the appeal in question was considered to be academic. Nevertheless, they give a flavour of the type of case that is likely to be academic.

89. The question of what constitutes an academic claim was considered more recently by the Court of Appeal in *R (L) v Devon County Council* [2021] EWCA Civ 358, [2021] ELR 420. In that case, there were challenges to alleged delays by the defendant local authority in issuing amended EHC plans in respect of the claimants. One aspect of the challenges gave rise to a dispute as to the proper interpretation of the relevant regulations. By the time that the defendant came to serve its acknowledgment of service and summary grounds of resistance, the relevant amended EHC plans had been issued, and the defendant argued that the claims were therefore academic. Although the Judge who granted permission to apply for judicial review was not persuaded that the claims were academic, the Judge who dealt with the substantive hearing held that they were academic, and he decided not to exercise his discretion to hear them. The claimants appealed against that decision.

90. On appeal, Elisabeth Laing LJ (with whom Haddon-Cave and Peter Jackson LJJ agreed) did not find it necessary to decide whether the claims were academic, because she decided that the Judge at first instance had erred in principle when considering whether to exercise his discretion and, exercising that discretion afresh, she decided that it was appropriate to determine the claim (see paragraph 49). However, she

"inclined to the view" that the claims were academic, because the claimants "had obtained all the practical relief for which they had asked, that is the issue of the final amended statements" (see paragraph 50). Elisabeth Laing LJ went on to observe that, although there was still a potential issue between the parties about the proper interpretation of the regulations, it was no longer live in the context of the claims, whether or not it was "possible, probable, or virtually certain that it would arise again in a future year".

91. Peter Jackson LJ (with whom Haddon-Cave LJ also agreed) concurred with Elisabeth Laing LJ that it was not necessary to decide whether the claims were academic, and he noted that it was not always easy to decide whether a claim is academic (see paragraph 61). He went on to explain that a claim will be academic "if the outcome does not directly affect the rights and obligations of the parties", and noted that the matter had been put in similar ways in the authorities to which I have referred above (see paragraph 62). Peter Jackson LJ also referred to *R (Rusbridger) v Attorney General* [2003] UKHL 38, [2004] 1 AC 357, paragraph 35, where Lord Hutton stated that "[i]t is not the function of the courts to decide hypothetical questions which do not impact on the parties before them", and *R (Brooks) v Islington London Borough Council* [2015] EWHC 2657 (Admin), [2016] PTSR 389, paragraph 25, where Lewis J referred to a case in which "there is no longer a live issue to be decided which will directly affect the rights and obligations of the parties". Peter Jackson LJ adopted the latter formulation, and suggested that a "claim will be academic if the outcome does not directly affect the rights and obligations of the parties" (see paragraph 62). However, he also pointed out that it is not always easy to decide whether a claim is academic, and whether a claim is academic depends on the particular circumstances (see paragraph 65).

92. In my view, the authorities to which I have referred indicate that there is no single, universally-applicable test that can be applied to determine whether a claim is academic; whether a particular claim is academic depends on the circumstances. Accordingly, I must consider the particular facts of the present case, guided by the approaches that have been adopted in the case law to which I have referred.

93. In one sense, there remains an issue between the parties in this case: the Claimant says that the Council's decision of 5 April 2023 was unlawful, whereas the Council says that it was lawful. Further, the Claimant continues to seek the quashing of that decision. However, the determination of that issue would not affect the respective positions of the parties in any practical sense, nor would it affect the rights and obligations of the parties. Ms Weston did not suggest the contrary; in particular, she did not suggest that the resolution of the claim would confer any legal or practical advantage on the Claimant in relation to the Council. Accordingly I consider that, adopting the words of Elisabeth Laing LJ in the *SB* case, to put things at their very highest, there is no more than a remote possibility of a potential future dispute between the Claimant and the Council to which the decision of 5 April 2023 might be even indirectly relevant.

94. As a result, all that is left is Ms Weston's point about the Claimant potentially being "on the back foot" in relation to Birmingham if the Council's decision of 5 April 2023 were not quashed. I accept that, at least in principle, if the resolution of the claim would materially affect the Claimant's position in relation to Birmingham, that could potentially constitute a reason why the claim is not academic. Ms Weston did not

argue that the resolution of the claim would directly affect the Claimant's legal rights or obligations vis-à-vis Birmingham; she merely contended that the resolution of the claim would (if resolved in the Claimant's favour) confer on him a practical advantage. However, I consider that, even if I were to quash the Council's decision of 5 April 2023, the extent of any practical advantage to the Claimant would be negligible at most.

95. The Claimant has not yet approached Birmingham to request an EHC needs assessment. Accordingly, as matters currently stand, there is no relationship as between the Claimant and Birmingham on which the determination of this claim could have any impact. Even if the Claimant were to request Birmingham to undertake an EHC needs assessment in the immediate future, he would be doing so nearly a year after the Council's decision of 5 April 2023, and some 16 months after the decision of 27 October 2022. There is no evidence before the Court as to what approach Birmingham might adopt to the question of age in those circumstances; indeed, there is no evidence as to the approach that Birmingham adopts generally when assessing the age of an individual, even for the purposes of the 1989 Act. In particular, there is no evidence that Birmingham approaches it decisions in the context of the 1989 Act on the basis of the same seven year grey area to which the Islington Guidance refers.

96. In those circumstances, and in view of the fact that what is required by way of an age assessment in a particular case is fact-specific, I do not consider that any ruling as to what the Council was or was not entitled to do in April 2023 would have any material effect on what Birmingham would do, or would lawfully be entitled to do, almost a year later. In particular, Ms Weston did not suggest that Birmingham could not take into account the Council's decision of 27 October 2022, even if I were to quash the Council's decision of 5 April 2023. What Birmingham would, and would be entitled to, do in that respect would turn primarily on the specific circumstances as they present to Birmingham at the relevant time, potentially including any relevant policy that Birmingham may have in relation to a grey area; it is very unlikely to turn on whether what the Council had done in the specific circumstances facing it in April 2023 was lawful.

97. Further, Ms Weston's argument on this point is, in effect, a call for the Court to rule on the lawfulness of the Council's actions in the past in order to assist or encourage Birmingham to act lawfully in the future. In my view, even if it were the case that the determination of this claim against the Council might help or encourage Birmingham to avoid acting unlawfully in the future, that would not be a sufficient reason to decide that the claim is not academic. Birmingham is required to act lawfully in any event; if it fails to do so, the appropriate course of action is a claim for judicial review against it.

98. Accordingly, I do not consider that there remains a live issue between the parties that, if resolved, would affect their respective rights and obligations. Further, I consider that, even if the Court were to resolve this claim in the Claimant's favour, there is no more than a negligible prospect of that outcome having any real practical impact on any potential future dealings between the Claimant and Birmingham. As a result, having considered all the circumstances, I accept Mr Harrop-Griffiths's argument that the claim is academic.

SHOULD THE CLAIM BE DETERMINED NONETHELESS?

99. On behalf of the Claimant, Ms Weston argued that, even if I were to conclude that the claim is academic, I should nevertheless exercise my exceptional discretion to decide it, because the claim raises an issue of general importance that requires determination. In her oral submissions in reply, Ms Weston identified the issue on which she relied in this respect as that of whether the same approach to the assessment of age as is adopted in the context of the 1989 Act should be adopted in the context of the 2014 Act and, in particular, whether the same approach to the grey area should be adopted.

100. In *ex p Salem*, Lord Slynn referred to the fact that the discretion to hear academic disputes, even in the public law context, must be exercised with caution, and that appeals which are academic between the parties should not be heard unless there is a good reason for doing so (see page 457). Lord Slynn gave as an example of a case in which there might be such a good reason one in which a discrete point of statutory interpretation arises which does not involve detailed consideration of the facts and where a large number of similar cases exist or are anticipated. Lord Slynn held that there was no good reason for determining the appeal before the House because, although there was a point of statutory interpretation, much may depend on the factual context, and the relevant question had arisen in only a few cases. Although Lord Slynn was referring to the then House of Lords' discretion to hear academic appeals, his approach applies equally to the Administrative Court's discretion to hear an academic claim (see the *L* case, paragraph 50 *per* Elisabeth Laing LJ, 64 *per* Peter Jackson LJ). In the *L* case, Elisabeth Laing LJ referred to the *ex p Salem* test as a "rigorous filter" (see paragraph 50).

101. Although Ms Weston contends that this claim raises an issue of general importance that requires determination, it is notable that this issue does not appear to have arisen in any contested case since the 2014 Act came into force (and, prior to that, it does not appear to have arisen under the analogous provisions of the predecessor legislation, Part IV of the 1996 Act). I was not told of any other case, whether actual or potential, that might turn on the issue identified by Ms Weston. Indeed, in oral argument, Ms Weston suggested that it was likely to be rare that an individual who was not treated as a child for the purposes of the 1989 Act would approach a local authority for an EHC needs assessment. Accordingly, I do not consider that this is a situation in which any appreciable numbers of similar cases exist or are anticipated, and this weighs against the exercise of my discretion.

102. Further, I consider that it is unlikely that this case raises an issue of general importance, as opposed to an issue that would require to be decided on its own particular facts. As I have explained above, Ms Weston accepted that the public law duties that are of most relevance in the context of the determination of age, and on which her case was founded, were the *Tameside* duty of inquiry and the duty to act in a procedurally fair manner. It is trite law that what is required by either of those duties in a particular case is context-specific. As a result, it is likely that any assessment of whether the Council's decision of 5 April 2023 was lawful would involve consideration of the specific circumstances of the case, including the reasons for that decision. In this context, I consider that it is relevant that Ms Weston placed particular emphasis on the Islington Guidance, and its provision for a seven year grey area, but there is no evidence as to whether any other local authority has a policy that refers to a similarly wide grey area. As a result, I have significant doubts that the determination

of this claim would result in the type of generally-applicable guidance that might be of assistance in other cases. In my view, this point weighs heavily against the exercise of my discretion.

103. There is an additional, evidential point that arises in this respect. Both parties have proceeded on the basis that the Council's letter of 5 April 2023 sets out the relevant decision for the purposes of the Claimant's challenge. However, it is not entirely clear exactly what fresh decision or decisions the letter of 5 April 2023 in fact sets out. In paragraph 1 (using the numbering that I have inserted into the quotation from the letter above), the letter begins by referring to the decision as to the Claimant's age that was taken on 27 October 2022. In paragraph 2, the letter then goes on to refer to the Claimant's tazkira, but it is unclear whether this part of the letter is intended to rehearse the conclusions about the tazkira that were reached on 27 October 2022, or whether it reflects some fresh consideration of the photograph of the tazkira that the Council retained on its files. In particular, paragraph 2 refers to information relating to the tazkira derived from the record of the Home Office screening interview, but that record was not available to Ms Kennedy and Ms Meiklem on 27 October 2022.

104. Paragraphs 3 to 7 of the letter refer to various other matters arising out of the record of the Home Office screening interview, which would appear to reflect some fresh consideration of the Claimant's case. However, it is not clear whether paragraph 8 of the letter represents a fresh decision as to the Claimant's age, or merely a restatement of the decision taken on 27 October 2022 which is sought to be buttressed retrospectively by reference to the matters referred to in paragraphs 2 to 7 of the letter.

105. In addition, insofar as paragraph 9 sets out a fresh decision, it is a decision to the effect that the Council would not provide the Claimant with "any support services under the Children Act 1989". However, that was an answer to a question that had not been asked: at that point, the Claimant was not seeking support or accommodation under the 1989 Act; he was seeking an EHC needs assessment under the 2014 Act and, as Ms Weston points out, the fact that the Council might have concluded that the Claimant was not a child for the purposes of the 1989 Act did not necessarily preclude it from concluding that he was a young person for the purposes of the 2014 Act.

106. Moreover, the letter was sent as a response to a letter before claim under the Pre-Action Protocol for Judicial review, and it appears to have been written by one of the Council's lawyers. The letter itself does not explain who took any decision that is referred to in it, there is no other evidence before the Court that sheds any light on this point, and Mr Harrop-Griffiths had no instructions on this point. Accordingly, insofar as the letter does set out any decision or decisions, the identity of the decision-maker is unknown. For the same reason, other than the matters that are expressly referred to in the letter (and, as I have explained, there is a lack of clarity as to the status of those matters) it is entirely unclear what any decision-maker did or did not take into account when reaching any decision.

107. As a result, I consider that it is likely that in this case there would be difficulties in applying to the facts the context-specific approach that the law envisages. I recognise that it might be argued that the potential difficulty in this respect has arisen out of a failure by the Council to provide a proper explanation of its decision-making, and that therefore this factor should not count against the Claimant. However, although there might be some force in this argument, as I have explained the Claimant's case was not

founded on any specific feature of the decision of 5 April 2023, and Ms Weston took no point on it. Indeed, it seems to me that both parties proceeded on the basis that the specific nature, status and effect of, and reasons for, any decision set out in the Council's letter of 5 April 2023 were essentially irrelevant. According, I consider that it is appropriate to treat this as a further factor that weighs against the exercise of my discretion.

108. In any event, even if I were wrong in relation to the points above, and the issue to which Ms Weston refers could properly be characterised as one of general importance and could be determined as an issue of principle, I do not consider that the Court has before it the material necessary in order properly to resolve that issue. As I have noted above, in effect both parties were agreed that the case law that has arisen in the context of age assessment under the 1989 Act should be applied by analogy to age assessment under the 2014 Act. Accordingly, I heard no contested argument on the point.

109. Nevertheless, it seems to me that the agreement of the parties in this respect might be based on an erroneous assumption that, because a decision by a local authority whether to exercise functions under either the 1989 Act or the 2014 Act might require it to assess the age of the relevant individual, there is no material difference in the approaches required in the two contexts. In effect, the parties approached the issue on the basis that it raises solely or primarily an issue of law. However, as I have mentioned above, the origin of what Ms Weston referred to as the "grey area" would appear to be the RCP Guidance to which Stanley Burnton J referred in paragraph 22 of the *Merton* case. The extract from the RCP Guidance quoted by Stanley Burnton J begins as follows:

> "In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15-18, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18…."

110. Accordingly, Stanley Burnton J's conclusion in *Merton* as to "the impossibility of any decision-maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16-20" (see paragraph 28) appears to have been founded on evidence that was directed primarily at the practical difficulties that arise when attempting to assess whether an individual is under or over the age of 18. In the present case, the parties did not adduce any evidence as to what practical difficulties might arise when assessing whether an individual is under or over the age of 25, and whether those difficulties might be similar to, or different from, those that arise when assessing whether an individual is under or over the age of 18. I recognise that, on investigation, it might transpire that no such evidence exists or is obtainable, but it does not appear that the parties have explored the matter, and therefore the Court simply does not know what the true position is.

111. In my view, the evidential vacuum in relation to this issue means that it is likely that it would be very difficult for me properly to resolve the suggested issue of principle identified by Ms Weston on its merits, other than perhaps by way of applying

something akin to a burden of proof, which would be an unsatisfactory way of resolving an issue that is said to be of general importance. Indeed, there is a risk that anything that I might say on this issue would subsequently be shown to be wrong in the light of evidence that might be adduced in a later case. I consider that this is a factor that weighs very heavily against the exercise of my discretion.

112. Finally, although it is not a point that was advanced by Ms Weston, I bear in mind the facts that this is a claim for which permission has been granted (although the issue as to whether the claim is academic had not yet arisen at the permission stage), the parties have prepared for and argued the claim at a full day's substantive hearing, and they have incurred the costs of doing so. Similarly, I bear in mind the fact the Court has expended resources on the hearing of the claim. As the Claimant is legally-aided, all of the costs will be borne by the public purse. In my view, there is a good argument that it would be in accordance with the overriding objective provided for by CPR 1.1 for me to determine the claim. Notwithstanding the Claimant's non-reliance on this point, I consider that it is a matter that weighs in favour of exercising my discretion.

113. Balancing the factors that point in favour of exercising my exceptional discretion against those that point in favour of not exercising it, I consider that overall the balance clearly falls against exercising my discretion, and there is no good reason in the public interest to determine this claim. In this context, I particularly bear in mind the fact that the discretion is an exceptional one, the fact that I consider that it is unlikely that this claim raises an issue of general importance and the fact that, even if I were wrong about that, I consider that it is unlikely that the Court would be in a position satisfactorily to determine the issue of general importance that Ms Weston identified.

CONCLUSION

114. For the reasons set out above, I consider that the Claimant's claim is academic and that I should not exercise my exceptional discretion to determine it. Accordingly, I dismiss this claim for judicial review.