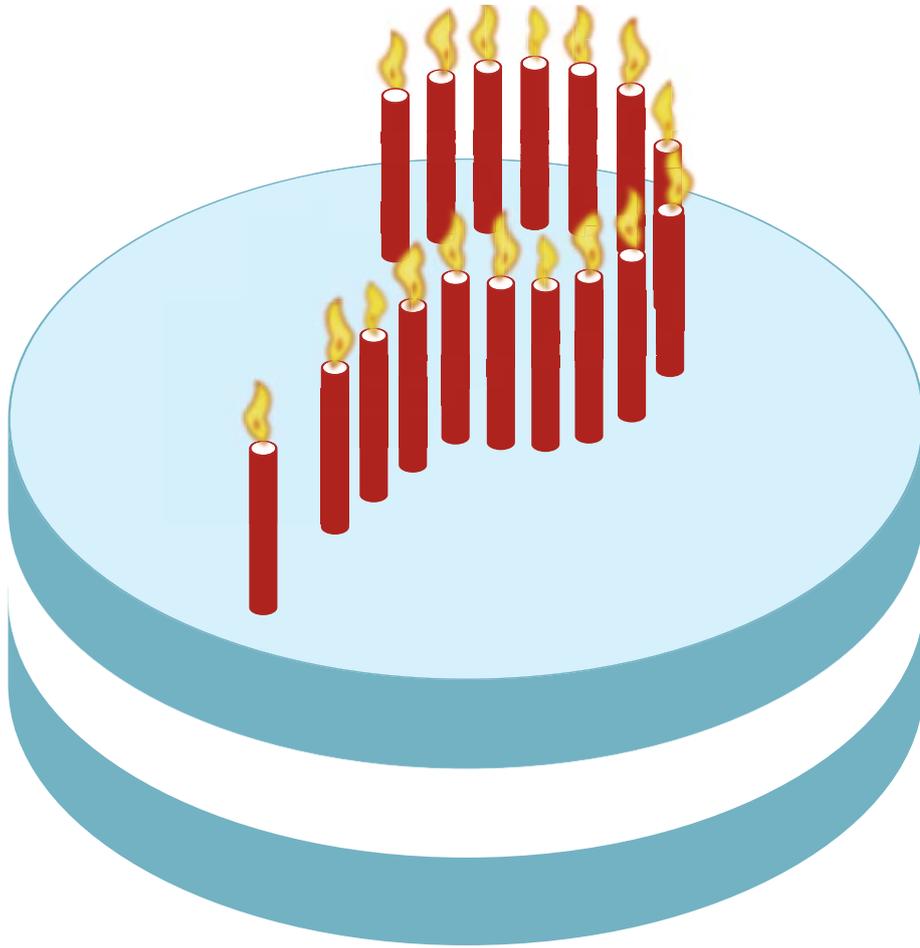


Happy Birthday?

Disputing the age of children in the immigration system



May 2013

Acknowledgements

This report was written by Kamena Dorling, with the invaluable assistance and expertise of the Migrant Children's Project team: Syd Bolton, Jane Barrett, Alison East, Sophie Freeman, Anita Hurrell and Daniel Smallwood.

Thanks also to those who provided case studies, comments and their expert opinions: Judith Dennis (Refugee Council), Hannah Elwyn (Refugee Support Network), Ilona Pinter, Chloe Purcell and Alice Myers (The Children's Society), Azeem Suterwalla (Doughty Street Chambers), Shu Shin Luh (Garden Court Chambers), Sarah Clarke (Independent Consultant), Sheila Melzak (Baobab Centre for Young Survivors in Exile), Colin Walker and Debbie Beadle (ECPAT UK) and Jenny Allsopp (Refugee Studies Centre).

This report, and the work of the Migrant Children's Project, would not have been possible without the funding provided by Unbound Philanthropy, the Paul Hamlyn Foundation, John Paul Getty Jnr, Comic Relief and Trust for London. We are very grateful for their ongoing support.



Coram Children's Legal Centre is a national charity committed to promoting children's rights in the UK and worldwide. The Migrant Children's Project at Coram Children's Legal Centre provides information and guidance to practitioners on the rights and entitlements of refugee and migrant children and young people, as well as providing advice and representation directly to children, young people, their families and carers. For more information on the work of the Centre, visit www.childrenslegalcentre.com.

Design and typesetting, Stephen Jones, www.makeitlooknice.co.uk

Contents

Definitions	2	4. The cost and impact of age disputes	33
1. Introduction	3	4.1 Disbelieving children	33
1.1 The importance of age	5	4.2 Falling through gaps in support	35
1.2 Guidance and international standards for assessing age	8	4.3 Impact on immigration status	36
2. Age disputes in the UK	10	4.4 Cross-examination	38
2.1 Current Practice	10	4.5 Understanding the process	39
2.2 Statistics	10	4.6 Vulnerability and need	40
2.3 Social work age assessments	12	4.7 Detention	43
2.4 Home Office policy	19	4.8 Impact on professionals	43
3. The court process	24	4.9 Financial cost	46
3.1 Credibility	28	5. Conclusion	47
3.2 Link between asylum case and age assessment proceedings	29	6. Recommendations	49
3.3 The role of other professionals	30	6.1 Home Office	49
3.4 Documentation	31	6.2 Local authorities/Department for Education	49
3.5 Alternatives to court	32	6.3 Other possible recommendations	50

Definitions

Asylum seeker - A person who has applied to the government of a country other than their own for protection or refuge ('asylum') because they are unable or unwilling to seek the protection of their own government. A child or young person is referred to as an 'asylum seeker' in the UK if he/she has lodged a claim for asylum with the Home Office and is still waiting to see if that claim will be granted, or has an appeal outstanding. Children may apply as a dependant of a family member or in their own right.

Age-disputed child or young person - A child or young person whose age has been disputed has not had their claimed date of birth accepted by the Home Office and/or by the local authority that he or she has approached to provide support or protection. This term is usually used to refer to people who claim to be children, but who are treated as adults by the Home Office and/or the local authority. Whether an individual is treated as an adult or as a child has significant implications for the way in which the person's claim for asylum is treated, and the support received.

Children - A child is defined by the 1989 United Nations Convention on the Rights of the Child and the United Kingdom's Children Act 1989 as a person below the age of 18 years.

Discretionary leave/UASC leave - Time limited permission to stay, granted where the Home Office has decided that the individual does not qualify for refugee status or humanitarian protection but where there are other strong reasons why the person needs to stay in the UK. This is the most common form of leave given to unaccompanied asylum seeking children (often referred to as UASCs) when there are no adequate reception arrangements in their country of origin. It is normally granted for 2½ years or until the individual reaches 17½ years of age – whichever is the shorter period.

First-tier Tribunal (Immigration and Asylum Chamber) - The First-tier Tribunal was established on 15 February 2010, alongside the Upper Tribunal (Immigration and Asylum Chamber) as part of the Unified Tribunals framework created by the Tribunals, Courts and Enforcement Act 2007. The new chambers replace the former Asylum and Immigration Tribunal. The First-tier Tribunal (Immigration and Asylum Chamber) is an independent Tribunal dealing with appeals against decisions made by the Home Secretary and his/her officials in immigration, asylum and nationality matters.

Home Office - The Home Office is a ministerial government department that leads on immigration and passports, drugs policy, crime policy and counter-terrorism. It is supported by 25 agencies and public bodies, including the UK Border Agency. At the time of writing the Secretary of State had announced that the UK Border Agency would be disbanded, therefore the term 'Home Office' is used throughout this report to refer to immigration services.

Leave to remain - The permission given by the Home Office to someone allowing them to stay in the UK. Indefinite leave to remain can be granted, or leave can be limited as to time and may contain various prohibitions (on working or claiming 'public funds').

Merton compliant - A term used to describe a local authority age assessment that has been conducted in accordance with the case law on age assessment and is therefore fair and lawful. The term derives from the case of *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin) which gives guidance as to the requirements of a lawful assessment by a local authority of the age of a young asylum seeker claiming to be under 18 years of age. It

should be noted that a 'Merton compliant' assessment must comply with *all* case law, not just *Merton*.

National Referral Mechanism (NRM) - The National Referral Mechanism (NRM) is a framework for identifying victims of human trafficking and ensuring that they receive the appropriate care. Authorised agencies, such as the police, Home Office, social services and certain NGOs, who encounter a potential victim of human trafficking, can refer them to the Competent Authority (CA). In the UK, the CAs are the UK Human Trafficking Centre and the UK Border Agency.

Refugee - A refugee is a person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country ...' as set out in the United Nations Refugee Convention 1951.

Separated child - A separated child is a child who has been separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from other relatives. These may, therefore, include children accompanied by other adult family members. The Home Office definition of unaccompanied children (see below) does not include children who arrived in the United Kingdom in the care of a parent or other adult (for example, a relative or family friend) who by law or custom has responsibility for the child, even if the child is no longer living with such an adult due to the subsequent breakdown of such an arrangement.

UK Border Agency (UKBA) - The UK Border Agency is an executive agency of the Home Office and the government body responsible for managing immigration control in the UK, including the processing of applications for permission to stay, citizenship and asylum. At the time of writing, the Secretary of State had announced that the UKBA was to be disbanded – therefore, the term 'Home Office' is used throughout this report.

Unaccompanied asylum seeking child - The definition for immigration purposes of an unaccompanied asylum seeking child is given by the Home Office as 'a person under 18 years of age or who, in the absence of documentary evidence establishing age, appears to be under that age' who 'is applying for asylum in their own right; and is separated from both parents and not being cared for by an adult who by law or custom has responsibility to do so'. Children in this situation are also known as separated children or unaccompanied minors (UAM).

Upper Tribunal (Immigration and Asylum Chamber) - The purpose of the Upper Tribunal is to hear and decide appeals against decisions made by the First-tier Tribunal in matters of immigration, asylum and nationality. Age assessment hearings can also be heard in the Upper Tribunal.

Young person - In this report, a young person is defined as anyone aged between 15 and 24 years of age, in keeping with the United Nations definition of youth. The term is frequently used when discussing those over whom there is a dispute as to whether they are a child or an adult.

1. Introduction

In 2011, Coram Children’s Legal Centre represented a young person, referred to as Y, in a case in the High Court. Y was trafficked to the UK from Nigeria at the age of five to work as a child domestic slave. She had been forced to work for two Nigerian families for nearly ten years, denied access to education, denied medical attention when she was ill, and only allowed to leave the house when the family went to church. Even then, she was forbidden from speaking to anyone. Y was finally able to escape her captors in 2008 and, after sleeping rough for several weeks, was taken to the local authority for support.

It would be reasonable to assume that the subsequent court case concerned bringing Y’s traffickers to justice, or seeking damages for the trauma that she had undergone in the previous decade. Instead, Y was in court to address a dispute about her age. As might be expected in her circumstances, she had no passport, birth certificate or other documentation to prove how old she was. All she knew was that she had seen her date of birth written down in a diary, and that it had been confirmed by her trafficker.

For nine months the local authority accepted Y’s claimed date of birth. She was placed in foster care and a care plan was drawn up, with no concerns raised about her age by her social worker, foster carer or the teachers at the school in which she was placed. However, following a police investigation during which Y’s traffickers told the police that she was older than she claimed, the local authority decided to review her age. Based on a number of factors, including a dental examination and the observation that Y presented as ‘independent and astute’, the social workers carrying out the age assessment for the local authority concluded that she was an adult. Y was taken out of secondary school and away from her foster carers.

Rather than accepting her account and providing her with the support and protection she so desperately needed, the local authority to which she had turned moved her into accommodation with adults. As a result, she was also treated by the Home Office as an adult until the dispute was resolved. This conclusion could only be challenged

in court, by initiating proceedings to judicially review the local authority’s decision, and by spending three days in a ‘fact-finding’ hearing so that the judge could make their own decision as regards to Y’s age.¹ Fortunately, the judge believed Y and it is now recognised that she was born in 1993.

After the case, Y pledged ‘I am going to make the most of my life’ and went on to study child care at college. But the process of being disbelieved and of having to challenge the local authority legally had taken nearly three years – yet more time wasted on top of the ten years of her childhood she had already lost. Crucially, while the dispute was ongoing, she was also denied the protection to which she was entitled as a victim of trafficking, such was the focus on her chronological age rather than her needs and vulnerability.²

This case vividly illustrates how damaging the impact of an unlawful age assessment can be on a young person, and Y’s case is sadly by no means unusual. Each year, a quarter of all unaccompanied children claiming asylum have their ages disputed.³ Ten years since the first court judgment outlined the criteria to follow when conducting age assessments,⁴ children are still being regularly disbelieved about how old they are and facing harmful, protracted disputes, during which they frequently do not receive the support and protection to which they are entitled. They might be housed with adults, denied access to education or college, or detained as an adult in an Immigration Removal Centre and forcibly removed from the United Kingdom. That the local authority chose to believe Y’s traffickers over her own account in this case is a stark example of the extent to which a culture of disbelief has developed in both the immigration service and social care, with vulnerable children viewed with suspicion and hostility, and subjected to ‘a forensic inquiry into the minutiae of their lives’⁵ as practitioners on all sides seek to ‘prove’ how old they are.

In the absence of any process of mediation or arbitration to try to resolve disputes about age, the only recourse is legal challenge by way of judicial review, which is expensive for local authorities and stressful for children and young people,

1 *R (Y) v LB of Hillingdon*, [2011] EWHC 1477 (Admin)

2 For more information on the rights of child victims of trafficking, see Coram Children’s Legal Centre, *Seeking Support: A guide to the rights and entitlements of separated children*, 2012 at www.seekingsupport.co.uk

3 There may be other separated children who do not claim asylum whose ages are disputed, but figures for this are not currently available.

4 *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin)

5 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment in R(A) v Croydon LBC [2009]*, Office of the Children’s Commissioner, 2012, at http://www.childrenscommissioner.gov.uk/content/publications/content_590

whose lives are left in limbo as they wait for a decision.⁶ Since the 2009 Supreme Court judgment, *A v Croydon*,⁷ it ultimately falls to the court to make its own finding as to the fact of a young person's age. This judgment appeared to offer a means by which age disputes could be resolved without the need for repeated age assessments by social services and was also intended to run alongside improvements in local authority age assessment processes. Mr Justice Collins stated that it would not inevitably result in an inappropriate judicialisation of the age assessment process because it was hoped that 'the fact the final decision rests with the court will assist in reducing the number of challenges'.⁸ However, the experiences of young people who have ultimately had to take part in a fact-finding hearing not only suggest that the process is still just as damaging, but that also some judicial age assessments may not be any more accurate or reliable than those carried out by local authorities.⁹

Whilst the need to establish an individual's identity, including their age as appropriate, is clear, the current process in the UK is often confused and flawed.¹⁰ Over the past decade, a culture of disbelief has developed whereby the default position taken by immigration officials and social care professionals is that the young person either does not know, or is lying about, their age. Furthermore, an increased recourse to litigation - the only existing means of definitively resolving a dispute - has developed and the courts have seen a 'burgeoning volume of cases which turn on the determination of the age of a young person in relation to the provision of services and support'.¹¹

This report examines the age assessment process and the practical and emotional impact of age disputes on young people in the immigration system, the human cost of a process that can be too long, too adversarial and fail to adequately consider the needs of the individuals involved. It also studies the impact on local authorities and the courts, and the financial cost of a system in which litigation is so often the only means of resolution. The report explores means of improving the current process and alternative ways to address the issue of age that work in the interests of children and young people.

Information for this report was gathered in the following ways:

- A review of the current international and UK legislative and policy framework on age assessments.¹²
- A literature review of existing academic research and NGO reports on age assessments in the UK.
- A case review of the 51 cases involving age disputes heard to date in the Administrative Court, Upper Tribunal and Court of Appeal.
- An in-depth file review of 12 Coram Children's Legal Centre case files to examine weaknesses and strengths in the relevant social work assessments, use of evidence and the impact of the process on the young people involved.
- Freedom of Information requests to 27 local authorities and the Ministry of Justice.

The findings of the report are further informed by ongoing discussions with local authorities, the Home Office, NGOs, solicitors and barristers regarding the situation on the ground at the time of writing.

Much detailed research and policy work has already been produced on this issue,¹³ highlighting problems and suggesting workable solutions. Yet we have seen little positive action from central and local government to implement possible changes and children continue to bear the brunt of a deeply flawed system. This report therefore seeks to build on the previous work that has been carried out to date and calls for concrete and immediate action to be taken to improve the process and promote the welfare of all children and young people in the immigration system.

6 S. Clarke, *Young Lives in Limbo: the protection of age disputed young people in Wales*, Welsh Refugee Council, 2011, p 10, at <http://www.welshrefugeecouncil.org/wp-content/uploads/2011/08/WRC-Young-Lives-in-Limbo-WEB4.pdf>

7 *R (A) v Croydon LBC* [2009] 1 WLR 2556

8 *ibid*, para 54

9 See L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC [2009]*, Office of the Children's Commissioner, 2012

10 J. Dennis, *Not a minor offence: unaccompanied children locked up as part of the asylum system*, Refugee Council, 2012 at http://www.refugeecouncil.org.uk/assets/0002/5945/Not_a_minor_offence_2012.pdf

11 *Rawofi v SSHD* [2012] UKUT 00197 (IAC)

12 The focus of this report is very much on the situation in England, but it draws heavily on research and guidance from Scotland and Wales. Many children who are age disputed by the Home Office will be dispersed across the UK, so a joined up system is very important.

13 Including H. Crawley, *When is a child not a child? Asylum, age disputes and the process of age assessment*, Immigration Law Practitioners' Association (ILPA), 2007, at <http://www.ilpa.org.uk/data/resources/13266/ILPA-Age-Dispute-Report.pdf>; S. Clarke, *Young Lives in Limbo: the protection of age disputed young people in Wales*, Welsh Refugee Council, 2011; L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment in R(A) v Croydon LBC [2009]*, Office of the Children's Commissioner, 2012; and J. Dennis, *Not a minor offence: unaccompanied children locked up as part of the asylum system*, Refugee Council, 2012

1.1 The importance of age

How old you are as a child or young person in the UK is significant for a number of reasons. It is a fundamental aspect of our individual identity in how we see ourselves and how others see us. It provides one of the essential bases for the way in which we engage with society and how we are treated, how we are enabled to participate and develop as members of society, culturally, socially and legally. Usually, it will determine our peer group and interests; when we start and finish school; when we are perceived as being responsible and independent. Age also dictates when we are legally allowed to vote, to drive, to marry, or be convicted for a criminal offence.¹⁴ In short, as well as being a means of marking growth and maturity and forming a key part of any child's identity, chronological age is intrinsically linked to their legal rights and responsibilities, and governs the relationship between a child and the state.¹⁵

In 1989, the UN Convention on the Rights of the Child (UNCRC), now ratified by all countries in the world except the United States and Somalia,¹⁶ established a common, international definition of a child as a 'person below the age of 18 years',¹⁷ thus solidifying the 'legally constructed model of childhood'.¹⁸ The UNCRC outlines all those universal benefits, safeguards and rights 'associated with childhood'.¹⁹ Under the Convention, states have a duty to grant special protection and assistance to separated children, those who have been separated from both parents, or from their previous legal or customary care-giver.²⁰ The best interests of the child should be a primary consideration in all actions concerning children (Article 3) and all the rights enshrined in the UNCRC should apply to all children without any discrimination based on nationality, immigration status or statelessness (Article 2). All children have the right to life, survival and development

(Article 6) and should be able to express their views freely in all matters concerning them (Article 12). They have a right to protection from all forms of harm (Article 37), to be protected as refugees (Article 22) and to be provided with measures of reintegration and psychological recovery (Article 39). They also have the right to preserve their identity (Article 8), and age is part of a child's identity.

The UNCRC allows for the fact that children need different degrees of protection and participation in different contexts and that some of these may be age-dependent. For example, Article 12 emphasises the right of a child to express his or her views and that these should be 'given due weight in accordance with the age and maturity of the child'. Article 5 of the UNCRC outlines the right of parents, family and/or community to provide direction and guidance to a child 'in a manner consistent with [their] evolving capacities'. However, there is clear delineation between a child and an adult, marked by chronological age, within the Convention.

In contrast, anthropological and sociological research on the concept of childhood emphasises that it is a 'social construction'²¹ and there exist continuing national differences regarding the perception of childhood and the treatment of children, often at odds with international law.²² As explained in the 2011 UNICEF report on age assessment practices, 'while all societies recognise a difference between childhood and adulthood, traditionally the distinction between the two life stages has varied considerably across cultures and societies by markedly different measures, such as puberty, marriage and degrees of work and responsibility'.²³

Just as the concept of childhood differs across the world, so too does the importance placed on chronological age in general, and the means of recording it. Age is not celebrated or marked in the same way across the globe nor is it allocated the same degree of importance as it is in the West, with birthdays not celebrated in many countries, and different measures

14 Coram Children's Legal Centre, *At what age can I..? A guide to age based legislation*, 2010, available at http://www.childrenslegalcentre.com/index.php?page=shop_products_all

15 A. Aynsley-Green, T.J. Cole, H. Crawley, N. Lessof, L.R. Boag, & R.M.M. Wallace, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control', *British Medical Bulletin* 2012; 102: 17-42, Oxford University Press, May 14 2012

16 UN Treaty Collection: Status of treaties: Convention on the Rights of the Child, at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en [accessed 28/04/13]

17 Convention on the Rights of the Child, adopted by United Nations General Assembly Resolution 44/25 of 20 November 1989 and entered into force 2 September 1990, Article 1

18 L. Brownlees & T. Smith, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011, at http://www.unicef.org/protection/Age_Assessment_Practices_2010.pdf

19 ibid

20 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6

21 C. Jenks, *Childhood*, (Routledge, 2005), cited in Brownlees & Smith, *Age assessment practices: a literature review & annotated bibliography*, 2011

22 See, for example, A. Bajpai, 'Who Is a Child?', 2007 at <http://infochangeindia.org/200706186472/Agenda/Child-Rights-In-India/Who-is-a-child.html>

23 L. Brownlees & T. Smith, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011

used in certain communities to mark different life stages and transitions.²⁴ Furthermore, birth registration remains a key problem: in sub-Saharan Africa, 64% of births go unregistered, in South Asia, the figure is 65%, with nearly 23 million children going unregistered.²⁵

This divergence of approaches to registration and celebration of birthdays has given rise to a problem specific to children subject to immigration control who come to the UK on their own from countries such as Afghanistan, Iraq, Somalia and Eritrea. Many children and young people claiming asylum or making other immigration applications in the UK are unable to prove their date of birth with official identity documents, such as a passport or birth certificate, because they have either never had them in the first place, or have had to destroy them en route. Some may have had to travel using false documentation as the only means of leaving their countries, or some may have used false documentation provided by traffickers. This documentation may suggest that a child is an adult even when they are not, particularly as smugglers and traffickers may consider that a child is more likely to attract attention from immigration officials.

Disputes over age can also arise because of a lack of understanding of the way in which dates of birth and calendars are calculated in other countries and cultures, and associated confusion and misunderstandings over what is being said by a child about his or her age.²⁶

If a child has no means of proving their date of birth, or access to a family member who can verify how old they are, or perhaps do not even know it themselves, how can the agencies responsible for their care, support and protection establish their age? It is extremely difficult to determine a child's age accurately, especially on appearance alone, and this is all the more difficult where children from different countries are concerned. Even those from similar ethnic backgrounds who have grown up

in the same social and economic environment may display significant physical, emotional and developmental differences. These differences can be exacerbated by experiences of adversity, conflict, violence and the migration process.²⁷

*'I have had a tough life and I think this explains why I look older'*²⁸

Despite the recognised difficulties in assessing age, many children are subject to age assessment procedures. Why? Because the question of age for children in the immigration system in the UK is of great importance to those working with them, determining how an individual is to be treated both in the immigration and asylum process and also with regards to their social care. Not only does age go to the heart of a young person's identity, it determines how or whether they are supported by children's services; their access to education; whether they provided with asylum support by the UK Border Agency and dispersed to a different part of the UK; and whether they are accommodated or detained with adults. Age also determines how their asylum or immigration application is processed and decided and forms a key part of how their credibility is perceived in this context.²⁹ In the consideration of asylum claims from persons seeking protection from persecution and other forms of human rights violations, international law and guidance recognises the particular vulnerabilities of children.³⁰ For separated children in the immigration system, age is fundamental to their receiving the support and protection they need.

In the *Merton* age assessment case (see p 12) Mr Justice Stanley Burton asserted that it would 'be naive to assume that the applicant is unaware of the advantages of being thought to be a child',³¹ and it is often argued that the process of disputing age is designed to catch out those who are lying and seeking to play the system.³² This fear of

24 *ibid*, p 3

25 UNICEF, *Children and the Millennium Development Goals: Progress Towards a World Fit for Children*, UNICEF New York, 2007 at http://www.unicef.org/publications/files/Children_and_the_MDGs.pdf

26 H. Crawley, *When is a child not a child? Asylum, age disputes and the process of age assessment*, ILPA, 2007, p 55

27 Many children, for example, leave countries such as Afghanistan and Iraq and embark - alone - on lengthy overland journeys to the UK. The stress and trauma of such a journey alone can affect how they then present to authorities once in the UK.

28 From a *Coram Children's Legal Centre* case. To protect client anonymity, none of the quotes are attributed.

29 Home Office guidance outlines that when assessing credibility 'the benefit of the doubt will need to be applied more generously when dealing with a child' - see Home Office Asylum Process Guidance, *Processing an asylum application from a child*, at <http://www.bia.homeoffice.gov.uk/>

30 See UNCRC Articles 22 and 37(1), <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.asp>; Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/OPACCRC.aspx>; *CRC General Comment Number 6 on the Treatment of Unaccompanied and Separated Children Outside their Countries of Origin*, at <http://tb.ohchr.org/default.aspx?Symbol=CRC/GC/2005/6>; UNHCR *Guidelines on International Protection Number 8: Child asylum claims under articles 1(a)2 and 1(f) of the 1951 convention and/or 1967 protocol relating to the status of refugees*, at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain?docid=4b2f4f6d2>. Article 24 of the Charter of Fundamental Rights of the European Union specifically includes requirements to treat the best interests of the child as a primary consideration, to maintain family unity and to ensure that the child is heard in all decisions made that affect them. The EU's common asylum directives, specifically the Reception, Procedures and Qualifications Directives, and the Dublin II Regulation, all contain special provisions and minimum standards for the care and protection of children in member states' asylum decision-making and support systems.

31 *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin), para 29

32 See, for example, *R (MNA) v LB of Croydon* (AAJR), [2012] UKUT 00326 (IAC), para 25: 'Whilst I am prepared to accept that there may be social differences between the United Kingdom and Afghanistan as regards the importance given to a person's age, and as to the passage of time, equally it would be naive to ignore the indications (recorded in the case law concerning age-disputed persons from Afghanistan) that there are people in that country who are well aware of the advantages (both as to welfare and claims to be made in need of international protection) to be gained by pretending that a person coming from that country to the United Kingdom is a child, when they are not.'

adults posing as minors appears only to have emerged after the restructuring of the asylum support system from 1997 onwards, which resulted in 'increased polarisation between the two frameworks in terms of welfare provision, sharply dividing responsibilities between central government and local authorities, and consequently heightened incentives to be a minor'.³³ Although the United Nations High Commissioner for Refugees (UNHCR) has recommended that 'where possible, the legal consequences or significance of the age criteria should be reduced or downplayed' as 'it is not desirable that too many legal advantages and disadvantages are known to flow from the criteria',³⁴ in the UK the two systems are very distinct. This is partly because there is a growing awareness in UK policy and law of the need for further protective measures for children, in contrast to the harsh, punitive treatment of single adults in the immigration and asylum system. Given the recognised duty to support and safeguard children seeking asylum, one way of agencies freeing themselves from these obligations is simply not to accept an individual to be a child, thus excluding them from the protection to which they would be legally entitled.

Successive UK governments have framed the need to carry out age assessments as an issue of safeguarding, based on concerns that adults may be incorrectly placed in accommodation with vulnerable children to whom they may pose a danger.³⁵ Indeed, a key reason why the process is so fraught with difficulty and contention is that, despite evidence of children being assessed incorrectly to be adults, thinking still appears to be guided by the 'entrenched belief that the majority of age-disputed young people are adults posing as children'.³⁶ While it may be undesirable for someone in their early twenties to be placed in accommodation with teenagers, the risk of this happening must be weighed against the risk of having individual children as young as 14 placed in detention, or independent and less carefully regulated accommodation, with adults of all ages.³⁷

Furthermore, in recent years there has been a rise in disputes not over whether the individual is a child or an adult, but over the exact age of the child, for example, whether they are 15 or 17. The significance of age in this context relates to whether the child is under or over 16, an age which often has implications for the level and type of care a child receives

under the Children Act 1989. Most children under the age of 16 will be placed in foster care, and older children will be placed in semi-independent accommodation with more limited support. In addition, the exact age of a child who is under 18 can have implications for their future entitlement to leaving care support. A young person aged under 17½ on arrival will probably have been looked after for over 13 weeks and therefore will be eligible for leaving care support. Anyone found to be close to the age of 18 or over will not receive this. Years can be spent in dispute over the question of a year or two, while all the time the child potentially receives an inadequate form of support, but has to battle with the very people tasked to look after them.

*'This area becomes terribly polarised, and we risk losing sight of the fact that the vast majority of us want adults to be supported as adults, and children to be supported as children, and we should all be on the same side in this... We have to accept that people will have to make their best judgments based on the information that is available to them. We need to accept that the vast majority of decisions will be near enough; occasionally there will be adults treated as children, but that is a lot safer than children being treated as adults.'*³⁸

Organisations supporting young people in the immigration system would not deny that there may be occasional cases of people claiming to be younger than they are. Nor can it be ignored that some unaccompanied children may have been briefed by the people-smugglers who facilitate their journey, providing them with information on what they should say when they reach the UK.³⁹ However, these exceptional cases should not shape the whole system for children who do not have proof of their age, and should not excuse a process that does not adequately consider the needs and rights of children within it.

33 A. V. Kvittingen, *Negotiating childhood: Age assessment in the UK asylum system*, Refugee Studies Centre, 2010, at http://www.rsc.ox.ac.uk/publications/working-papers-folder_contents/RSCworkingpaper67.pdf

34 UN High Commissioner for Refugees (UNHCR), *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, February 1997, para 5.11

35 A.V. Kvittingen, *Negotiating childhood: Age assessment in the UK asylum system*, Refugee Studies Centre, 2010. See also Home Office, *Planning better outcomes and support for unaccompanied asylum seeking children*, 2007, para 24

36 S. Clarke, *Young Lives in Limbo: the protection of age-disputed young people in Wales*, Welsh Refugee Council, 2011, p 12

37 See Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, p 13 for echo of this

38 Helen Johnson, Refugee Council, oral evidence to the Joint Committee on Human Rights, 27 November 2012 at <http://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2027%2011%2012%20transcript.pdf>

39 This is referred to in some reported judgments – see, for example, *R (JS) v Birmingham* [2013] UKUT 01122 (IAC), para 108, and *R (RJ) v Ealing (AAJR)* [2012] UKUT 00305 (IAC) para 46

1.2 Guidance and international standards for assessing age

Age determination is not an exact science. Even when based on medical evidence, it is impossible to identify a child's exact chronological age, with a margin of error that 'can sometimes be as much as five years either side'.⁴⁰ A number of factors make age assessments complex and challenging. For example, within different ethnic and national groups there are wide variations in young people's growth and ages of puberty, and young people may look and act older than they are because of their experiences in their country of origin, or difficult journey to the UK. In some countries, different calendars are used and/or birthdays are not celebrated.⁴¹

It is widely accepted that there is no single and sure method for assessing a person's age.⁴² The - so far fruitless - quest in recent years to find a 'magic bullet' that will tell us the exact age of a young person 'through a single medical measure which is completely reliable and consistent from case to case' has resulted in much focus on the use of X-rays and other invasive and questionable medical procedures.⁴³ In 2008, for example, the then Minister for Immigration, Liam Byrne MP, convened a working group on age assessment. The consensus of the group was support for a multi-disciplinary and holistic approach to age assessment, but much of its focus was on the use of dental X-rays and other procedures were considered, on which no agreement could be found.⁴⁴

This report does not focus on these issues in depth, but many NGOs, medical bodies and statutory agencies have

raised their concerns regarding the accuracy, legality and ethical justification of such measures.⁴⁵ In 2012, the four children's commissioners in the UK emphasised their belief that the use of X-rays to determine age 'places a child at risk because they may be unable to give informed consent and will be at increased, unnecessary exposure to medical radiation'.⁴⁶ Years earlier, the British Dental Association vigorously opposed the use of dental X-rays to determine age because of its inaccuracies as a method.⁴⁷ While the use of some types of medical evidence is a valid part of a holistic age assessment,⁴⁸ what is clear is that the use of X-rays as the sole or main means of determining age is too unreliable. An assessor can use physical examination and radiographic assessment to conclude whether an individual is physically mature, but this may not correlate with their chronological age. UNHCR recommends that activities acknowledge inherent margins of error in medical assessments⁴⁹ and the Separated Children in Europe Programme (SCEP) emphasises that medical exams used to assess age 'can never lead to precise results and will always bring a considerable risk to the safety, well-being and protection of the individual'. It recommends that X-rays and sexual maturation assessments be avoided.⁵⁰

Although knowing a child's age is one of the keys to realising their full rights under the UNCRC, and the child's right to an identity is outlined under Article 8, the Convention itself does not directly address the issue of assessing age. However, the UN Committee on the Rights of the Child has discussed age assessment in two of its General Comments,⁵¹ stressing that 'if there is no proof of age, the child is entitled to a reliable

40 The Royal College of Paediatrics and Child Health guidelines state that: 'In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied upon. 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. Age determination is an inexact science and the margin of error can sometimes be as much as five years either side. Assessments of age measure maturity, not chronological age.' See Royal College of Paediatrics and Child Health, *The Health of Refugee Children: Guidelines for Paediatricians*, 1999 para 5.6

41 Those from Afghanistan or Iran may be familiar with the calendars in use there but they do not always translate directly to the Gregorian calendar, and mistakes can be made in the conversion of dates.

42 See L. Brownlees & T. Smith, *Age assessment practices: a literature review & annotated bibliography*, 2011

43 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC [2009]*, 2012, Forward

44 Immigration Law Practitioners Association, *Information Sheet: Age Disputes (Dental X-Rays)*, 2012, at <http://www.ilpa.org.uk/data/resources/14526/12.04-Age-Disputes-Dental-X-Rays.pdf>

45 See, for example, T.J. Cole, *Dental age assessment- a statistical critique*; Australian Human Rights Commission, *An age of uncertainty: Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children*, 2012. In the UK, concern has been raised by the British Medical & Dental Associations, General Medical & Dental Councils, the Royal College of Paediatrics and Child Health, and the Department for Health, among others – see A. Aynsley-Green, T.J. Cole, H. Crawley, N. Lessof, L.R. Boag, & R.M.M. Wallace, 'Medical, statistical, ethical and human rights considerations in the assessment of age in children and young people subject to immigration control', *British Medical Bulletin* 2012; 102: 17–42, Oxford University Press, May 14 2012

46 http://www.childrenscommissioner.gov.uk/content/press_release/content_466

47 British Dental Association response to Home Office consultation paper, 'Planning Better Outcomes and Support for Unaccompanied Asylum Seeking Children', May 2007

48 Dental and scientific evidence may be all the more applicable in the absence of any other evidence, as was found in the recent case of *R (MK) v Wolverhampton CC* [2013] UKUT 00177 (IAC)

49 UNHCR, *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997

50 Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012

51 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, at: <http://www.unhcr.org/refworld/docid/4670fca12.html> and UN Committee on the Rights of the Child (CRC), *General Comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: <http://www.unhcr.org/refworld/docid/4ae562c52.html>

medical and social investigation that may establish his/her age and, in the case of conflict or inconclusive evidence, the child shall have the right to the rule of the benefit of the doubt.⁵² In its General Comment No. 6 on the Treatment of Unaccompanied and Separated Children outside their Country of Origin, the Committee outlined that age assessments 'should not only take into account the physical appearance of the individual, but also his or her psychological maturity'. The Committee also states:

'The assessment must be conducted in a scientific, safe, child and gender-sensitive and fair manner, avoiding any risk of violation of the physical integrity of the child; giving due respect to human dignity, and, in the vent of remaining uncertainty, should accord the individual the benefit of the doubt'.⁵³

This has been echoed in guidelines from the UN High Commissioner for Refugees (UNHCR), which also emphasise that 'caution needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child's age. Children need to be given clear information about the purpose and processes of the age-assessment procedure in a language they understand. Before an age assessment procedure is carried out, it is important that a qualified independent guardian is appointed to advise the child'.⁵⁴

In addition to its 2009 *Statement of Good Practice* providing detailed recommendations for the practice of age assessment, the Separated Children in Europe Programme⁵⁵ has also produced a position paper on the issue, emphasising that age assessments 'should be initiated with the genuine and primary aim of ensuring protection to separated children' rather than for the purpose of immigration control, and that immigration control 'should not be prioritised over, or treated as a pre-condition for, care and protection of individuals who may be separated children'. The paper outlines that 'a central role in the age assessment process should be assigned to experts in children's development, including paediatricians, social workers and psychologists' who are appropriately trained. No professionals for whom there is a potential conflict of interest, for example, financial interest as is the case for local authorities, should conduct the assessment.⁵⁶

While international guidance clearly calls for multi-disciplinary holistic assessments,⁵⁷ there is little further information on how these could, or should, operate, and practice within Europe varies. The SCEP's recent review of the situation facing separated young people whose age is in dispute found that, even though age assessment is rarely based solely on one type of examination, 'the process almost never takes the form of a holistic assessment of physical, developmental and psychological factors, as well as environmental and cultural aspects, involving different professionals'.⁵⁸ A lack of guidance on psycho-social or developmental assessments of age has, it has been suggested, resulted in more weight being placed in some countries on medical assessments, based on 'perceptions of credibility and reliability of methods',⁵⁹ rather than the multi-disciplinary approach.

52 UN Committee on the Rights of the Child *General Comment No. 10 (2007)*, para 39

53 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, at: <http://www.unhcr.org/refworld/docid/42dd174b4.html>, para 31

54 UNHCR, *Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*, 22 December 2009, HCR/GIP/09/08, at: <http://www.refworld.org/docid/4b2f4f6d2.html>, para 75

55 Separated Children in Europe Programme, *SCEP Statement of Good Practice*, March 2010, Fourth edition, March 2010, at: <http://www.unhcr.org/refworld/docid/415450694.html>

56 Separated Children in Europe Programme, *Position Paper on Age Assessment in the Context of Separated Children in Europe*, 2012 at http://umf.asyl.at/files/DOK45Age_Assessment_PP.pdf

57 Separated Children in Europe Programme, *SCEP Statement of Good Practice*, March 2010, Fourth edition, March 2010

58 Separated Children in Europe Programme, *Review of Current Laws, Policies and Practices Relating to Age Assessment in Sixteen European Countries*, 2011, at www.separatedchildren-europe-programme.org/separated_children/publications/reports/index.html

59 Brownlees & Smith, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011

2. Age disputes in the UK

'The majority of the unaccompanied children I work with have their ages disputed. Too often this results in long delays to their cases, and expensive and unnecessary legal challenges. It's a bewildering enough process for children anyway, without all this additional anxiety and insecurity.'

Immigration caseworker

2.2 Current practice

In England and Wales, a local authority has a duty to support a separated migrant child under the Children Act 1989 as a 'child in need'.⁶⁰ The child's age determines the type of support and accommodation that the local authority should provide and whether they will be eligible for leaving care support on turning 18.⁶¹ Age also determines how a child is treated in the asylum and immigration process. For example, there are specific procedural safeguards in asylum interviews and there is separate policy determining how a child's evidence and credibility should be assessed. In a child's asylum claim, child-specific forms of persecution and child-specific risks need to be taken into account. Since November 2009, the Home Office has been under a duty to safeguard and promote the welfare of children, under section 55 of the Borders, Citizenship and Immigration Act 2009, and must treat the best interests of the child as a primary consideration in all decisions affecting someone under 18. Home Office policy states that an unaccompanied child should not be detained under administrative immigration powers, save in exceptional circumstances and then only overnight.⁶²

Age assessment is therefore of vital significance in both immigration and social care contexts, and at present both immigration officials and social workers will make decisions

about a child's age, sometimes with overlapping or conflicting views being taken. Often a dispute initiated by the Home Office will prompt a local authority dispute, and vice versa. While Home Office case owners 'should give considerable weight to the findings of age made by local authorities',⁶³ a local authority cannot simply accept the finding of the Home Office. It is important to note that a local authority can simply accept the child's stated age, if it is intending to provide them with support. If there is reason to doubt that a child is the age they claim to be, they are under a statutory duty to conduct their own assessment as a 'gateway' assessment to determining whether a child is a 'child in need' under the Children Act 1989.⁶⁴

2.3 Statistics

The issue of age and the lack of proof of age has been seen as increasingly important since the late 1990s and early 2000s, with a peak in the number of young people whose ages were disputed in 2005, when nearly half (45%) of all applicants presenting as separated asylum-seeking children had their ages disputed.⁶⁵ Absolute numbers of age disputes have decreased in recent years,⁶⁶ but arguably only because the number of separated children claiming asylum in the UK has decreased. The percentage of those who claim asylum as children whose ages are disputed has remained fairly constant over the past five years (see Table (a)). Overall, nearly a quarter of all those applying for asylum as children have their ages disputed, according to Home Office statistics. Even this figure does not reflect the full extent of the problem, as it does not include those who claim to be children but are not officially recorded as 'age disputed' and instead are simply treated by the Home Office as adults (see Section 2.4 for an outline of UKBA policy). Neither does

60 The statutory framework of the Children Act 1989 imposes the following duties on a local authority:

a. A duty to safeguard and promote the welfare of children in their area who are in need (section 17)

b. A duty to accommodate a child in need within their area where there is no person with parental responsibility for them or they have been lost or abandoned (section 20)

61 Under section 23C of the Children Act 1989 - this support would include help with education and training, assessment of needs, and the provision of a personal advisor until the age of 21, or 25 if the young person is still in education.

62 Home Office Enforcement Instructions and Guidance Chapter 26, at <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter26?view=Binary>

63 Home Office Asylum Process Guidance, *Assessing Age*, para 5.2, at <http://www.ind.homeoffice.gov.uk/sitecontent/documents/policyandlaw/asylumprocessguidance/specialcases/guidance/assessing-age?view=Binary>

64 Under section 17 of the Children Act 1989

65 H. Crawley, *When is a child not a child? Asylum, age disputes and the process of age assessment*, ILPA, 2007, p 3

66 See Asylum data tables Immigration Statistics October to December 2012 at <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2012/immigration-statistics-october-to-december-2012#asylum-part-2-appeals-unaccompanied-asylum-seeking-children-age-disputes-and-dependants>

it include those separated children who present at a local authority as a child and do not claim asylum – as was the case for Y, described above.

	Asylum applications from unaccompanied children	Age disputes	% age disputed
2008	4,285	1,401	24.6%
2009	3,174	1,129	26.2%
2010	1,717	489	22.2%
2011	1,398	374	21.1%
2012	1,168	328	21.9%

Table (a) ⁶⁷

In the absence of any established, fixed process, age disputes can occur at various stages of a child's journey through the immigration and social care system. Their age may be disputed on arrival, at a screening interview when a child claims asylum, at a police station, once in immigration detention, or on presenting to a local authority for support. As there are no centrally held statistics on the numbers and outcomes of age disputes in this fractured process it is very difficult to paint an accurate picture of the problem.

CCLC sent Freedom of Information requests to 27 local authorities asking for the numbers of separated children seeking asylum referred to their care, how many of these had their ages disputed, and the outcomes of the assessments. The outcomes revealed wide variations in the practice of both assessing age and record-keeping with regards to separated children. Of the 22 that provided complete figures, between them they had conducted 697 age assessments over a period of less than two years (April 2011 to December 2012). This figure represents only a fraction of the authorities in England, and does not include the age assessments conducted by one of the main gateway authorities, so the figure for all local authorities in England is likely to be far higher - a conservative estimate would be at least 500 age assessments a year. ⁶⁸

Worryingly, five local authorities did not keep records on the numbers of children and young people referred to their care whose ages they assessed and with what result. One local authority could not even tell us the number of referrals of unaccompanied children made to that authority. Comprehensive files for all children referred to their care should be kept as part of the local authority's record-keeping under its Children Act duty to safeguard and promote the

welfare of children in need in its area. It is difficult to see how the local authority can discharge its duties effectively without effective access to information on the child, and the care and support that they might be receiving. An age assessment is a key part of any initial and core assessment of a child in need, and it is of concern that the decisions taken in any age assessment are not being recorded as a matter of course.

The number of age assessments undertaken by those local authorities that provided information ranged from as few as three a year to over 150 a year. This has to be seen in the context of the numbers of original referrals, as gateway authorities receive much higher numbers of separated children from the outset. When viewed as a percentage of referrals, there was still a wide variation (see Table (b)). Six local authorities assessing the age of 95-100% of children and young people referred to them, compared to seven local authorities that only disputed the age of less than a quarter of children. Some of these were gateway authorities, or areas where many children arrive through lorry drops, which may explain the difference, but it is still of concern that some will see fit to assess nearly all children.

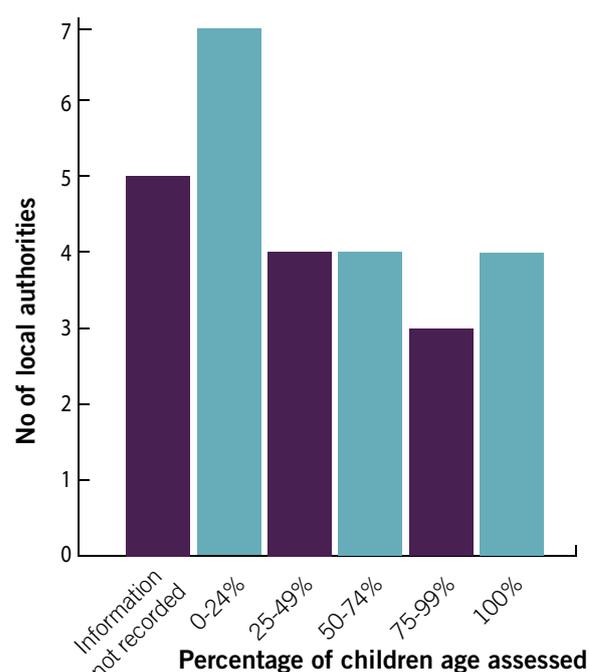


Table (b)

Those local authorities assessing nearly 100% of those referred to them as separated children then went on to find over half to be over 18, with one exception where the local authority found 88% of those assessed to be children. By comparison, as an average, of all the 697 age assessments

⁶⁷ *ibid*

⁶⁸ Croydon received 233 unaccompanied children referrals in this period - it was unable to provide figures for those who were age assessed. There are 326 local authorities in England.

for which authorities provided information, 70% concluded that the individual being assessed was a child.

As a further question, local authorities were asked the number of those found to be children who were subsequently supported under section 20 of the Children Act, and this revealed instances where children had gone missing subsequent to their assessment. In one local authority over a 15 month period four children went missing (described by the authority as ‘absconding’) subsequent to their ages being disputed. Children going missing from care has been raised as a key concern, especially in the context of trafficking, with an estimated 60% of suspected child victims of trafficking in local authority care going missing. This is in part because they are not placed in appropriate accommodation, nor given specialist protection – a problem that is, again, ‘enhanced by the culture of disbelief’ and by the prioritisation of immigration control.⁶⁹ While not examined in this report, a number of cases have illustrated that age disputes can damage the relationship between a young person and their social worker and can increase the likelihood of children not receiving the appropriate care and going missing from care as a result.

All local authorities reported very low numbers of legal challenges to their assessments – only 29 over the 18 month period. However, NGOs in certain areas reported much higher instances of legal challenges. The low figures could therefore have been due to authorities only recording cases as having been challenged if they proceeded to full hearing, and not taking into account pre-action protocol letters, mediation with advocates and legal representatives. For example, one authority reported four challenges, while advocates working in that authority new of at least 11 age assessments that had been challenged. Furthermore as Croydon is the most regularly challenged (receiving ‘hundreds of challenges’ in the past few year, according to its FOI response) but could not provide figures, it is hard to paint an accurate picture of the numbers of age assessments challenged.

The Ministry of Justice recorded 96 applications for judicial review relating to age assessments in 2011 - 2013. Many cases will settle before going to full hearing. This is explored further in Section 3.

2.3 Social work age assessments

There is currently no statutory procedure or guidance issued to local authorities on how to conduct an age assessment. Instead the current approach has evolved in an ad hoc fashion through practice developed by local authorities, the emergence of practice guidelines and developing case law. Around 2003, the London boroughs of Hillingdon and Croydon developed a pro-forma for carrying out age assessments, with accompanying notes guiding social workers on the information they ought to be seeking.⁷⁰ This is now the standard form for age assessments and the approach was approved in the case of *R (B) v Merton*,⁷¹ in which the judge set down broad guidelines as to how age ought to be assessed. Further criteria for lawful assessments have been established in subsequent judgments. As a result, whilst a lawful age assessment is often referred to as ‘Merton compliant’, assessors need to comply with a range of case law outlining the necessary criteria, including:

- the need for a holistic assessment undertaken by experienced and trained social workers;
- the need for safeguards to ensure fairness;
- the need to give reasons for a decision;
- that the benefit of the doubt should always be given; and
- that the putative child has the right to be accompanied during the assessment by an appropriate adult.

(see Table (c) for more details of the legal requirements for lawful assessments).⁷²

Once a decision has been made this will inform the local authority’s future provision of care and support and should also be communicated to the Home Office for their records. Current Home Office guidance states that ‘case owners should give considerable weight to the findings of age made by local authorities’ and that ‘where the local authority’s assessment is the only source of information about the applicant’s age – their assessment will normally be accepted as decisive evidence’. However, it also states that case owners should discuss the assessment with the local authority if it appears ‘the applicant has not been given the benefit of the doubt; or that it appears the general principles set out in the Merton judgment were not adhered to’.⁷³

69 See, for example, APPG for Runaway and Missing Children and Adults and APPG for Looked After Children and Care Leavers, *Report from the joint inquiry into children who go missing from care*, 2012, p 13-14

70 ‘Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers’ at [http://www.proceduresonline.com/hillingdon/childcare/pdfs/Master%20Age%20assessment%20\(August%202005\)%20.pdf](http://www.proceduresonline.com/hillingdon/childcare/pdfs/Master%20Age%20assessment%20(August%202005)%20.pdf) – these notes are now out of date

71 *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin)

72 See also Coram Children’s Legal Centre, *Seeking Support: A guide to the rights and entitlements of separated children*, 2012, at www.seekingsupport.co.uk

73 Home Office Asylum Process Guidance, *Assessing Age*, para 5.2

Table (c). The following points have been made regarding assessments:

- Two qualified and properly trained social workers should conduct the assessment.⁷⁴
- A young person has a right to be accompanied during the assessment by an appropriate adult.⁷⁵ This should be someone who is independent from the assessment, and preferably should be an adult of the child's own choosing.
- The assessors should check thoroughly that the interpreter speaks the correct dialect/language and that the young person and the interpreter understand one another properly. The interpreter should have experience interpreting in the kind of situation created by the age assessment process.⁷⁶
- A full and careful explanation should be given to the child of the nature of the assessment and its purpose and of the role of the assessing social worker.
- The assessors must take a child-friendly and sensitive approach, including checking that questions have been understood and offering breaks.
- The assessors should develop as much rapport as possible with the child and should ask open-ended, non-leading questions. They should be mindful of the child having been coached and that the child may have had to answer similar questions several times previously, thereby blurring the possible accuracy of the answers.⁷⁷
- An assessment cannot be made solely on the basis of appearance, and should be a holistic one taking account of the young person's appearance, demeanour, background and credibility.⁷⁸
- Any assessment should take into account relevant factors from the child's medical, family and social history, and the decision-maker should seek to elicit the general background of the applicant, including his or her family circumstances and history, his or her educational background and his activities during the previous few years. Ethnic and cultural information may also be important.⁷⁹
- There is a duty on the decision-makers to give reasons for a decision that an applicant claiming to be a child is not a child.⁸⁰
- The young person should be given an opportunity during the assessment to answer any adverse points the decision-maker is minded to hold against him or her.⁸¹
- If the decision-maker is left in doubt, the claimant should receive the benefit of that doubt.
- A child should be given a fair and proper opportunity to deal with any important points adverse to their case at a stage when an adverse decision is no more than provisional so as to enable him or her to provide any explanation or additional facts that might change such findings.⁸²
- The reasons for a social worker's decision should be internally consistent and should not exhibit any obvious error or inadequate explanation for not accepting any apparently credible and consistent answers of the child.⁸³
- The child should be informed of the consequences of the assessment decision.
- The decision must be based on firm grounds which are explained to the child. The decision should be issued in writing to the individual and should contain information relating to their right to challenge the decision.

74 Alluded to in *Merton* and affirmed by Court of Appeal in *A v Croydon LBC* [2008] EWCA Civ and *R (K) v Birmingham City Council* [2011] EWHC 1559 (Admin)

75 *R (FZ) v LB of Croydon* [2011] EWCA Civ 9, CA

76 *R (AS) v LB of Croydon* [2011] EWHC 2091 (Admin)

77 *ibid*, para 19

78 *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin), para 28

79 *ibid*, para 21

80 *ibid* para 45. Also *A v London Borough of Croydon*, *WK v Kent Borough Council* [2009] EWHC 939 (Admin), para 81 and *R (NA) v. London Borough of Croydon*, [2009] EWHC 2357 (Admin), para 52

81 *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin), para 56 and *R (on the application of NA) v. London Borough of Croydon*, [2009] EWHC 2357 (Admin), para 52

82 *R (FZ) v London Borough of Croydon*, [2011] EWCA Civ 59, para 20

83 *R (AS) v LB of Croydon* [2011] EWHC 2091(Admin), para 19

Training and guidance

The lack of statutory guidance and training has resulted in much confusion within both local authorities and the Home Office as to what constitutes a lawful assessment.⁸⁴ In the case of *AAM (by his litigation friend Francesco Jeff) v SSHD*,⁸⁵ in which a 15 year old was assessed by a social worker to be 18-20 whilst detained in custody, the immigration officer who accepted the age assessment to be correct later admitted to not knowing the meaning of 'Merton compliant'. The result of that inadequate assessment was that the child was unlawfully detained in an Immigration Removal Centre for 44 days, which had had 'a serious debilitating effect on him'.⁸⁶

The age assessment system in the UK has developed in the way it has because it has been presumed that social workers will have the necessary expertise to undertake assessments of age given their grounding in social care assessments.⁸⁷ However, there is a clear difference between the role of a social worker in the context of welfare concerns and child protection and their role in seeking to elicit information in order to make a decision on a child's age. Most age assessments require specific knowledge of different countries of origin, their cultures and religions. Practitioners have identified a need for further information about festivals, local calendars, cultural expectations of children's roles and responsibilities and child development.⁸⁸ For many social workers, this is a new, specialist task for which they do not feel sufficiently prepared, and social workers themselves frequently call for further specialised assistance and training in this area. While some courses cover the issues to consider when conducting an assessment of offer an overview of the legal developments in case law,⁸⁹ and a number of local authorities, in response to increased demand, have begun to provide their own in-house training, at present there is no statutory provision of either guidance or training. This absence has resulted in variations in the experience, capacity and procedures followed by different

local authorities, with significant differences in the quality and approach towards age assessment as a consequence.⁹⁰

In addition to these difficulties, it is arguable that local authorities that dispute the age of a child have a conflict of interest with that child, to whom they owe statutory welfare and safeguarding duties, and a vested interest in the outcome of age assessments.⁹¹ This, in certain cases, can have an impact on their objectivity. If a young person is found to be a child, they become the ongoing responsibility of children's services, whereas an adult claiming asylum will be supported instead by the Home Office. Therefore 'there is little incentive for local authorities to identify individuals as children' as they will then be required to take responsibility for that child and for leaving care arrangements after he or she turns 18.⁹² Financial constraints are further exacerbated by budget cuts and the view of some local authorities that the funding provided by the Home Office for them to support unaccompanied children seeking asylum is inadequate.⁹³ The resource implications of the process of age assessment vary enormously between local authorities, with those where there are ports and screening units (most notably Kent and the London Boroughs of Croydon and Hillingdon) dealing with by far the largest number of unaccompanied children seeking asylum, which can pose significant challenges for them. In CCLC's experience of training and advising voluntary sector workers, legal representatives and social workers, it has become apparent that in some cases social workers may feel under pressure from their managers either to find a child to be an adult, or to decide that they are over 16.

Most social workers are aware of the challenges in determining age, including the need to consider the different life experiences of young people, cultural perceptions of age-related behaviour and the potential impact of trauma.⁹⁴ Many social workers are capable of carrying out good assessments, and will be aware of their legal duties, of the need to undertake assessments with an open mind and to take into account cultural and developmental factors when

84 J. Bhaba & N. Finch, *Seeking asylum alone: unaccompanied and separated children and refugee protection in the UK*, Garden Court Chambers, 2006, p 2

85 [2012] EWHC 2567 (QB)

86 *ibid*, para 44

87 See, for example, *R (AS) v LB of Croydon* [2011] EWHC 2091, para 15: 'The age assessments that are carried out by the defendant and other local authorities on asylum seeking children are carried out using interview techniques undertaken by social workers who have been fully trained and who have usually acquired considerable experience in undertaking and evaluation these interviews'.

88 Brownlees & Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012

89 The Refugee Council currently provides training on 'Age assessment awareness and working with age-disputed young people' and Coram Children's Legal Centre provides an overview of the process and legal developments as part of its training on 'The rights and entitlements of young refugees and migrants'. During the lifetime of its Refugee Children's Project, the Immigration Law Practitioners Association provided training on age disputes (see <http://www.ilpa.org.uk/pages/refugee-childrens-project.html>)

90 K. Calvo et al. (2007) 'Does Judicial Review Influence the Quality of local authority Services?' (online), ISER Working Paper No. 2007, available at www.iser.essex.ac.uk/publications/working-papers/iser/2007-34

91 Bhaba & Finch, *Seeking asylum alone: unaccompanied and separated children and refugee protection in the UK*, p 62

92 Immigration Law Practitioners' Association *Child first, migrant second: Ensuring that every child matters*, London, 2006, p 14

93 K. Dorling & A. Hurrell, *Navigating the System: Advice provision for young refugees and migrants*, Coram Children's Legal Centre, 2012

94 J. Wade, A. Sirriyeh, R. Kohli & J. Simmonds, *Fostering unaccompanied asylum-seeking young people*, BAAF, 2012, p 283

gathering evidence to inform their assessment. Many are aware of the need to conduct a holistic assessment, gathering comprehensive information and looking beyond physical appearance and demeanour, with reasoned judgment and a lawful process. Some of the assessments examined in the course of this research demonstrated a fair and just approach, focussing on the needs of the child, with a good ongoing analysis of the weight to be given to each piece of evidence.

For some social workers, the threat of legal challenge, and process of going to court, has sharpened awareness of legal requirements and proper age assessment practice. In 2012, the Office of the Children's Commissioner's report *The Fact of Age* identified a number of changes that had been made by one local authority since their experience in court. These included ensuring that two social workers are present; recording all aspects of the age assessment process; and introducing a letter for a young person to sign, agreeing that they have understood what the age assessment process is about and their right to have an appropriate adult present; and that they have made the decision that they do not want an appropriate adult present, as applicable.⁹⁵

However, what is notable from past research,⁹⁶ recent reported judgments,⁹⁷ and from the age assessments examined as part of CCLC's own casework is that there continues to be a lack of consistency within and between local authorities in their approach to, and conduct of, these assessments. A number of problems exist, including:

- Insufficient weight being given to cultural and personal background and the opinions of other professionals such as doctors, teachers, foster carers and children's advocates.
- Inconsistency in the use of evidence such as documentation.
- Too much weight being placed on physical appearance and socially constructed ideas of appropriate behaviour.
- Adverse findings on credibility being drawn based on minor inconsistencies and insufficient application of the benefit of the doubt.

- Insufficient understanding of, and involvement in, the process on the part of the young person.
- A disposition to amend age assessments where new evidence appears to indicate that the child is an adult, but not the other way round.

The extent to which UKBA's much-criticised 'culture of disbelief'⁹⁸ appears to have crossed over into some social work departments is striking. Many assessments appear to start from the position of disbelieving the child, and rather than focussing on assessing age as part of a wider assessment of their needs, minor inconsistencies in a young person's account are used to undermine their credibility. This is despite the fact that giving the benefit of the doubt means that, when dealing with children, 'due allowance should be made for the fact that a child might have a different way of recounting narratives and that proper regard should be paid to the fact that it was a child who was the subject of the age assessment process'.⁹⁹ Conscious and unconscious attitudes to asylum, immigration and race, as well as organisational culture and wider societal attitudes can all influence how an assessment is conducted, but this is not always acknowledged.¹⁰⁰

'Throughout the assessment M appeared shy and uncomfortable. He sat still and quietly mainly facing towards the interpreter and presented as somewhat subservient to the assessors. This was partially taken as a natural reaction to being questioned... The only concern held by the assessors was that his shyness and apparent uncomfortable disposition may have been due to his being an adult attempting to hide his physical appearance and project an image of a young person.'

From a local authority age assessment

95 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC [2009]*, Office of the Children's Commissioner, 2012, p 71

96 See S. Clarke, *Young Lives in Limbo: the protection of age disputed young people in Wales*, Welsh Refugee Council, 2011, pp 11-12; H. Crawley, *When is a child not a child? Asylum, age disputes and the process of age assessment*, Immigration Law Practitioners' Association, 2007, pp 107 & 112

97 The following cases, among others, involve thorough examinations and critiques of social worker assessments: *R (Durani) v SSHD & Nottingham CC* [2013] EWHC 284 (Admin), para 86; *R (AZ) v Hampshire County Council* (AAJR) [2013] UKUT 00087 (IAC), para 57; and *R (RJ) v London Borough of Ealing* (AAJR) [2012] UKUT 00305 (IAC), paras 76-80 and 90-103

98 See, for example, The Children's Society, *Into the Unknown: Children's journeys through the asylum process*, 2012 at <http://www.childrensociety.org.uk/sites/default/files/tcs/into-the-unknown--childrens-journeys-through-the-asylum-process--the-childrens-society.pdf>

99 *R (ES) v Hounslow* (AAJR) [2012] UKUT 00138 (IAC), para 43

100 Scottish Refugee Council & Glasgow City Council, *An Age Assessment Pathway for Social Workers in Scotland*, 2012

*'He sat on a chair pulling threads from the chair and sucking them, laying some of the threads on his head. By doing this, he gave us the impression that he was attempting to appear younger than he actually is.'*¹⁰¹

Where good practice exists, and the correct information is elicited from a young person, following the appropriate procedures, still the conclusions may be irrational, too easily falling back on the impression made by the assessors at the start of the assessment. Too much emphasis is still placed on physical appearance and demeanour, and the starting point rarely appears to be one of believing the child's testimony. In one case, the social worker 'accepted that there were two reasons that actually underpinned his conclusion; appearance and demeanour and the fact that the claimant gave lengthy answers to apparently straightforward questions, although [the social worker] could not now say what they were.'¹⁰² In another assessment examined as part of a judicial review, the assessors outlined that 'whilst [the child's] oral account tended as a whole to support his claimed age of 14', because of his physical appearance, demeanour and interaction during the assessment, they found him to be 16.¹⁰³ In a different case, the social worker was confident a young person was older solely because 'his physical features are well defined, his skin texture well weathered and he appeared confident in relation to adults'.¹⁰⁴

In one CCLC case, the assessors noted that the young person's 'presentation was rather childlike', that his 'self-care skills are less developed', his 'story was consistent' and all the activities he reported to have taken part in and his daily routine 'are appropriate to a male of the age he claims'. They also noted that he had experienced trauma to his head that could affect his memory and the evidence he produced. Yet, due to his 'demeanour', 'build', 'physical appearance' and 'the pitch of his voice' they still found him to be 16 years old rather than 13 as he claimed to be.

*'Almost all evidence of physical characteristics is likely to be of very limited value ... there is no clear relationship between chronological age and physical maturity in respect of most measurable aspects of such maturity.'*¹⁰⁵

Training and guidance, both including a focus on how best to gather and analyse the information needed in order to conduct a comprehensive assessment, would be a welcome step forward in improving the process. All age assessments should be grounded in good social work principles, which include liaising with other agencies and individuals as appropriate. Any statutory guidance should draw on the Department for Education guidance on children in need assessments¹⁰⁶ and existing guidance on this issue, such as that produced in Scotland.¹⁰⁷

In addition, Achieving Best Evidence, published by the Crown Prosecution Service, addresses how to achieve the best possible evidence in criminal proceedings where a child witness is involved.¹⁰⁸ It provides useful guidance, techniques and tips for interviewing children, acknowledging that children's minds can operate differently to those of adults and that it is not appropriate to approach interviews in the same way. This is especially important in criminal and family proceedings where a great deal relies on the testimony of the child – for example, in child abuse cases. The Achieving Best Evidence approach should be mandatory for anyone conducting an age assessment given the similarities in what they are trying to achieve. As the main basis of an age assessment will be the young person's story, which should be elicited carefully and sensitively, similar training on Achieving Best Evidence to that provided for those working with victims of abuse could usefully be provided to social workers undertaking age assessments.

A multi-agency age assessment process

Many reported age assessment judgments have addressed the length of time spent by social workers with the putative child whom they are assessing, this being seen as one of the reasons why social work assessments are still far from satisfactory. Invariably, the longer the period of time over which an assessment can be conducted, the clearer the sense of a young person's development, maturity, capacity and life experiences that can be gathered. Therefore, it may be that 'a person such as a teacher or even a family member, who can point to consistent attitudes, and a number of supporting instances over a considerable period of time, is likely to carry weight that observations made in the artificial surroundings of an interview cannot carry'.¹⁰⁹

101 From a local authority age assessment

102 *R (SS) v LB of Croydon* [2012] (AAJR) [2012] UKUT 00139 (IAS), para 70

103 *R (AE) v London Borough of Croydon* [2012] EWCA Civ 547

104 *R (ES) v Hounslow* (AAJR) [2012] UKUT 00138 (IAC)

105 *R(AM) v Solihull Metropolitan Borough Council* [2012] UKUT 00118 (IAC), para 15

106 The Department for Education's 2013 *Working together to safeguard children* guidance streamlines previous guidance documents and replaces: *Working together to safeguard children* (2010), *Framework for the assessment of children in need and their families* (2000), and *Statutory guidance on making arrangements to safeguard and promote the welfare of children under section 11 of the Children Act 2004* (2007)

107 Scottish Refugee Council & Glasgow City Council, *An Age Assessment Pathway for Social Workers in Scotland*, 2012

108 Ministry of Justice, *Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures*, March 2011 at http://www.cps.gov.uk/publications/docs/best_evidence_in_criminal_proceedings.pdf

109 *R (AM) v Solihull Metropolitan Borough Council* [2012] UKUT 00118 (IAC)

However, there are a number of practical difficulties relating to the way in which age assessments are often carried out and current practice varies. In many local authorities, the assessment will be carried out over the course of one or two interviews, without significant input from professionals other than the social workers conducting the assessment. Some local authorities will conduct assessments on sight, similar to those undertaken by the Home Office, and turn young people away on the grounds that they look much older than 18. Some will view their process of assessment as ‘ongoing’ in that it may be reviewed later down the line if a young person’s behaviour and/or further information/evidence indicates that the initial assessment was incorrect. Others may not come to a decision on age until after a number of weeks.¹¹⁰

Many social workers are not able to observe young people over a period of time or in a variety of moods and need to carry out assessments as quickly as possible.¹¹¹ One reason for this is capacity. Another is the restrictive nature of current UK Border Agency Grant Instructions. While *Working Together to Safeguard Children* guidance gives a maximum timeframe of 45 days from the point of referral in which to carry out a core assessment,¹¹² the Home Office only allow for ‘a maximum of 21 days’ grant to be payable (for example, from the start of care) where a prompt Merton-compliant age assessment is conducted and the person claiming to be a child is found to be over the age of 18.¹¹³ Therefore, there is a clear disincentive to take longer than 21 days to assess a child in case they are found to be 18 or over.

It is important for the young person not to experience undue delay when a decision is being made on his or her age, if that delay would result in their missing school, being placed in inappropriate accommodation, and experiencing greater insecurity. However, longer assessments must necessarily be possible, involving the engagement of other statutory and voluntary organisations who have direct and regular contact with the young person in a variety of settings. During that time the young person should continue to receive the support appropriate to their claimed age. In very rare situations, it will be appropriate to make assessments quite quickly,¹¹⁴ although an assessment must still be undertaken, and this must still be conducted fairly and with adequate safeguards, such as the provision of an appropriate adult. In all others, age assessment should become a process, rather than a one-

off event. It is not appropriate to conduct age assessment as soon as a young person has arrived in the UK, nor to carry them out while they are in detention or in custody.

Tied to this process is the involvement of other professionals and carers. While guidance and case law has consistently called for an ‘holistic’ and ‘multi-disciplinary’ age assessment process¹¹⁵ and has emphasised that this is likely to result in better outcomes for children, the use of evidence from other professionals and carers by the courts has also helped clarify the weight that can be given to their views and expertise (see section 3). Yet input in the earlier stages of assessment of professionals and carers such as doctors, advocates, teachers, care and support staff, foster carers or others with relevant knowledge still varies. For example, advocates have raised concerns that they have not been consulted about their observations or opinions about a young person’s age, despite providing support to them every day for a number of weeks.

An holistic assessment should gather information from all relevant sources and include information that is drawn from contacts in different types of setting. Deciding who should contribute and how ‘will be a decision for the assessors when they are planning and reviewing the progress of the assessment. It would also be a point of general good practice to ask the young person who might be able to assist.’¹¹⁶ A system should be developed whereby the social worker retains the statutory lead role for assessment under the Children Act 1989 but has a duty to, wherever possible, obtain the views of other professionals and carers, who should have clearly defined opportunities to contribute their opinions and expertise.

*‘There is no magic in age assessment. Assessment is just that; no more than opinion, which can be best achieved by professionals trained in the various field, and not just trained as social workers, obtaining a view of the person over a number of sessions’.*¹¹⁷

110 In one recent case, the young person had been placed in a community home for up to twelve weeks, during which time the age assessment was undertaken as part of a ‘comprehensive assessment of [the] individual’s needs’ – see *R (JS) v Birmingham City Council* AAJR [2013] UKUT 00122 (IAC)

111 *R (AZ) v Hampshire County Council* (AAJR) [2013] UKUT 00087 (IAC), para 49

112 *Working Together to Safeguard Children: A guide to inter-agency working to safeguard and promote the welfare of children*, HM Government, March 2013, para 57

113 UK Border Agency *Grant Instructions to Local Authority Financial Year 2012/13*

114 The judgment in *Merton* notes that ‘there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry’, para 27

115 See, for example, H. Crawley, *When is a child not a child?*, ILPA, 2007; Joint Committee on Human Rights, *Children’s Rights: Government Response to the Committee’s Twenty-fifth Report of Session 2008–09*, recommendation 18

116 Scottish Refugee Council & Glasgow City Council, *An Age Assessment Pathway for Social Workers in Scotland*, 2012

117 *R (KN) v LB of Barnet* [2011] EWHC 2019 (Admin), para 64

Appropriate adults

A further necessary safeguard in the local authority age assessment process was outlined in the judgment of *R (FZ) v LB of Croydon*, which held that the child in that case should have had the opportunity to have an appropriate adult present.¹¹⁸ It is generally accepted in a variety of contexts that, where children or other vulnerable people are to be interviewed, they should have the opportunity to have an appropriate adult present. The judgment refers to the Police and Criminal Evidence Act Code C¹¹⁹ and Home Office guidance on appropriate adults.¹²⁰ Taken together, these establish that an appropriate adult is not expected to act simply as an observer and that the purpose of their presence is to:

- advise the person being interviewed;
- observe whether the interview is being conducted properly and fairly;
- assist communication with the person being interviewed;
- ensure that the person understands what is happening to them and why, and understands their rights and that the appropriate adult has a role in protecting their rights.

While in most age assessments appropriate adults are provided, these may not always be individuals already known to the young person, or someone they have chosen. The cases studied for this report also indicate that the level of engagement between the young person and their appropriate adult varies. In some circumstances it appears that appropriate adults are merely passive observers, and that the young people being assessed were not fully clear about their role or purpose. A further issue is that some social workers have viewed the engagement of appropriate adults as unhelpful because they interrupt the flow of the assessment unnecessarily.

There is a key role for appropriate adults in ensuring that age assessments are carried out appropriately and that the young person fully understands the process. In addition to this aspect of their role, many see it as advisable that the appropriate adult keeps a verbatim note of the meeting that can be made available to the young person subsequently. Such a note could be useful for occasions where there is dispute or confusion over what was said in the course of the interview. However, some local authorities have rejected the

CASE STUDY 1: S¹²¹

At point of referral to The Children's Society, S was considered to be an 18-year-old care leaver by social services. He believed that he was 16 years old and stated that he had a medical age assessment corroborating his stated age. S had a solicitor assisting him to challenge his assessed age. The solicitor believed that S was a vulnerable young person who required additional support; an educational psychologist's report stated that he had a learning difficulty, with a functioning age of 7-12.

S had an age re-assessment and was again found to be an adult. The social workers dismissed the expert educational psychologist's report, and simply made their own judgement that he did not have a learning difficulty. When the outcome was delivered, the social workers did not give the young person an opportunity to raise any questions and did not speak directly to him, instead relying on an interpreter to recite their conclusions. Parts of this age assessment report analysis were also duplicated, word for word, from a previous age assessment.

At last contact, the solicitor was hoping to assist with a legal challenge to the assessment. S was still not receiving any additional support from the local authority in relation to his learning difficulty.

term 'appropriate adult' in favour of the more passive term 'independent observer'¹²² and have specifically requested that those attending as appropriate adults do not take a note of the assessment. Agencies have also reported that, while they are confident as to what the law is, they have accepted compromises with local authorities so as to ensure that an adult can attend the assessment. Some local authorities use in-house staff to act as appropriate adults, which may create a conflict of interest as the appropriate adult's role is to observe whether the assessors are acting properly and fairly and to intervene if not. The reasoning behind the response of local authorities to this role is not clear, but the variation in approach illustrates why guidance on this role would be beneficial for all involved.

118 *R (FZ) v LB of Croydon* [2011] EWCA Civ 9, CA, para 25. Also, in *R (NA) v London Borough of Croydon*, Blake J recognised at paragraph 50(1) the need in that case for the claimant to be asked whether he wanted to have an independent adult present.

119 At para 11.17

120 Home Office, *Guidance for appropriate adults*, 2003 at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/117625/guidanceappadultscustody.pdf

121 Case study provided by The Children's Society. Names and some details have been amended to protect the anonymity of the young people concerned. Unless specified, all case studies are based on CCLC cases.

122 See London Asylum Seekers Consortium

2.4 Home Office policy

*'It is not sensible to allow people who are... not trained social workers or paediatricians to be first line of working out whether you believe a child is a child or not'*¹²³

Age disputes often arise when an asylum-seeker first applies for asylum, usually at a port of entry or at the Asylum Screening Unit. If an asylum-seeker's claim to be a child is doubted by the Home Office and 'there is little or no documentary evidence to prove their age', the Home Office will conduct an initial age assessment of the individual based solely on appearance and demeanour. Home Office policy goes on to state that:

1. *The applicant should be treated as an adult if their physical appearance / demeanour very strongly suggests that they are significantly over 18 years of age. [their emphasis]*
2. *All other applicants should be afforded the benefit of the doubt and treated as children ... until a careful assessment of their age has been completed.*¹²⁴

There are a number of problems with this approach. It falls far short of what would be deemed a lawful assessment in the social care context, as it only involves examining appearance and demeanour, with subjective criteria based on a 'socially constructed understanding' of how a child should look and behave.¹²⁵ While the Home Office claims that its approach, which is to dispute *all* cases where there is little or no evidence to support the applicant's claimed age, provides 'a consistent and fair approach towards all cases rather than simply relying on physical appearance',¹²⁶ in fact it simply serves to make the dispute of age the default position, increasing the number of cases that are disputed when there may be no need and calling into question the Home Office's approach in relation to its safeguarding duties and children's rights.

A disturbing consequence of this policy is that many children end up being treated as adults, accommodated with adults, or, worse still, detained with adults in Immigration Removal Centres. Children being treated as adults are not automatically

referred to a local authority and as a result may be dispersed to different areas of the UK without a formal age assessment being undertaken, nor any notification made to the dispersal area local authority of a (disputed) child in need being sent to live in their area. Some may subsequently be identified by accommodation providers or voluntary sector organisations and referred to children's services in the dispersal area, but others may never come to the attention of service-providers and may be treated as adults throughout the process without understanding their options or their right to a full assessment of their needs as a child. Some are unable to secure legal representation or maintain contact with their legal representative following dispersal. In these circumstances they will be unable to challenge the assessment of their age and will continue to be treated as adults.

The Home Office does not provide data on the number of individuals claiming to be children who are subsequently treated as adults because it is contended that their appearance/demeanour '**very strongly** suggests that they are **significantly** over 18 years of age'. It is therefore not possible to paint a complete picture of the numbers of asylum applicants claiming to be children and it is not possible to track the outcomes for those individuals. Voluntary sector organisations have requested that these figures be made publicly available for many years, and while the Home Office has started a pilot looking at the collection of these statistics, at the time of writing this data had not yet been provided. This failure should be seen in the wider context of an agency repeatedly criticised by the Independent Chief Inspector of Borders and Immigration, the Home Affairs Select Committee and others for not providing accurate data.¹²⁷ If the Home Office is to have a policy intended to cover what it perceives to be obvious cases then it must be accountable, subject to the appropriate scrutiny, and must provide data to demonstrate that its policy is not being routinely misused.

The Home Office should move away from its practice of disputing the age of such a high number of children in the first instance. This requires addressing the entrenched culture of disbelief and, in the absence of documentation, placing greater reliance on the testimony of children and young people as evidence in and of itself. The agency should be aware that its officials lack the training required in order to assess someone's age and of the difficulties in making judgements on a person's age based on their appearance,

¹²³ The Children's Commissioner in oral evidence to the Joint Committee on Human Rights, 11th December 2012 at http://www.parliament.uk/documents/joint-committees/human-rights/JCHR_11-12-12_uncorrected_transcript.pdf

¹²⁴ In both category (a) and category (b) cases, the asylum-seeker should also be given an IS.97M form stating that their age is disputed. Home Office Asylum Process Guidance, *Assessing Age*, section 3.

¹²⁵ H. Crawley, *When is a child not a child? Asylum, age disputes and the process of age assessment*, ILPA, 2007, p 49

¹²⁶ UK Border Agency to Sophie Barrett Brown and Alison Harvey, Immigration Law Practitioners' Association, 28 September 2010

¹²⁷ See Independent Chief Inspector of Borders and Immigration, *An inspection of applications to enter, remain and settle in the UK on the basis of marriage and civil partnerships, April – October 2012* at <http://icinspector.independent.gov.uk/wp-content/uploads/2013/01/marriage-and-civil-partnerships-FINAL-PDF.pdf>, para 8.10; Independent Chief Inspector of Borders and Immigration, *An inspection of the UK Border Agency's handling of legacy asylum and migration cases, March - July 2012* at <http://icinspector.independent.gov.uk/wp-content/uploads/2012/11/UK-Border-Agency's-handling-of-legacy-asylum-and-migration-cases-22.11.2012.pdf>; and Home Affairs Select Committee *Fourteenth Report: The work of the UK Border Agency (July-September 2012)* at <http://www.publications.parliament.uk/pa/cm201213/cmselect/cmhaff/792/79202.htm>

as well as the safeguarding implications of using their policy to treat someone as an adult. With this in mind, the policy of treating someone claiming to be a child as an adult because 'their physical appearance/demeanour very strongly suggests that they are significantly over 18' should be used with extreme caution.

Detention

The UK government's stated policy on the detention of children for the purpose of immigration control is clear. Home Office policy states that 'unaccompanied children must only ever be detained in the most exceptional circumstances, and then only overnight, with appropriate care, whilst alternative arrangements for their safety are made'¹²⁸. The current coalition government has made much of having ended the detention of children and the harm detention causes.¹²⁹ Yet its own policy in relation to separated children continues to be breached in practice.

Children can end up in detention in different ways, including because they have been treated as adults after the initial, unsatisfactory, assessment by the Home Office or because their age has been disputed by a local authority and the Home Office detains them later in the process.

Immigration detention can take place:

- to effect removal;
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release.

Detention in the Detained Fast Track is used for those asylum applicants whose claims the Home Office considers to be 'straightforward and capable of being decided quickly'.¹³⁰

As set out above, if an individual is routed as an adult, the Home Office will not make a referral to a local authority. Whether a local authority age assessment takes place will therefore depend on whether the individual has been able to access legal advice and a legal representative who can make that referral, through a legal representation rota or a duty advice scheme¹³¹ or if they come to the attention of another professional body who can make that referral, such as the Refugee Council.

UK Border Agency policy on detention states that:

UK Border Agency will accept an individual as under 18 (including those who have previously presented themselves as an adult) unless one or more of the following categories apply (please note this does not apply to individuals previously sentenced by the criminal courts as an adult):

A. There is credible and clear documentary evidence that they are 18 or over.

B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over.

C. Their physical appearance / demeanour very strongly suggests that they are significantly over 18 years of age and no other credible evidence exists to the contrary.

D. The individual, prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and

- only claimed to be a child after a decision had been taken on their asylum claim; and

- only claimed to be a child after they had been detained; and

- has not provided credible and clear documentary evidence proving their claimed age; and

- does not have a Merton compliant age assessment stating they are a child; and

- does not have an unchallenged court finding indicating that they are a child; and

- physical appearance / demeanour very strongly suggests that they are 18 years of age or over. (All seven criteria within category D must apply).

*In all cases, if officers receive relevant new evidence, they should promptly review any previous decision to treat an individual as an adult.*¹³²

128 Chapter 26 of the Home Office Enforcement Instructions and Guidance states that 'unaccompanied children must only ever be detained in the most exceptional circumstances, and then only overnight, with appropriate care, whilst alternative arrangements for their safety are made' – see <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/oemsectione/chapter26?view=Binary>

129 C. Hope. 'Nick Clegg: children will no longer be locked up in immigration detention centres', *The Telegraph*, 16 December 2010, at <http://www.telegraph.co.uk/news/uknews/immigration/8204528/Nick-Clegg-children-will-no-longer-be-locked-up-in-immigration-detention-centres.html>; Nick Clegg N. Clegg & B. Nalumu, 'We are proud of having ended child detention', *The Guardian*, 29 October 2012, <http://www.guardian.co.uk/commentisfree/2012/oct/29/proud-ending-child-detention>

130 Home Office Enforcement Instructions and Guidance, Chapter 55 'Detention and temporary release' at <http://www.bia.homeoffice.gov.uk/sitecontent/documents/policyandlaw/enforcement/detentionandremovals/chapter55.pdf?view=Binary>

131 An individual in detention can get a free 30 minute session with a lawyer visiting the centre through the Detention Duty Advice scheme. For more information, see Bail for Immigration Detainees website at www.biduk.org

132 UK Border Agency Enforcement Instructions and Guidance, Chapter 55 'Detention and temporary release', 55.9.3.1 Individuals claiming to be under 18

CASE STUDY 2: *R (Durani) v SSHD & Nottingham County Council*¹³³

This recent case involved a young Afghan detained unlawfully. The young person arrived in 2009, and was assessed by the local authority to be 17, even though he claimed to be 15. His asylum claim was refused, due to, among other reasons, credibility issues, and the decision 'relied on inconsistencies between what the claimant told Nottingham County Council at the age assessment and what he told UK Border Agency'.¹³⁴ He was granted discretionary leave, but his application for further leave was refused, again due to the 'inconsistency between the claimant's account told to Nottingham County Council and to the UKBA'.¹³⁵ His appeal was dismissed but the Immigration Judge held that 'I ought properly to give him the benefit of the doubt, so far as his credibility is concerned'. The young person was detained in May 2011.

The young person's solicitor wrote to Nottingham County Council outlining that their assessment had been too reliant on physical appearance and provided supporting evidence in the form of a taskera (an Afghan identity card), an identity card from a madrassa in Pakistan and a supporting letter from a key worker at Horizon Social Housing who said on a number of occasions the claimant had said he was younger than the given age. Nottingham County Council accepted that documents needed to be properly examined, but UKBA refused to release the claimant and to cancel removal directions.¹³⁶ The young person was eventually released due to a court order, having been detained for three weeks.

This case raises a number of questions. Why was the age assessment not challenged earlier? Why did this young person's support worker not raise his concerns earlier? Why did the UK Border Agency not release the child as soon as doubt was raised as to his age?

It is extremely difficult to obtain accurate data on the number of children who are detained in adult Immigration Removal Centres when their age is disputed as the Home Office does not publicly report on all cases where age is disputed and there are limited alternative sources of information, with some detained children potentially going unidentified. The figures that the Home Office publishes each month under the heading 'children entering detention held solely under Immigration Act powers' show 46 children as having been detained as adults in 2011, and 13 in 2012.¹³⁷ These figures demonstrate that even on its own terms, the Home Office is detaining children unlawfully. Children who are being assessed by local authorities to be in the 12-16 years age bracket are ending up in detention. However, these figures themselves are not complete. On request, the Home Office has provided further information on age dispute detention cases, currently unpublished, which provides more detail and which presents higher numbers than those gleaned from the publicly available data. To take as an example the period January to March 2012, the figures given by the Home Office show that 13 individuals were released from detention either as children, or pending further assessment. This is over two and a half

times as many as given in the official published statistics.¹³⁸ Furthermore, many children are released as adults pending an assessment, and then found to be children.

The Refugee Council works with many age disputed children in detention each year and reports, for example, that of the 38 age dispute cases they dealt with in 2011, 22 (58%) were released from detention because they had been assessed to be children by a local authority. 13 were assessed as adults. The remainder were released as adults and were waiting for the result of their age assessment when the Refugee Council ceased working with them. In 2012, the Refugee Council worked with 24 children who were wrongly detained as adults, and in the first three months of 2013, worked with nine children who have been released from detention.¹³⁹

In its 2012 report, the Independent Monitoring Board for Harmondsworth Immigration Removal Centre expressed concern regarding children being detained; the delay in securing their release and assessment in the community by a local authority; and that the Home Office had failed to provide the Board with the information necessary to fully monitor the problem.¹⁴⁰

133 *R (Durani) v SSHD & Nottingham County Council* [2013] EWHC 284 (Admin)

134 *ibid*, para 20

135 *ibid*, para 22

136 *ibid*, para 36

137 Home Office Migration Statistics, Statistical data set: Children entering detention under Immigration Act powers, available at: <https://www.gov.uk/government/statistical-data-sets/children-entering-detention-under-immigration-act-powers>; Home Office Migration Statistics, Immigration Statistics October – December 2012, Detention tables Volume 1 dt.01 to dt.08.q

138 Information provided to the Refugee Children's Consortium

139 Figures from J. Dennis, *Not a minor offence: unaccompanied children locked up as part of the asylum system*, Refugee Council, 2012, at http://www.refugeecouncil.org.uk/assets/0002/5945/Not_a_minor_offence_2012.pdf and Refugee Council contribution to the Detention Forum submission to the Home Affairs Select Committee Asylum Inquiry, April 2013.

140 Harmondsworth Immigration Monitoring Board Report 2012, Section 6.1 at <http://www.justice.gov.uk/downloads/publications/corporate-reports/imb/annual-reports-2012/harmondsworth-2012.pdf>

In *R (AA) v Secretary of State for the Home Department*, the Court of Appeal held that the immigration detention of AA had been lawful because, although AA had been a child at the time, he had been lawfully assessed as being an adult and that the Home Office has been entitled to rely on the local authority's age assessment. The judge held that the current criteria outlined in the EIG are 'sufficiently certain to authorise detention for immigration purposes' although 'it is inescapable that the first and third criteria at least involve an element of judgment by the UK Border Agency'.¹⁴¹ The question remains whether Home Office officials are in a place to exercise that judgment without placing children at risk? At the time of writing the case had been appealed to the Supreme Court and was awaiting judgment.

In light of strong evidence that Home Office policy in practice is resulting in the unlawful detention of children, it is clear that in the current process there can rarely be certainty that an age-disputed individual is not a child. The Home Office should exercise far more caution and address the use of its Enforcement Instructions and Guidance so that if there is any doubt whatsoever regarding an individual's age, even if they are being treated as an adult, they are not placed in immigration detention. Detaining a putative child is simply a risk that is not worth taking: it has serious implications for the child's safety and it could also lead to the government having to pay substantial compensation payments due to their mistakes. It is in no-one's interests to continue to detain putative children where their age may be in any doubt.

The Home Office has been called on to act more proactively in preventing the detention of children, in promptly releasing children from detention and by establishing arrangements with local authorities to ensure that they take immediate responsibility for the welfare of all young people in detention in their area. It is not compatible with the government's commitment to end the detention of children, or local authorities' responsibilities to safeguard children, if children continue to be detained for up to five days waiting for social services to act and to find appropriate accommodation. Detention is the least appropriate accommodation and all steps should be taken to ensure that children are released immediately.

Recent policy outlines that an individual defined as an age dispute case will not remain in detention pending an age assessment but should be released into the care of the local authority. This is welcome, but there are still problems regarding those who enter the UK on false documentation indicating that they are an adult,¹⁴² and the Home Office should continue to chase up referrals to social services and be proactive with the relevant local authority, just as

would happen if a child were at the Asylum Screening Unit and needed to be accommodated. This issue should be addressed in case owner training and/or a revised asylum instruction.

141 *R (AA) v Secretary of State for the Home Department* [2012] EWCA Civ 1383, paras 58 & 60

142 See Home Office Detention Services Order 14/2012 'Care and management of age dispute cases in the detention estate'. Where they enter the UK on false documentation indicating that they are any adult, a child will be defined as an adult rather than an 'age dispute case' and policy regarding their prompt release does not apply.

CASE STUDY 3: H

'I would like to start a new life in this country like a child of this country.'

H arrived in the UK in 2011, having left Afghanistan three months earlier and travelled over land through Iran, Greece, Italy and France. His parents had been taken away by unknown actors, and he had been living with his uncle who had subjected him to regular beatings, breaking his arm on one occasion. Eventually he stole some money and escaped. He feared return to Afghanistan because of the possible retribution from his relatives.

'In Afghanistan if you have no parents everybody wants to take advantage of you ... they won't help you and if they catch you either they sell you or use you.'

H claimed to be 15, but the Home Office decided that his physical appearance and demeanour 'strongly' suggested that he was 'significantly' over 18. He was assessed by two social workers in local authority A, who agreed that he looked older than he claimed to be and was 'deliberately making himself look younger in his behaviour'. They assessed him to be over 19 years old and likely to be in his early twenties. He was moved on to UK Border Agency asylum support and dispersed to local authority B, in a different part of the country.

H claimed asylum and repeatedly told the Home Office that the assessment of his age was incorrect. He explained to the Home Office that he had often considered killing himself whilst in Afghanistan, and that he had hoped that since arriving in the UK his life would be better. When asked what he feared would happen if he were returned to Afghanistan, H simply replied 'I'd have to commit suicide'.

H's asylum claim was refused. His appeal was heard two months later and the Immigration Judge accepted the assessment of local authority A. H had no legal representation at his appeal.

One month after being dispersed, local authority B received a referral from a Community Psychiatric Nurse requesting a new age assessment because of her concerns regarding his emotional welfare, and firm belief that he was younger than 18. She was worried about his sharing a house with adults and that his basic needs were not being met – for example, he was unable to cook for himself. By this point, H was 16 on his own account. Local authority B conducted a second age assessment and also concluded that: 'his physical looks strongly indicate that he is over 18 years of age. There was nothing about H's demeanour and responses to questions, or his account of day to day life that lead us to conclude that he is a child'. While the social workers acknowledged H's vulnerabilities and anxieties, concerns regarding his being housed with adults were dismissed. No attempt was made to form an independent view, and instead the findings of the Immigration Tribunal were relied upon.

H was referred to Coram Children's Legal Centre, who lodged a judicial review of local authority A's age assessment. The local authority subsequently withdrew this assessment.

H was picked up by the transport police for travelling on public transport without a ticket, and then the Home Office detained him in an Immigration Removal Centre with a view to removing him from the UK. Coram Children's Legal Centre contacted the Home Office immediately to request H's release. Following a Court order preventing removal, H was released into the care of another authority - local authority C - over three weeks after he was initially put in detention.

Local authority C assessed H to be 16, with the date of birth he had claimed to have from the start of this process. They noted that his 'behaviour, interaction and demeanour suggested you are your claimed age' and that he exhibited signs of naivety and inexperience. This decision was accepted by the Home Office, and H was subsequently granted discretionary leave to remain.

In total H had three different age assessments, and it took a year to resolve the question of his age, including a period of over three weeks in detention.

'Life is not good, I wish I had died in Afghanistan. I thought my life would change, but that's not happened. I was thinking my life would be in peace.'

3. The court process

At present, the only way to challenge an age assessment is to apply for permission to the High Court to bring a judicial review to challenge the local authority for failing to undertake its statutory duties fully and correctly. Prior to 2009, if the court found that the assessment had not complied with the necessary criteria for it to be deemed lawful, the original assessment would have to be set aside and the local authority would have to carry out a new assessment. Since the Supreme Court judgment in *A v Croydon* in 2009, an assessment is still addressed as part of a judicial review, but it now falls to the court to decide the age of the young person, not only determining whether they are a child or an adult, but also ascribing a date of birth. The court's decision is then binding on the local authority and also the Home Office.¹⁴³

So the only solution for children wishing to be recognised as the age they claim to be is to find a lawyer practising in the relevant area of law and, with their assistance, threaten to take the case to court. When examining an application for permission to decide whether the case can proceed further, the court must ask whether it is arguable that the claimant is younger than assessed by the local authority. If it is arguable, the case can proceed. If not, it is dismissed and the local authority's assessment stands. The case of *R (F & Ors) v Lewisham*¹⁴⁴ outlined the way in which the court should determine age disputes, stating that:

- There is a general expectation that a young person will give oral evidence to the court.
- Whether or not a young person should give evidence orally should normally be a matter for the trial judge.
- Expert evidence is relevant and can be produced. It is for the trial judge to accord what weight s/he wishes to give to that evidence.
- Normally social services records are expected to be disclosed to the young person for consideration in advance of the trial together with the assessing social workers' handwritten notes of the age assessment.

In addition to the intention of the Supreme Court Justices in *A v Croydon* that 'the fact the final decision rests with the court will assist in reducing the number of challenges',¹⁴⁵ many professionals also hoped that this would signal a new, improved system because of 'the perceived neutrality of the Court and the prospect of there being a way to resolve age disputes without resort to repeated re-assessments by local authorities'.¹⁴⁶ However, age disputes continue to be lengthy and protracted, and the judicial approach, whilst at least bringing finality in its decision, brings its own set of issues for the young people and professionals working with them.

Age assessment hearings involve detailed live evidence given by a number of witnesses, with lengthy examination and cross-examination, which means they can last three days or more, and the preparation for such cases is time consuming and expensive. For the young person involved in each case, months or years may have passed since they arrived in the UK, and the hearing may be the fourth or fifth time that they have had to give an account of their life.

The first full age assessment hearing was *MC v Liverpool City Council*.¹⁴⁷ and in 2010, age assessment cases began to be transferred to the Upper Tribunal of the Immigration and Asylum Chamber (UTIAC)¹⁴⁸ although the Administrative Court still retains the power to hear cases if it so wishes. According to Ministry of Justice figures, between April 2011 and March 2012 there were 11 substantive age dispute hearings in the Administrative Court, and between April 2011 and March 2013, there were eight substantive hearings in the Upper Tribunal (these statistics do not include permission hearings). Each hearing took between one and four days.

Of course, this does not adequately reflect the number of age assessments that have been legally challenged in this period. According to Ministry of Justice figures, there were 73 applications to the Administrative Court for judicial review of age assessment in the financial year 2011-12, and 23 in 2012-13. Yet there were only nine full age dispute judicial review hearings in the Upper Tribunal in 2012-13. Many cases will be settled before getting to court, or the local authority will concede. For example, of the CCLC cases examined, a third of them involved either the local authority settling the case

143 The case of *R (AS) v LB of Croydon* [2011] EWHC 2091 clarified that the court's declaration on age was an order in rem

144 *R (F & Ors) v Lewisham* [2010] 1FLR 1463

145 *R (A) v LB of Croydon*, [2009] 1 WLR 2556, para 54

146 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012,

147 [2010] EWHC 2211 (Admin)

148 Under The First Tier Tribunal and Upper Tribunal (Chambers) Order 2010, made under the power conferred by section 7(1) and (9) of the Tribunals, Courts and Enforcement Act 2007– this Order specifically named age assessments as a category of judicial review claims which the Upper Tribunal could hear.

accepting the young person's claimed age, or agreeing to undertake a reassessment.

The table below gives details of 23 full fact-finding hearings since July 2010 for which there are reported judgments. In eight of these, the court upheld the assessment of the local authority, while in four the court found that the claimant was the age

they claimed to be. In all of the others, the court held that the claimant had a completely different age, often assigning a date of birth mid-way between that claimed and that given by the local authority. In one of the cases, the judge decided that the claimant was not only older than he claimed, but older than the local authority had considered him to be.

Case	Date of hearing	Country of origin	Date of arrival in UK	Claimed age on arrival	Assessed age	Outcome of hearing
<i>R (MK) v Wolverhampton CC</i> [2013] UKUT 00177 (IAC)	11 -13 March 2013	Bangladesh	December 2007	12	First assessed to have been 16 on arrival, then assessed to have been 18	Court gave DOB of 19/06/92 (15 on arrival)
<i>R (JS) v Birmingham CC</i> (AAJR) [2013] UKUT 00122 (IAC)	11 & 12 February 2013	Afghanistan	December 2008	12	First assessment: 18 on arrival; Second: 17	Court gave DOB of 01/01/91 (17 on arrival)
<i>R (AZ) v Hampshire CC</i> (AAJR) [2013] UKUT 00087 (IAC)	3, 4 & 5 December 2012	Iran (Kurdish ethnicity)	September 2011	15	Assessed to be 18 on arrival	Court agreed with claimant's stated DOB
<i>R (TS) v LB of Croydon</i> [2012] EWHC 2389 (Admin)	15 & 16 August 2012	Afghanistan	June 2011	13	Assessed to be 15	Court agreed with LA assessment
<i>R (JK) v Nottingham CC</i> (AAJR) [2012] UKUT 0034 (IAC)	14 & 15 August 2012	Afghanistan	October 2008	14	Assessed to be 16	Court gave DOB of 15/09/93 (just turned 15 on arrival)
<i>R (MNA) v LB of Croydon</i> (AAJR) [2012] UKUT 00326 (IAC)	9, 12 & 16 July 2012	Afghanistan	July 2008	13½	Assessed to be 16½ on arrival	Court upheld LA assessment
<i>R (RJ) v LB of Ealing</i> (AAJR) [2012] UKUT 00305 (IAC)	13, 14 & 15 June, 6 July 2012	Afghanistan	July 2009	13 (turning 14 in August 2009)	Assessed to be 17 on arrival	Court gave DOB of 01/02/94 (15 on arrival)
<i>R (W) v LB of Croydon</i> [2012] EWHC 1130 (Admin)	13 April 2012	Afghanistan	October 2009	14	Assessed to be 18 in April 2010	Court held that over 18 on arrival

HAPPY BIRTHDAY? DISPUTING THE AGE OF CHILDREN IN THE IMMIGRATION SYSTEM

Case	Date of hearing	Country of origin	Date of arrival in UK	Claimed age on arrival	Assessed age	Outcome of hearing
<i>R (AS) v Ealing LBC</i> [2012] EWCH 356 (QB)	9 March 2012	Afghanistan	November 2009	14	Assessed to be over 18	Court gave DOB of 24/08/1993 (16 on arrival)
<i>R (SS) v LB of Croydon</i> (AAJR) [2012] UKUT 00139 (IAC)	2, 3, 6 February 2012	Afghanistan	September 2009	14	Assessed to have been 16 on arrival	Court gave date of birth of 15/12/93 (15 on arrival)
<i>R (U) v LB of Croydon</i> [2011] EWHC 3312 (Admin)	6, 7 & 8 December 2011	Afghanistan	June 2008	14	Assessed to have been 16 on arrival	Court agreed with the social worker's assessed DOB of 01/01/92 (16 on arrival)
<i>R (MWA) v Secretary of State for the Home Department & Ors</i> [2011] EWHC 3488 (Admin)	6 & 8 December 2011	Afghanistan	June 2009	12	3 assessments undertaken – all find young person to be over 18	Court held that claimant had date of birth of 16/12/92 (17 on arrival)
<i>R (ES) v LB of Hounslow</i> (AAJR) [2012] UKUT 00138 (IAC)	22, 23, 24 November 2011	Afghanistan	September 2009	13	Assessed to have been 16 on arrival	Court gave date of birth of 01/03/94 (15 on arrival)
<i>R (AS) v LB of Croydon</i> [2011] EWHC 2091 (Admin)	25 October 2011	Afghanistan	April 2009	13	Assessed to be 15	Judge approved settlement, declaring the LA assessments to be quashed and DOB of 18/03/1995 (14 on arrival)
<i>R (AM) v Solihull Metropolitan Borough Council</i> [2011] UKUT 00118 (IAC)	12 October 2011	Afghanistan	January 2010	16	Assessed to have been 18 on arrival	Court gave date of birth of 01/01/90 (20 on arrival)
<i>R (KN) v LB of Barnet</i> [2011] EWHC 2019 (Admin)	20- 21, 22 July 2011	Democratic Republic of Congo	2008	15	Assessed to be over 18	Court held date of birth to be 23/08/93 as child claimed

Case	Date of hearing	Country of origin	Date of arrival in UK	Claimed age on arrival	Assessed age	Outcome of hearing
<i>R (AE) v LB of Croydon</i> [2011] EWHC 2128 (Admin)	[judgment given 01/07/11]	Iran	September 2009	14	Assessed to be 16	Court gave date of birth of 03/09/94 (15 on arrival)
<i>R (R) v LB of Croydon</i> [2011] EWHC 1473 (Admin)	24 & 25 May 2011	Afghanistan	May 2008	14	First assessed to be over 18. Second assessment two years later again found him to be over 18.	Court gave date of birth of 09/12/92 (18 on arrival)
<i>R (Y) v LB of Hillingdon</i> [2011] EWHC 1477 (Admin)	28 to 30 March 2011	Nigeria	n/a	Claimed date of birth 17/02/93	Assessed to be over 18 in 2009	Court held date of birth to be 17/02/93 as claimed
<i>R (N) v LB of Croydon</i> [2011] EWHC 862 (Admin)	[judgment given 16/03/11]	Afghanistan	April 2009	13	Assessed to be 15	Court gave DOB of 01/04/95 (14 on arrival)
<i>R (CJ) v Cardiff County Council</i> [2011] EWHC 23 (Admin)	22, 23 & 24 November 2010	Afghanistan	August 2008	15	Visually assessed to be over 18 by Croydon, then assessed by Cardiff as over 18	Court held that was over 18 on arrival - now 20
<i>R (A) v LB of Camden</i> [2010] EWHC 2882 (Admin)	[judgment given 12/10/10]	Afghanistan	March 2007	15	Assessed to be 17 (born in 1990)	Court held that claimant was born on 09/01/1990
<i>MC v Liverpool City Council</i> [2010] EWHC 2211 (Admin)	16 July 2010	Iran	December 2008	16	Assessed to be over 18	Court gave date of birth of 24/09/92

Some of the court's decisions on age raise the question of whether in reality judges feel able to make an accurate determination of age based on the information presented to them. Indeed, in one case the judge remarked 'what is my experience of judging the age of teenagers in Afghanistan or those who have lived in Afghanistan and have lived in this country for a year or two?'.¹⁴⁹

3.1 Credibility

*'Lies or a disregard for the truth create evidential pitfalls, and the claimant has moulded his account in order to provide himself with the lowest possible age, regardless of the consequential difficulties. I consider this approach on his part revealed not only determination but also a marked degree of maturity.'*¹⁵⁰

The age assessment process is in theory an inquisitorial one, with no burden on either the young person nor the local authority to prove their case and the court aiming to come to the best decision it can on the basis of the evidence presented.¹⁵¹ However, the judgments available to date indicate that young people 'have a high hurdle to overcome in order for the court's assessment to agree with their stated age'.¹⁵² It is no longer solely a question of identifying problems in the local authority's assessment and demonstrating that it was undertaken unlawfully; now young people must give detailed evidence and the question, in essence, is whether the court believes their account. In *R (K) v Birmingham City Council* it was stated that 'the claimant's credibility is highly material, if not fundamental, to the fair and proper assessment of his age'¹⁵³ and most young people involved in court proceedings have had to undergo a detailed and lengthy questioning of their account of their life, with the court rarely believing the young person's testimony entirely.

*'He seemed to have memorised a script and stuck to it'*¹⁵⁴

There is a clear difference between a young person purposefully lying and there being inconsistencies in his or her account, yet it appears that the latter will often have a disproportionately adverse effect on both social workers' and the court's perception of their credibility. For example, in one case the Upper Tribunal found that 'although the discrepancies in the Claimant's evidence relate to minor matters ... they illustrate that when the Claimant is pressed on an answer he will say what he feels best serves his case rather than give a truthful answer'.¹⁵⁵ There can also be what has been described as an 'illogical jump'¹⁵⁶ from finding one specific part of the child's evidence not credible to a further finding that his or her evidence on another issue cannot be accepted as it has been described. This jump can also be seen in the relationship between assessments of age and the determination of a young person's asylum claim. Minor discrepancies between what the child said in their asylum screening interview or full asylum interview and what they said in their age assessment interview are given substantial weight.

When giving evidence during these trials, children are being expected to 'recall the minutiae of their lives'¹⁵⁷ and recount past experiences, in some cases many years after having left their country of origin. They are expected to recall experiences that happened to them as very young children. In one case, the young person's barrister conceded that his client was unable 'to give reliable evidence of his age and there appear to be inconsistencies in the answers he has given at different interviews' but the barrister reminded the court that:

*'Afghanistan is a pre-industrial country in which age is not important and an individual being told his age by his mother is not good evidence of age ... Further, it is unrealistic to expect a child (whether 15 or 16) to give a reliable chronology of events in his early life. Furthermore, on any view, C has only been told his age recently and any attempt by him to reconstruct how old he was in the past will be no more than rough approximation.'*¹⁵⁸

149 *R (A) v Camden* [2010] EWHC 2882 (Admin), para 46

150 *R (TS) v LB of Croydon* [2012] EWHC 2389 (Admin), para 99

151 The general rule in court proceedings is that the party that is asking for a benefit (such as services under the Children Act 1989) has to prove his or her case. In civil cases the evidential standard is on the balance of probabilities, i.e. more than 50%. In *CJ v Cardiff* in the Administrative Court, Ouseley J took the view that it was ultimately for the Claimant to prove his or her case. The Claimant appealed Ouseley J's decision in *CJ v Cardiff* and the case was heard in December 2011 by the Court of Appeal which held that there had been an incorrect application of the burden of proof. The nature of the court's inquiry under the Children Act was reaffirmed as being inquisitorial and the application of a legal burden was not the correct approach.

152 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012.

153 [2011] EWHC 1559 (Admin), para 77

154 *ZS v SSHD* [2012] EWHC 3053 (Admin), para 12

155 *R (ES) v Hounslow (AAJR)* [2012] UKUT 00138 (IAC), para 55

156 *R (AE) v Croydon* [2011] EWHC 2128 (Admin), para 47

157 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012,

158 *R (TS) v LB of Croydon* [2012] EWHC 2389 (Admin), para 24 submission of Mr C Buttler

This focus on minor inconsistencies in a child's evidence persists despite a growing awareness of the link between child development and memory, and how this may affect a child giving evidence. Not only has research shown that the starting point for assessing whether an asylum-seeker's account is truthful - which is whether they give a consistent and detailed narrative - is 'arguably misconceived',¹⁵⁹ but traumatic events have been found to also have a particularly negative impact on cognitive, development and memory performance in children.¹⁶⁰

Case law makes clear that allowance should be made for the fact that a child 'might have a different way of recounting narratives',¹⁶¹ but there is little evidence of allowance being made when a negative assessment of credibility determines the conclusion drawn by the court in relation to age. That said, in two recent cases, the judges found that the claimants were not credible or reliable witnesses, but still concluded that they were younger than they had been assessed to be, based on the other evidence provided.¹⁶² This highlights the importance of other evidence being gathered on which the court can rely, beyond the testimony of the child.

3.2 Link between asylum case and age assessment proceedings

Although there will invariably be overlap between a young person's account of their age and life and the reasons they have had to flee their country of origin, 'the two are not necessarily one and the same account'.¹⁶³ Early case law regarding age assessments acknowledged that, while it may be necessary to take a history from a young person and come to a view as to whether it is true, 'an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin'.¹⁶⁴

Yet the relationship between the young person's asylum or immigration claim and age assessment is problematic.

Much weight has been placed to date on the young person's immigration history as a proxy for determining credibility at the permission stage. This occurs despite the fact that young people may come to the UK under false pretences for reasons entirely irrelevant to their true age. This problem was illustrated in the 2011 case *R (A) v LB of Croydon and Secretary of State for the Home Department*. The young person had entered the UK on a passport using a false name and false date of birth. He told the immigration officers and social services of the deception used to enter the UK as soon as he presented to them. He also provided them with the name of the agent and an explanation of his life story and age, and his account was consistent throughout. This was never followed up by the Home Office even though they had the contact details of the agent including telephone numbers and home address. The young person was assessed to be the age recorded in the false documents. In the absence of definitive proof that the claimant was not the person whose false name he said he used and whose age was much older, the court found it was unable to grant permission to proceed to a substantive fact-finding hearing.¹⁶⁵

A different approach was adopted in the recent case of *R (AZ) v Hampshire County Council*,¹⁶⁶ where neither party sought to lead detailed evidence about the young person's asylum claim, either to support or undermine his claim about age. Instead, the Tribunal examined evidence from the child himself and others whom he had encountered in the UK. The evidence focussed on an assessment of the child's age, and in the cases of witnesses supporting him, details of his daily life, educational and social progress. The Tribunal found that he had 'given truthful answers to questions put before him'¹⁶⁷ and concluded that he was in fact the age claimed.

Though the focus of this report is on decisions made on children's ages, the use of age assessment reports by Home Office case owners in their decision making on children's asylum, immigration and trafficking claims is also relevant. UNHCR has expressed concern that information gathered in an age assessment interview has been used inappropriately to discredit a child's credibility in their asylum claim.¹⁶⁸

159 See J. Herlihy, L. Jobson & T. Turner, *Just Tell Us What Happened to You: Autobiographical Memory and Seeking Asylum*, 2012 and other research by the Centre for the Study of Emotion & Law at http://www.csel.org.uk/csel_publications.html; 'Just tell us what happened' Free Movement Blog at <http://www.freemovement.org.uk/2013/02/06/just-tell-us-what-happened/>; J. Souter, 'Bogus' asylum seekers? The ethics of truth-telling in the asylum system', *OpenDemocracy*, 29 July 2011, at <http://www.opendemocracy.net/5050/james-souter/bogus-asylum-seekers-ethics-of-truth-telling-in-asylum-system>

160 <http://writepass.co.uk/journal/2012/11/psychological-interventions-for-children-and-adolescents-who-have-experienced-war-related-trauma-an-argument-for-narrative-exposure-therapy/>

161 *R (ES) v Hounslow* (AAJR) [2012] UKUT 00138 (IAC), para 43

162 *R (JK) v Nottingham CC* (AAJR) [2012] UKUT 0034 (IAC); *R (RJ) v Ealing* (AAJR) [2012] UKUT 00305 (IAC), para 33

163 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012. An example of the difficulties that this link can cause is the problems caused by the EURODAC process as young people are often told to give an older age to immigration officials in other Europe countries so that they can avoid detention and continue their journey.

164 *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin)

165 *R (A) v LB of Croydon and Secretary of State for the Home Department* [2011] EWHC 3116 (Admin), described in L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012

166 (AAJR) [2013] UKUT 00087 (IAC)

167 *ibid*, para 21

168 UNHCR *Quality Initiative Project, Sixth Report to the Minister, April 2009*: section 3.4.10

3.3 The role of other professionals

In order to assist the courts in making a finding on age, the opinions of experts such as paediatricians, independent social workers, psychiatric and dental experts have been presented, either to support or contest the conclusions drawn by social workers. In many cases prior to 2011, the claimants relied on paediatric reports. However, in *R (R) v LB Croydon* the statistical methods behind some of these were strongly criticised, and it was held that the conclusions drawn in the reports could not be relied upon.¹⁶⁹ Social workers can of course use medical evidence as part of their age assessments, but the court has found that a report from a paediatrician should not generally 'attract any greater weight than the observations of an experienced social worker'.¹⁷⁰ In addition, key figures in a young person's life who may have worked with them, such as teachers, advocates and foster carers, have been called on to give their opinions.

Since 2011, the court's interpretation of evidence from professionals and carers has varied from case to case. For example, it has viewed evidence from teachers as both helpful and reliable,¹⁷¹ or of no assistance.¹⁷² In *AM v Solihull* the court was unimpressed at the paucity of information that the claimant's foster carers could offer¹⁷³ and the case of *R (TS) v Croydon* explored the argument that the foster carer may have had an interest in keeping the claimant young 'for financial reasons' and that there were 'conflicting pressures' making the foster carer a 'difficult witness to rely on'.¹⁷⁴ NGO advocates, such as those from the Refugee Council and The Children's Society, have often been called to give evidence in support but in one case the court found that one caseworker's view was based on her subjective assessment and belief in the context of her assisting him in preparing for legal proceedings. Accordingly, little weight was given to her opinions.¹⁷⁵ A similar finding was made in *CJ v Cardiff*

that 'the flavour of the judicial assessment of evidence from organisations that assist or advocate for young refugees is that they lack impartiality'.¹⁷⁶ By comparison, in a very recent case the advocates were seen as 'impressive witnesses',¹⁷⁷ as was the therapist Dr Bamber in the case of *R (KN) v L of Barnet*, who had been providing therapeutic support to the claimant and whose expert view was that she was a child as she claimed.¹⁷⁸ Many unaccompanied children have suffered varying degrees of trauma, and while not all are able to access appropriate mental health services, for those who can, the regular contact they have with their psychotherapist, similar to that which they might have with a teacher or carer, can mean that that professional may be well placed to give their opinion on reasons for the young person's behaviour which could be of great significance in their age assessment case.

Independent social worker reports have been criticised in a number of cases. Concerns have been raised that they only offer an opinion about a young person's age based on a single meeting;¹⁷⁹ that the tone of the reports borders on advocacy of one party's case and does not reflect a truly independent view on age;¹⁸⁰ and that independent social workers have no more expertise than local authority social workers in carrying out age assessments.¹⁸¹

Recent jurisprudence suggests that both the young people and the relevant local authorities have struggled to identify independent experts who can effectively assist the court in a way that is perceived as truly independent of the interests of either party. Further useful work could be done to train and prepare professionals and carers in how to provide evidence to the court. Timely requests for, and provision of, information from others who spend a considerable period of time with the young people would be extremely valuable as part of the original assessment as well as part of the evidence in the court hearing. However, a way needs to be found for expertise and opinion to be fed into the court's assessment

169 [2011] EWHC 1473 (Admin)

170 In *A v Croydon* [2009] EWHC 939 (Admin) (08 May 2009), the existence of a report from Dr Birch was held not 'to attract any greater weight than then observation of an experienced social worker' – para 33

171 *R (RJ) v LB of Ealing* (AAJR) [2012] UKUT 00326 (IAC) - the teacher was found to be an 'impressive witness whose opinion carries a good deal of weight'

172 *R (Y) v LB of Hillingdon* [2011] EWHC 862 (Admin)

173 *R (AM) v Solihull Metropolitan Borough Council* [2011] UKUT 00118 (IAC)

174 paras 78 & 104

175 *R (ES) v LB of Hounslow* (AAJR) [2012] UKUT 00138 (IAC)

176 An exception was the case of *R (AE) v Croydon* where evidence from the Refugee Council was held to be credible by the Administrative Court

177 *R (AZ) v Hampshire CC* (AAJR) [2013] UKUT 00087 (IAC), p 39

178 [2011] EWHC 2019 (Admin), para 60

179 *R (Hossein) v Secretary of State for the Home Department and Kent County Council* [2011] EWHC 1924 (Admin) per Collins J at para 15. See also *R (AM) v Solihull BC* (CO/2467/2011) (heard in the Upper Tribunal).

180 *R (YE) v Secretary of State for the Home Department and LB of Croydon* [2011] EWHC 496 (Admin) per Cranston J at para 21. See also concerns raised in *R (Y) v LB of Hillingdon* [2011] EWHC 1477 (Admin) at para 63 as to independent social workers' understanding of their role as experts.

181 *R (AM) v Solihull* [2011] UKUT 00118 (IAC) at paras 70-72.

in a way which is seen to be independent and objective, or else, it is probably that age dispute hearings will continue to 'be reduced to a clash between the claimant's account and the local authority social workers' opinion, with the court left to figure out for itself whether either account should be accepted.'¹⁸² At present, it appears that in the absence of other evidence the court will usually favour the social worker's view, even if their assessment has been discredited.

3.4 Documentation

A young person's lack of documentation, including birth certificates and ID cards, can be a significant factor in the decision to dispute age and issues of documentation may also be tied in with the perceived credibility of the child's account of his or her stated age and experiences. Home Office policy makes clear that 'where there is little or no evidence to support the applicant's claimed age' they will either be deemed 'age-disputed' or an adult.¹⁸³

There is still a widespread lack of clarity as to what records are, and should be, available; which documents will be acceptable as proof of age; and what weight they should be given in age determination. Documentary evidence may be determinative of age¹⁸⁴ but only if it can be shown to be authentic and its provenance does not raise questions.¹⁸⁵ Many young Afghans who do not have a birth certificate can produce a taskera, which is an identity card stating a child's age, in the form of a 16-page booklet, issued on either a permanent or a temporary basis, according to the Repatriation Ministry's Herat office. In order to start school in Afghanistan, a child needs an identity card.¹⁸⁶ The Home Office will often question the evidential value or validity of such documents and it can be difficult to verify the authenticity of many of the documents provided by young people. Often experts will be called on to assess their authenticity. In the case of *R (W) v LB of Croydon*¹⁸⁷ the young person submitted a letter from the hospital where he was born, a taskera and a certificate for a tailoring course he had attended in support of his application. All were dismissed as 'foreign documents' which were 'simply untested hearsay (probably multiple hearsay) evidence of their contents'.¹⁸⁸ In another case, a taskera was described as a 'self-serving

document' because it 'simply records what the official at the Ministry of Interior Office had been told by the Claimant's father. It is not proof of age'. The passport provided, issued by the Embassy of Afghanistan, was deemed 'of no evidential value'.¹⁸⁹ What is left is a vicious circle whereby young people try to fit into the evidential requirements of the UK, but an opinion or official documents obtained from the country of origin are rejected in favour of the opinion of professionals in the UK (often based on appearance).

CASE STUDY 4: K

K arrived from Uganda at an airport in the UK with a visa in a false passport that said he was 24. K was actually 16 but using false documentation was the only way he could flee his country and come to the UK and seek protection. He claimed asylum as soon as he arrived and he was placed in the detained fast track at an Immigration Removal Centre.

K was able to contact someone who contacted a family member in his home country and was in this way able to get his birth certificate proving his age. His immigration solicitor got the document authenticated and submitted it to social services and to the Home Office. However, rather than accepting the age on the authenticated birth certificate as well as K's own account of his age, the Home Office continued to detain K on the basis that they were relying on the age given in the passport. The Home Office eventually agreed to release K under threat of legal challenge.

The local authority also decided not to accept the birth certificate and proceeded with the process of conducting a full age assessment.

In another case of, the child was assessed to be an adult by both the local authority and the First-tier tribunal, who took into account, but did not consider conclusive, the taskera which appeared to confirm his age. He was detained then released due to a Court order, at which point Cardiff prepared a further assessment, taking the taskera into account, and determined that AA had been a child.¹⁹⁰

182 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], 2012.

183 UK Border Agency Asylum Processing Instruction, *Assessing Age*, section 2.1

184 See *SA (Kuwait) v SSHD* [2009] EWCA Civ 1157, cited in S. Bolton, K. Kaur, S. Luh, J. Peirce & C. Leo, *Working with refugee children: Current issues in best practice*, Immigration Law Practitioners Association (ILPA), 2012 p 81

185 *ibid*

186 Immigration and Refugee Board of Canada, *Afghanistan: The Afghan identity card called "tazkiras" [taskera], particularly whether the date of issue is stated in the document, the procedures to replace or renew it, and on the differences in its appearance since 1973, 1 July 1998, AFG29678.E*, available at: <http://www.unhcr.org/refworld/docid/3ae6aba334.html>

187 [2012] EWHC 1130 (Admin)

188 para 32

189 *R (ZS) v SSHD* [2012] EWHC 3053 (Admin), para 25 and 27

190 *R (AA) v Secretary of State for the Home Department* [2012] EWCA Civ 1383 para 13

In light of problems like those illustrated above, 'it is unlikely that documentary evidence will be conclusively determinative of the factual dispute over age'.¹⁹¹ However, less emphasis on the need for documentary evidence from the outset might prove helpful, and in cases where there is documentary evidence supporting a child's account, that has been authenticated, this should be taken as decisive. Even where children have such proof, their ages are still being disputed and they are still having to undergo lengthy assessments.

3.5 Alternatives to court

*'The decision of a Court may be authoritative but it is not necessarily for that reason more nearly factually correct than an assessment by anybody else. And litigation should be a last resort: either the claimant can accept a local authority assessment, or if the parties can agree to compromise, there should be no need for the Court's intervention. The Judicial Review claim will not need to be brought, or, if brought, can be settled by consent. That is not in any sense a worse outcome than a full hearing, at the end of which the Court makes an assessment of the claimant's age. On the contrary, it is likely to be a better outcome. There is no "loser"; and a great deal of time and money is saved.'*¹⁹²

Given the time, cost and impact of full age assessment hearings, and the fact that by the time the case gets to the Tribunal there is often a fresh set of witnesses, some judges have encouraged case conferences prior to the hearing. In these, those involved in the young person's case meet, without lawyers present, to see if they can come to their own agreement and thus avoid the need for a lengthy hearing. The content of these meetings are not reported.

A more preferable development could be the introduction of a form of alternative dispute resolution (ADR) that would be used following an initial decision as a preliminary stage in the commencement of legal proceedings. It would be a necessary step for both sides to engage in before continuing proceedings more formally. Judicial review would remain as the remedy for a child, but only if attempts at resolution had been attempted and failed would the dispute (subject to the court's permission) proceed to a full hearing. Legal aid should be available for the ADR stage of proceedings, whether proceedings have been issued or it is used prior to issuing.

Mediation is an accepted and proven way of addressing and resolving disputes, particularly where the parties need to

emerge with a continuing relationship, as no party is seen publicly to 'lose' and the information disclosed remains confidential. It may be necessary to go through some of the main procedural steps including, for instance, disclosure and exchange of witness statements and experts' reports, in order to put an individual case into the strongest position from which to negotiate. Legal representation would still be required, but use of ADR could also speed up settlement, resulting in significant savings of time and costs, in addition to a reduction of stress on all the parties in comparison to what would be involved if matters were taken to judicial review in the High Court/Upper Tribunal.

In the context of age assessments, a form of 'evaluative mediation', in which an appropriately trained and experienced mediator would express a view for the parties about the strengths and weaknesses of their respective cases, and what might be a fair and just resolution to the dispute, may be most appropriate. Whilst the fact of a person's age cannot be definitively determined within the parameters of currently accepted social/medical/scientific approaches, ADR could assist in helping the parties to agree the most appropriate and beneficial determination of age in the particular circumstances, having narrowed down by agreement the issues and evidence which are relevant to the consideration of age and excluding those that are extraneous. The final decision would be one which would promote the best possible outcomes for the individual under dispute in a way that reflects the need to safeguard that individual and others and give the benefit of the doubt.

Even if an agreement on age could not be reached at the ADR stage, the process would importantly serve to identify and narrow down the issues and evidence in dispute and determine exactly what matters of disagreement on facts, expert opinion and law are to be put to the court for formal judicial resolution.

It is important to emphasise that judicial review as the final means of redress is a critical safeguard for children, and is currently an essential way of ensuring that they receive the correct support and protection in the UK. It is fundamentally important that access to justice for children through judicial review is not restricted, that legal aid is retained for children seeking redress through judicial review and that access to the courts for these children is not restricted. At the time of writing, proposals by the Ministry of Justice under consultation threaten access to judicial review for children in age dispute cases, which is of great concern.

*'We constantly have to go through litigation in the courts to be able to ensure that age assessments are happening fairly, properly and justly.'*¹⁹³

191 S. Bolton, K. Kaur, S. Luh, J. Peirce & C. Leo, *Working with refugee children: Current issues in best practice*, ILPA, 2012

192 *R (JS & YK) v Birmingham City Council* (AAJR) [2011] UKUT 00505 (IAC), para 5

193 Baljeet Sandhu, Islington Law Centre, in oral evidence to the Joint Committee on Human Rights, 11 December 2012

4. The cost and impact of age disputes

'These appeals show how disputes as to age assessments can generate prolonged and costly litigation. The expense is bad enough. But even worse is the damage that delay and uncertainty may cause to the interests of children'.¹⁹⁴

CASE STUDY 5¹⁹⁵

Two young people arrived in the UK at the beginning of 2013, having fled Albania. Both claimed to be 15. The local authority assessed them both to be over 18 and sent them to the Home Office. Subsequently one presented a biometric passport with his stated age, that had been accepted by both the Home Office and his solicitor. The local authority refused to accept the passport as satisfactory proof of his stated age and returned then both to the Home Office in London. Both boys are challenging their age disputes. In the meantime they are being housed in adult accommodation. They report being scared and unhappy, and are worried about being robbed and staying safe.

4.1 Disbelieving children

In certain contexts children may be disbelieved for good reason – in trafficking situations, for example, it may be that the child has been given a story to use and fears the consequences of departing from that account. It may be that it is in their best interests for the decision-maker not to take this at face value. In addition, some children simply do not know themselves how old they are, and so determining their age as accurately as possible is not a matter of dispute but of mutual interest between the young person and the social work professional. That a child in this situation who is repeatedly asked for their date of birth provides some kind of information when it is demanded of them should not be held against them.

However, in other cases children are clear how old they are, but their views are treated with suspicion and doubt, often tying in with financial pressures, relationship breakdown or a simple hardening of attitudes towards separated children claiming asylum. At the heart of the age dispute process lies the culture of disbelief.

'Challenges to their credibility in terms of key aspects of their identity such as their age or their account of their experiences have a profound and persisting impact on the sustaining of self esteem and self confidence. The challenges to young people weaken their fragile sense of identity and repeatedly returns them to a sense of helplessness and hopelessness linked with their experiences of violent abuse. They feel disempowered and a loss of their sense of self, who they are and we see their sense of vulnerability persist and increase as a result of this climate of disbelief. This sense of uncertainty and self doubt common in young asylum seekers whose identity has been challenged persists often for years through the prolonged asylum seeking process and often beyond when they struggle to find adequate support for their education because an official has wrongly assessed their age and level of developmental functioning'.¹⁹⁶

Age disputing a young person can create an immediate context of distrust, and can affect the way they engage with their social worker or personal adviser from then on. Young people can be left bewildered and angry by the process, can experience 'general levels of antagonism and hostility' from their social workers,¹⁹⁷ and in extreme cases may abscond from the care system as a result of not being believed and because of having to face a protracted age dispute.¹⁹⁸ The impact of believing children was highlighted in *R (AZ) v Hampshire*, where it was noted that the young person's attendance at Manchester Academy had 'really helped' him,

¹⁹⁴ *R (Khadri) v Birmingham City Council and ors* [2012] EWCA Civ 1432, para 52

¹⁹⁵ Provided by The Children's Society

¹⁹⁶ Sheila Melzak, consultant child and adolescent psychotherapist, clinical director Baobab Centre for Young Survivors in Exile, to Coram Children's Legal Centre, 25 April 2013

¹⁹⁷ H. Crawley, *When is a child not a child? Asylum, age disputes and the process of age assessment*, IILPA, 2007, p 102-103

¹⁹⁸ S. Clarke, *Young Lives in Limbo: the protection of age disputed young people in Wales*, Welsh Refugee Council, 2011, p 55

partly because he was able to engage with an institution where ‘someone has believed his claimed age’ and he could be with his peer group.¹⁹⁹

‘We explained that the onus of proving his age was on him.’

From a local authority assessment

Often the context of an age assessment is not child friendly and can feel more like an interrogation than a conversation. This can be worsened by a lack of cultural or political awareness which can unfairly impact on their assessment of the child and prevent constructive dialogue. Children may not feel relaxed and this is not conducive to their giving accurate answers to the questions asked of them.

‘I didn’t know any of the social workers, so I couldn’t feel relaxed. I was nervous, I wanted to give good answers... even if you were older it would be hard to focus.’

Young person

When there is no other evidence available, it might be helpful for practitioners to move away from seeing age assessment as a quest for the ‘truth’, and instead recognise that it is not an issue of whether the young person is reliable or not, but rather a means of deciding on a likely age, taking into account their development to date and their current needs. Many young people have significant mental health issues that can impair any attempt to access the ‘truth’, but too often these needs are forgotten or ignored as priority is given to issues of credibility. In one of CCLC’s cases, an educational psychologist observed that the client had a mental age equivalent of 12 years, and commented that he expected the client’s limited cognitive skills to ‘significantly reduce his ability to recall dates and times accurately, and reduce his ability to give and remember having given coherent instructions, particularly if these are of a complex, novel or abstract nature’. The young person was assessed to be 18 rather than 15 as he claimed to be and ended up having to undergo four separate age assessments.

‘The starting point should be whether there is good reason to significantly detract from what the child says about their age. If they have a range of ages within which they feel the young person could fall, then if the child’s claimed date of birth falls within that it should be accepted.’²⁰⁰

Age ‘can only be assessed but never determined’ and the ‘search for certainty is often at the expense of assessing the child’s psychological and developmental well-being’.²⁰¹ In the absence of a simple scientific means of proving how old someone is, all that can be arrived at is an estimation of what the young person’s age is likely to be, and what date of birth would be appropriate to accord to the child, within the wide parameters of the best available sociological, developmental and ‘scientific’ methods used, allowing for sufficient weight to be placed on their vulnerability. The suggestion that the child is lying would be less relevant if the emphasis were shifted from an arbitrary definition of precise chronological age, towards a measured assessment of an appropriate age to work to, based on a holistic appreciation of all relevant factors. Social workers who have been given this unenviable task need to stop grasping the impossible and accept the inevitable uncertainty.

‘We should get away from the assumption that all young people are lying on arrival, and perhaps move towards the assumption that the vast majority are telling the truth. We could then take an awful lot of heat out of this, and save a lot of time and money. We have a team of volunteers that practically every day go and act as an appropriate adult in age assessments that are pointless, time-consuming, and distressing for young people. It is because people start from the assumption that somebody is lying. Until we can find something to prove that, or to prove otherwise, there is no proof in all this. If we started from a premise that far more young people are telling the truth then we could invest our energies in those that perhaps are not, work out why they are not, and see what services, whether adult or children, are best to support them.’²⁰²

199 *R(AZ) v Hampshire CC* (AAJR) [2013] UKUT 00087 (IAC), para 38

200 Judith Dennis, Refugee Council, to Coram Children’s Legal Centre, 26 April 2013

201 Einzenberger, B. Age Assessment, UNHCR BO Vienna, Annex 6 of Separated Children in Europe Programme, Report of the Workshop on Age Assessment and Identification, Bucharest 20-22 March 2003, cited in from Brownlees & Smith, *Age assessment practices: a literature review & annotated bibliography*, UNICEF, 2011

202 Helen Johnson, Refugee Council, oral evidence to the Joint Committee on Human Rights, 27 November 2012 at <http://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2027%2011%2012%20transcript.pdf>

4.2 Falling through gaps in support

'These people whose ages is disputed the social services they never help them. If someone doesn't have a social worker, a teacher, nothing, how would they know what to do?'

Young person

A key problem in the current process for resolving age disputes is the length of time that challenging an assessment can take, including finding a solicitor, correspondence with local authorities, possible reassessments, and subsequent litigation, potentially with adjournments. Pending the results of their age assessment/s, children can be left in limbo, and as the UK does not have a system of guardianship, or similar, to ensure that there is someone representing and assisting the child throughout the age assessment process,²⁰³ age-disputed individuals run the risk of falling into the gap between institutional responsibilities and support systems. The process can have a significant impact on their access to appropriate services, education and healthcare, including Child and Adolescence Mental Health Service, and delays can halt the normal processes of settling young people, their engagement and intergration.

In one stark case, by the time the child, previously found to be over 18, had been correctly assessed to be 15 she has been without care services for over 15 months. She was pregnant, receiving therapy for sexual abuse and had been subjected to witchcraft practices.²⁰⁴ If assessed to be an adult and moved to Home Office accommodation, a young person may then have little interaction with other professionals who can subsequently help inform the assessment of their age. In another case, the young person from Iran, who claimed to be 16, was unable to call any witnesses for his age hearing because he had had so little interaction with others since being moved into adult accommodation. In his second assessment, conducted nine months after he arrived in the UK, he stated that he was still too scared to go outside in case he got lost.

It can take six months or more just to get a permission decision, and even after being granted permission to proceed by the Administrative Court, there can be a gap of many more months before the hearing. In the judgments studied for this report, and in CCLC's case work, the length of time it took between a young person's age being disputed and their case finally being resolved or reaching a full fact-finding hearing ranged from one to four years. In over 65% of the reported cases that went to full hearing, and in some cases to appeal, it took over two years to get a final decision. In nearly 20% of cases, the young people involved had to wait for four years. Two thirds of the CCLC's cases involved two or three age assessments conducted by different individuals over the course of one to three years. In five of the cases the young people involved were found to be adults in their initial age assessments. In four, they were found to be children but three years older than claimed, still significantly impacting the support they received and access to education.

*'Whilst there are potential resource ramifications for local authorities there are lifelong ramifications for young people who find themselves in limbo, sometimes for years'*²⁰⁵

When judicial review proceedings are initiated, an application can be made to the court for an interim relief order obligating the local authority to provide support and accommodation to the young person under the Children Act 1989 until the end of the hearing and, on the whole, the court has been prepared to grant such interim relief.²⁰⁶ However, a requirement on the local authority to support the child imposed by an interim relief order means that support is often provided reluctantly, and the relationship between a young person and their social worker, which is key to their being provided the appropriate support, can be damaged. Even if granted interim relief, children can be left without the pastoral support they need, and it is not uncommon for them to be left without access to education for many months, even years.²⁰⁷ In the current system that still feels adversarial, the relationship between the young person and their social

203 This report does not explore the issue of guardianship, but the appointment of a guardian for every separated child is set out in paragraphs 21 and 33 of the Committee on the Rights of the Child *General Comment No. 6*. The Committee has stated that the appointment of a guardian serves as a key procedural safeguard to ensure a child is properly represented in the asylum process, their views are expressed and best interests upheld. The issue of age disputes in the UK further highlights the need of separated children to have an independent adult consistently working with them from the point that they arrive in the UK, guiding them through the system – for further information see K. Dorling & A. Hurrell, *Navigating the System: Advice provision for young refugees and migrants*, Coram Children's Legal Centre, 2013, p 44 and the Scottish Guardianship Service - http://www.scottishrefugeecouncil.org.uk/policy_and_research/responding_to_policy/guardianship_project. In Scotland and other EU member states, guardians attend age assessments. In Scotland, there is evidence that the guardian played an important role where the young person's age was disputed because the process 'can severely undermine the confidence and trust that a young person has in his or her social worker' – H. Crawley & R. Kohli, *'She endures with me': An evaluation of the Scottish Guardianship Services Pilot*, Swansea University, University of Bedfordshire, 2013

204 Local Government Ombudsman *Report on an investigation into complaint no 08 005 858 against Liverpool City Council*, 24 March 2010

205 L. Brownlees & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC [2009]*, Office of the Children's Commissioner, 2012

206 *ibid*

207 'Croydon Council ordered to educate asylum-seeking teenagers', *Croydon Guardian*, 24 October 2010, at http://www.croydonguardian.co.uk/news/8471030.Council_ordered_to_educate_asylum_seeking_teenagers/

worker can be severely undermined during the course of a challenge.

In one case, the child claimed to be 16 but was thought by the local authority to be over 21. Though interim relief was granted, he was only given a room in a shared house, and was given no assistance in accessing any form of education. He also had no idea who his social worker or support worker was. For a year, this young person was in limbo, waiting for resolution and given no assistance in his personal or educational development.

'I usually get up at 2pm. I turn on the TV to play the Xbox game for about one or two hours. Afterwards I take a shower. After that, I go to the shop to buy something to eat. At 7 o'clock I go to see my friends or play football with them up to 9 o'clock. Then I come back. After that I start the game again.'

Young Person

Age assessments also have serious implications for young people's entitlement to support from the local authority once they reach the age of 18, which will depend on their age, as well as the length of time for which they were looked after.²⁰⁸ In *R (R) v LB Croydon*²⁰⁹ the child has claimed to be 15 but was assessed to be over 18 and was accommodated thereafter by Home Office. Thirwall J held that he was the age he claimed to be, although by the time of the hearing he was anyway 18 years old. The issue of whether he was a 'former relevant child' arose as he had never in fact been looked after by the local authority. The judge concluded that he should be treated as having been accommodated by the local authority when he had been in Home Office accommodation since he was in fact a child in need at that time and required accommodation. This is an important judgment, as it opens up the possibility of support as a care leaver being made available to many young people who were wrongly assessed to be adults when they first presented to local authorities. Yet, in one CCLC case, even following the social worker's assessment that the young person qualified for leaving care support, he was nevertheless treated like an adult and provided with minimal support. He was not given a pathway plan or a personal adviser until Coram Children's Legal Centre wrote a Letter Before Action to the local authority, and his social workers appeared not to believe that they needed to forge any kind of supportive relationship.

CASE STUDY 6: M

When M arrived in the UK, he believed that he was 13 years old, though he had no proof of his age. M had been in school in Afghanistan, before fleeing to the UK. He was proud of the fact that he was always at the top of his class in his home country and particularly enjoyed sciences and maths, hoping to become a doctor one day. Upon being taken into care, the local authority responsible for him argued that he was 17 years old. However, his solicitor, foster carer and other professionals working with him felt that he was clearly not 17, and believed that his claimed age of 13 was indeed correct.

Because of the dispute over his age assessment, M was not able to enrol into school or college. After a solicitor challenged the age assessment carried out by the local authority, it was in the end established that M's age was 13. By this time, he had already been in the UK for eight months and had missed almost a whole academic year. In this time, he had nothing to do and resorted to hanging out in a local park and playing video games in his room. Being unable to attend school and having nothing to do led to a deterioration of his mental health and M became very depressed. Upon finally starting school, M had been out of education for over a year, meaning that he had fallen very much behind and has found it very difficult to resume his studies.

(case study provided by Refugee Support Network)

4.3 Impact on immigration status

'In the preamble to the age assessment report, the following statement was supposedly read out to M: "It is important that you understand that we are not from immigration and have no power over any decision they make about your case". However, considering what happened subsequently this statement seems somewhat ironic. Because the local authority continued to dispute M's age, he did not receive his immigration status document until nearly two years after his asylum claim had been determined; this delay was entirely attributable to the age dispute.'

Solicitor

²⁰⁸ Where a young person was looked after for a cumulative total of 13 weeks beginning after the age of 14 and ending after the age of 16, s/he becomes, on reaching the age of 18, a 'former relevant child'. A local authority has duties towards a former relevant child until s/he reaches the age of 21 (s.23C(1)-(6)). Some of these duties continue beyond the age of 21 if the 'pathway plan' sets out a programme of education or training which continues past his/her 21st birthday (s. 23C(7)), in particular the duty to provide assistance under s. 24B(2) to the extent that his/her welfare and his/her education or training needs require it (see below).

²⁰⁹ Thirwall J, 10 February 2012, judgment not yet available

The delay involved in age dispute cases, and incorrect assessments of age, can have a significant impact on a young person's immigration status. Those treated as adults are excluded from the safeguards and child-specific considerations that would apply if their claim were processed as a child, nor will they receive a grant of limited leave to remain (previously called 'discretionary leave') if their asylum claim is refused, in the absence of adequate reception arrangements in their home country.²¹⁰ In *R (AA) v Secretary of State for the Home Department*²¹¹ the young person involved was initially assessed to be over 19, and then subsequently assessed to have been 17 (15 on arrival). As a result his claim was not processed as a child and he did not benefit from the unaccompanied asylum seeking children discretionary leave policy. This was found by the court to be unlawful and is a clear example of the impact of age disputes on children's immigration status.

Even for those treated as children, but whose ages are disputed, there are problems. While Home Office policy states that 'the asylum process should not normally be delayed whilst a full decision on an applicant's age remains outstanding',²¹² many have had to wait months or years for a decision while their age is still in question. This can result in them 'ageing out', and as a result not being granted refugee status, or being denied a grant of limited leave where they would have received one had their age not been disputed.²¹³ In 2012, of the 870 initial decisions on children's asylum claims, 279 were not made until the young person had turned 18. While 27% (160) of children whose cases were decided while they were still under 18 were granted refugee status, only 16.5% (46) of those who had turned 18 were. For Afghan children, the odds are much worse - 20% (32) of Afghan children were granted refugee status, but the figure was a mere 1.6% (1) for those who had turned 18.²¹⁴

A further difficulty can be caused by the fact that, in the present system, a young person may be going to court to appeal a refusal of asylum at the same time as proceedings are being brought on the issue of their age. A young person, when appealing the refusal of the asylum claim, may receive a favourable finding on their age by the Immigration Judge in the Immigration Tribunal. If they then proceed to challenge

their age assessment, they may then have a fact-finding trial before the Upper Tribunal, which could make findings on credibility and fact that are different to those made by the Immigration Tribunal in the asylum appeal, and could come to a different decision on their age to that of the Immigration Judge. This can result in the question of the young person's immigration status being re-opened. In one reported case, for example, the UKBA revoked the young person's grant of refugee status while the age assessment was being disputed.²¹⁵ This is extremely disturbing for children who have had a final decision on their asylum claim. The fear of having a status decision revoked can leave many young people unwilling to challenge their age assessment, unwilling to risk 'losing an advantage that they already have from the Secretary of State'.²¹⁶

'For my peace of mind I need to be my age. Two ages are not acceptable for my heart and mind'.

Young person

Though the focus of this report is on decisions made on children's ages, the use of age assessment reports by Home Office case owners is also relevant. UNHCR has expressed concern that information gathered in an age assessment interview has been used inappropriately to discredit a child's credibility in their asylum claim²¹⁷ and this was illustrated in a recent case²¹⁸ where the young person's asylum claim was refused due to, among other reasons, credibility issues, and the decision relied on inconsistencies between what the claimant had told the local authority at the age assessment and what he told the Home Office.²¹⁹ In many CCLC cases, the age assessment was heavily relied on by the Home Office in its 'Reasons for refusal' letter refusing the young person's asylum claim. This is very problematic given the frequency with which minor inconsistencies in a child's account can result from miscommunication, poor interpretation or inaccurate record-keeping. Concerns regarding the use of information in such a way by the Home Office have partly been responsible for the design of good practice guidance on information-sharing between local authorities and the Home Office.²²⁰ However, the

210 Home Office Immigration Rule 352ZC *Requirements for limited leave to remain as an unaccompanied asylum seeking child*, at <http://www.ukba.homeoffice.gov.uk/policyandlaw/immigrationlaw/immigrationrules/part11/>

211 [2012] EWCA 1642

212 Home Office Asylum Process Guidance, *Assessing Age*, para 2.1

213 The case of *R (AA) v SSHD* [2012] EWCA 1643 involved a young person who was not granted discretionary leave as a result of an age dispute.

214 Home Office Immigration Statistics: October to December 2012 at <https://www.gov.uk/government/publications/immigration-statistics-october-to-december-2012/immigration-statistics-october-to-december-2012#asylum-part-2-appeals-unaccompanied-asylum-seeking-children-age-disputes-and-dependants>

215 *R (AM) v Solihull BC* [2012] UKUT 00118

216 L. Brownless & Z. Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC* [2009], Office of the Children's Commissioner, 2012

217 UNHCR Quality Initiative Project, *Sixth Report to the Minister, April 2009*: section 3.4.10

218 *R (Durani) v SSHD & Nottingham CC* [2013] EWHC 284 (Admin)

219 *ibid*, para 20

220 Available at <http://www.adcs.org.uk/goodpractice/ageassessment.html>

Home Office maintains that it needs to see full age assessments in order ‘to ensure the asylum application is determined correctly based on all available data’ and ‘to allow the case owner to make an assessment as to the applicant’s age for the purpose of determining the immigration decision’.²²¹

4.4 Cross-examination

*‘Lawyers are very concerned about the impact on children of having to go through lengthy cross examinations in the High Court or Upper Tribunal. An asylum appeal, which usually lasts for just a few hours, can be traumatic enough and yet an age dispute case can go on for days – this simply cannot be in a child’s best interests’*²²²

The age assessment process is an inquisitorial one and, as one judge outlined, the exercise is similar to the assessments made by courts and tribunals of whether a person has a mental disorder, whether a child has a special education need and whether a care plan is one enabling the court to agree to a care order for a child.²²³ Yet in reality the court process in age dispute cases feels more adversarial in nature. Young people are aware that much depends on how they are perceived, and that the defendant may seek to undermine their credibility.

‘M also experienced severe anxiety at having to explain himself again and again and go over all the events in his history, repeatedly, knowing that he would have to do so again in court.’

Solicitor

In the family and criminal courts, much work has been done regarding children giving evidence, and it is well recognised that a young person having repeatedly to give

evidence and re-live traumatic experiences can result in secondary victimisation, a process of re-traumatisation through the responses of individuals and institutions. In *W (Children)* the Supreme Court held that giving evidence in family proceedings would always be harmful to a child. The Youth Justice and Criminal Evidence Act 1999 allows for special measures to be implemented for young victims giving evidence in court.²²⁴ ‘Special Measures’ are provisions designed to assist vulnerable and intimidated witnesses to give their best evidence in court, in light of the widely acknowledged stress that can be caused by the process of giving evidence, which in turn can affect the quality of communication.

For children in the asylum process whose ages have been disputed, the process of repeatedly having to tell their story and of possibly going to court can be equally stressful. Some have undergone traumatic experiences before reaching the UK, which they are required to re-live again and again in a variety of fora. In one case, a girl trafficked to the UK from Nigeria, who had serious mental health problems, refused to challenge her age assessment, even though the incorrect age that her traffickers had given her was being relied on. This was because she was too traumatised by the process of claiming asylum to come into confrontation with another authority.

Guidance for the Tribunal provides that a child will be only be required to give evidence where the Tribunal determines that ‘the evidence is necessary to enable the fair hearing of the case and their welfare would not be prejudiced by doing so’.²²⁵ It states that age-disputed individuals should be treated in accordance with guidelines for children and vulnerable witnesses.²²⁶ However, in age cases, there is an expectation that a young person will have to give oral evidence as issues of credibility will hinge on the account that they give of their earlier life,²²⁷ and putative children are yet again expected to repeat their past experiences, and be subject to cross-examination. In one typical example, by the time of the fact-finding hearing, the young person had set out his account of events five times, twice in oral evidence.²²⁸

221 UK Border Agency to Sophie Barrett Brown and Alison Harvey, Immigration Law Practitioners Association, 28th September 2010; Email from Laura Pearson, UK Border Agency to Refugee Children’s Consortium, 18th July 2011

222 Solicitor, CCLC

223 *R (KN) v Barnet*, para 18

224 Section 16. These include:

- Giving evidence through a TV link
- Video recorded evidence
- Removal of wigs and gowns so that the court feels less formal.
- Evidence given in private.
- Use of communication aids
- Examination through an intermediary, who can help a witness understand questions that they are being asked, and can make his or her answers understood by the court

See http://www.cps.gov.uk/victims_witnesses/going_to_court/vulnerable.html

225 Senior President Practice Direction, para 2

226 <http://www.justice.gov.uk/downloads/tribunals/immigration-and-asylum/lower/ChildWitnessGuidance.pdf>

227 *R (F) v Lewisham LBC* per Holman J at para 30

228 *R (SS) v LB of Croydon* [2012] – in *R(RJ) v Ealing*, statement given five times, once in oral evidence

While it is recognised that giving oral evidence can be a stressful experience for children seeking asylum, or those who have been victims of trafficking and abuse, sometimes affecting the quality of evidence given,²²⁹ the available safeguards are used infrequently. In one case, Special Measures were requested, and while adjustments were made, including all questions being asked by the judge, the comment was made that ‘it is not entirely clear why a person who claims to be a child is entitled to the same facilities as a person who actually is a child’.²³⁰ In another, reports from the claimant’s doctors and advocate as to his deteriorating mental health caused by the stress of litigation were not deemed sufficient by the judge to excuse him from having to give live evidence.²³¹ In the case of *Y v Hillingdon*, despite clear psychological evidence indicating the risks of re-traumatisation that would stem from giving live evidence, the court still directed that Y give evidence, although Special Measures were in place.

In *KN v LB of Barnet* the claimant had been diagnosed with post traumatic stress disorder and depression. A doctor recommended that the claimant was unfit to attend court as she was a ‘very vulnerable, traumatised and psychologically damaged person’ and that, if cross-examined in court or by video link, the risk of self harm would increase and it could damage any progress in recovery she had made so far.²³² The judge ordered that the claimant be excused from giving evidence or attending the final hearing, but did comment that to make a decision on her age without the advantage of seeing her and hearing her evidence was ‘a most unsatisfactory scenario’.²³³

4.5 Understanding the process

One complaint from both social workers and judges has been that children will often not challenge their age assessment until they turn 18. However, what is clear from research and many of the cases examined is that not all children and young people realise the purpose and significance of the age assessment process.²³⁴ If they are still being treated as a child, but one who is three years older than they claim to be, they may not realise the need to have their age reassessed until it becomes urgent, at which point it becomes a crisis for the child. Also, it is not a given that all young people are aware that they are able to challenge their age assessment in the first place, and it may only be if their immigration solicitor or advocate takes the necessary steps that they are made aware of the possibility and assisted in doing so.

“Do you understand what the age assessment is?”

“What do you mean?”

“Through asking questions we will try to agree your age. Do you understand the importance of age assessment?”

“I don’t know how important it is but it is important to me”

[It was explained that the Home Office need to know and it affects his status]

From a local authority age assessment

Those treated as adults will usually be dispersed, which affects their ability to challenge the original assessment. Some local authorities will only undertake a formal age assessment (or re-assessment) if they are put under pressure to do so by a legal representative, advocate or other concerned party. Many of those who are age disputed – and especially those who live outside London – do not realise that they are entitled to be formally assessed and have neither a legal representative nor anyone else who can advocate on their behalf. The possibilities of obtaining a formal assessment are therefore limited, and often the immigration legal representative will need to instigate the age assessment challenge. This demonstrates the clear need for lawyers to be conversant with all the different areas of law affecting unaccompanied children seeking asylum, and the ongoing need for training for all legal representatives working with this group of children on the different areas of law affecting them.²³⁵ The same applies to criminal solicitors, as often the court will decide on a young person’s age in criminal proceedings, including the practice of ‘deeming’ a young person’s age, based on their appearance. This has significant implications for how they are treated in the criminal courts and in sentencing and potentially also for their treatment in the social care and immigration contexts.

‘For every one client we represent, there might be another nine that don’t have the benefit of legal advice’.

Solicitor

229 *R (RJ) v LB of Ealing* (AAJR) [2012] UKUT 00305 (IAC), para 22

230 *R (W) v LB of Croydon* [2012] EWHC 1130 (Admin)

231 *R (CJ) v Cardiff* [2011] EWHC 23, para 92

232 *R (KN) v Barnet* [2011] EWHC 2019 (Admin), para 5

233 [2011] EWHC 2019 (Admin),

234 S. Clarke, *Young Lives in Limbo: the protection of age disputed young people in Wales*, Welsh Refugee Council, 2011, p 45

235 See K. Dorling & A. Hurrell *Navigating the System: Advice provision for young refugees and migrants*, Coram Children’s Legal Centre, 2012, for a more detailed discussion of these issues.

CASE STUDY 7

‘When I attended my age assessment interview I had not been told the purpose of the interview. It was not explained to me that my age was in question and that the purpose of the interview was for them to make a decision about my age. There were five people present during the interview including myself. The social workers were introduced. I had heard the term social worker before but I did not understand what it meant. I was told I could ask for a break during the interview and then the social workers started asking questions.

My solicitors have since explained to me that I had the right to have an appropriate adult with me during the assessment. I was not advised of this before the assessment and I did not know what an appropriate adult was until my solicitors told me. If asked I would have chose to have someone else with me at the interview. It would have made me feel much more comfortable and relaxed.

In the course of the interview I formed the impression that these were people from the Home Office because they were asking so many questions about my asylum case. I had only been to the Home Office once before and I had been asked very few questions then. I had not yet had my screening interview at the Home Office.

At the end of the interview the interpreter told me they think I am over 18 and asked if I had any questions or concerns. I did not say anything. I was confused and frustrated and did not understand their reasons for not believing me. They did not explain their reasons to me. I was also surprised because I had not known until the end of the interview that the purpose was to assess my age. I had thought the interview was about my asylum case. I was told that from that point on I would be treated by the Home Office as an adult and that I would have to leave my accommodation in a week.

I do not understand how the social workers have arrived at the conclusion that they have. I have always been clear about my date of birth and I know my age to be 16.’

The role of independent advocates in this context is crucial. An advocate working with a young person should be able to empower them to resolve any problems they might have by providing them with information, advice and support, and help ensure that they have access to support, education and social networks. Without access to an advocate who can speak on their behalf, young migrants and refugees have ‘expressed concern that they would be unable to access basic services, let alone complain about the quality of those services’.²³⁶ This is all the more important in the case of age disputes, as the child or young person can be cut off entirely

from support. Yet, independent advocacy provision is still ‘patchy’ and one concern is that some young people may not be aware of their rights and entitlements as a result of not receiving this extra support.

4.6 Vulnerability and need

‘The guiding principle is whether an individual demonstrates an “immaturity” and vulnerability that may require more sensitive treatment.’²³⁷

Social work guidance makes clear that, whatever legislation a child is assessed under, the purpose of the assessment is always to gather important information; to analyse their needs; to decide whether the child is a child in need or likely to suffer significant harm; and how to provide support.²³⁸ However, while need is not always directly related to age, age is often used to determine need, and as a result many older children may experience only a cursory assessment of their needs, with a standardised service response. Coram Children’s Legal Centre (CCLC) has witnessed a number of young people placed in independent accommodation despite having inadequate life skills and an inability to care for themselves. In several of the reported age assessment judgments studied as part of this report, professionals appear to have highlighted this very problem, only promptly to dismiss it, because the focus is entirely on establishing the young person’s chronological age.

‘During the period when I was helping M, it became apparent that the tussle over his age had served to distract from other issues, which sadly remained largely unaddressed, such as his sense of the loss of his entire childhood and family, the trauma of his journey and the prospect of his future life in the UK with not a single member of his family here. M could not afford to think about these things as he was taken up with proving his age.’

Solicitor

Many young people going through the immigration process have undergone traumatic experiences, including torture, imprisonment, beatings and dangerous overland journeys. Key problems once in the UK include depression, isolation, health issues, lack of self-care skills, lack of education and inadequate support (including short-term homelessness), all of which serve to exacerbate each other.

236 K. Dorling & A.Hurrell *Navigating the System: Advice provision for young refugees and migrants*, Coram Children’s Legal Centre, 2012 p29

237 UNHCR *Guidelines on Policies and Procedures in Dealing with Unaccompanied Children Seeking Asylum*, 1997, para 5.11

238 Department for Education, *Working together to safeguard children*, 2013

'He has a constant pain in his chest and has had panic attacks due to stress which have exasperated this pain... he scaled his pain on a scale of 1-10 as being 10'.

From a local authority age assessment

In one case involving a young person claiming to be 15 but assessed as 18, who had to have surgery for the injuries he sustained in Afghanistan, an independent report stated:

'T misses his family and has some unresolved mourning issues. He cannot sleep and has bad dreams. He only sleeps for about 3 or 4 hours and becomes very anxious and depressed at night. He has symptoms of post traumatic stress and very much needs a safe secure environment with support and should be placed in a foster home. When he was in hospital having surgery on his injuries the doctor said that he was too young to be left on his own.'

The impact of trauma is then exacerbated when young people reach the UK and are left with minimum support. In another case, the young person was receiving treatment for depression, one reason for which was 'the extreme isolation which he has suffered whilst living in the United Kingdom',²³⁹ and language barriers which had prevented him from making friends at college or elsewhere. He lived alone, had difficulty in caring for himself and relied heavily on the assistance of his support worker.²⁴⁰ In a further case, the child was described as missing his family and feeling depressed. He had received 'no education since he came and is listless and directionless. He presents as very scared and this is interfering with his sleeping. He is alone and lost and has nightmares when he does get to sleep. He has to keep a light on and is afraid of the dark'.²⁴¹

Many children arriving in the UK have undergone lengthy and dangerous overland journeys to get here, and many of the assessments examined noted that the young people were underweight,²⁴² had not received any medical attention, and were unable to cook or look after themselves. Yet, often these issues were not seen as concerning, and were not followed up appropriately, if at all.

*'The claimant gave evidence at some length before us about his ability to cope as a young man living in semi-independent accommodation. He spoke of problems he experiences with budgeting and cooking meals for himself and explained about how he had dropped out of college because he had not attended sufficiently, due to problems in sleeping.'*²⁴³

In one concerning CCLC case, the child reported that he had been abused by his uncle, who repeatedly beat him, breaking his arm and once hitting his skull with a brick. In his assessment, not only is his reported abuse dismissed because 'other than a bump on the head' there were no other visible signs of his having been physically abused, but he had not been seen by a GP despite reporting ongoing pain throughout his body.

In another assessment, rather than the traumatic experiences that the young person had been through being seen as a cause for concern, 'the fact that he survived such experiences' was taken to suggest that the young person 'has a level of maturity and resilience of someone older than his reported age.' In another, that the young person did not show 'sufficient' emotion when recounting his past was also taken as indication that he was an adult. Children who are most resilient and who show evidence of being more mature may be penalised for not conforming to a more static idea of a 'child' held by those assessing them.

Somewhere along the line, sensible and considered analysis of the impact of traumatic experiences on a young person is being lost to a dispassionate focus on defining their chronological age. Even if 18 or 19 on arrival, many of these young people will still have left their countries as children, and undergone lengthy journeys alone as children. This issue also raises the question of how we treat those who are young and vulnerable, regardless of their exact age. The leaving care system in the UK recognises that upon turning 18 a young person does not overnight become an adult with no extra support needs, yet little thought is given to considering how appropriate support can be provided to young people found to be over 18 who do not officially enter the care system but who have considerable health and welfare needs. Rather than being provided with support under local authority obligations to vulnerable adults, they are immediately moved on to Home Office support, which does not go beyond the provision of accommodation and basic subsistence.

239 *R (AZ) v Hampshire CC* (AAJR) [2013] UKUT 00122 (IAC), para 18

240 *ibid*, para 7

241 *R (MWA) v SSHD & Ors* [2011] EWHC 3488 (Admin) – para 51:

242 See, for example, *ES v Hounslow* (AAJR) [2012] UKUT 00138 (IAC), para 56

243 *R(SS) v LB of Croydon* (AAJR)[2012] UKUT 00139 (IAC), para 37

CASE STUDY 8: L

L grew up in West Africa. Her parents could not afford to send her to school, so when she was 9 she was sent to go and work for a family. After a few years the mother of the family said to L that she was going to send her to the UK to work for her daughter and that she would receive an education there.

L's life in the UK was very different. She was locked in the family's house for three years. She had to look after three children and had to do all the cooking and cleaning. The woman would beat and starve Lisa often. Sometimes she had to sleep outside in the cold and the woman would threaten to kill her if she did something wrong.

At the age of 15, L escaped the house. She walked the streets for hours, crying, not knowing what to do, until a man approached her and offered to take her to the police. She was referred to social services. The police visited the address and found a passport, which they identified as fake. On the passport it said that L was 29. The local authority did not conduct an age assessment even though Lisa was saying she was 15. She was sent to live in Home Office accommodation with other adults.

L was very frightened and confused as she didn't understand what was going on. A man in the accommodation offered to help her. He took advantage of L and she became pregnant from him sexually abusing her.

L was referred to a solicitor who challenged the local authority. They responded by conducting an appropriate age assessment which determined L's age to be 15. She was then placed in foster care. Had the local authority followed their duty, awarded benefit of the doubt and conducted an appropriate age assessment Lisa would have been safeguarded and placed in appropriate accommodation for a child instead of with adults which placed her at risk.

(case study provided by ECPAT UK)

Contrary to the stance behind much government policy which seeks to remove young migrants from the UK as soon as they turn 18, in the case of *KA (Afghanistan) v SSHD* the judge stated that, 'there is no temporal bright line across which the risks to and the needs of the child suddenly disappear'.²⁴⁴ The later related judgment in *EU* reaffirms and perhaps extends what was said in *KA* about there being no 'bright line' once the age of 18 is reached as the question is one of risk on account of 'apparent or assumed age' and not the actual date of birth. The judgment points out that the vast majority of unaccompanied children have been age-assessed and given that a date of birth is as an administrative formality, 'the origin of the precise date of birth is a further reason why the achievement of adulthood cannot of itself necessarily change the assessment of risk on return'.²⁴⁵

The existence of leaving care provisions in England is due to government's recognition that the transition to adulthood is a process, not a single event and that 'young people who live with their families will continue to benefit from emotional and often financial support, sometimes well into their twenties'.²⁴⁶ Leaving care support is intended to replicate this ongoing support for children in care, acknowledging that both practically and emotionally, functioning as an adult does not automatically occur on the 18th birthday. Indeed, the Children (Leaving Care) Act had two primary aims: to prevent children from leaving local authority care before they were ready and to give local authorities the duty to support care in such a way that reflects, 'the gradual transition of a young person from dependence to independence'.²⁴⁷ The Welsh Government is considering the possibility of extending the Convention on the Rights of the Children and the human rights-based approach to those who are between 18 and 24 years of age so that adequate protection and care is secured after they turn 18 and there is no abrupt change, uncertainty and instability.²⁴⁸ In addition, the UNHCR has looked at the concept of 'youth' and at how 'the length of time that many young people spend in situations of displacement with limited access to education and livelihood opportunities means that 'the years youth spend in displacement are often wasted, which impedes their future development and productivity'. It has recommended that 'youth' be recognised 'as a social group/life stage with particular needs that are distinct from those of younger children and adults'.²⁴⁹

244 *KA (Afghanistan) v SSHD* [2012] EWCA Civ 2014, para 7

245 *EU and others v SSHD* [2013] EWCA Civ 32

246 Department for Education and Skills, *Care Matters: Transforming the Lives of Children and Young People in Care*. The Stationery Office 2006, para 7.8; Department for Education and Skills, *Care Matters: Time for Change*, The Stationery Office 2007, para 6.34

247 Department of Health, Children (Leaving Care) Act 2000, Regulations and Guidance. Department of Health 2000

248 Dragan Nastic, UNICEF, <http://www.parliament.uk/documents/joint-committees/human-rights/JCHR%2027%2011%2012%20transcript.pdf>

249 UNHCR, *A global review: UNHCR's Engagement with Displaced Youth*, 2013 at <http://www.unhcr.org/513f37bb9.html>

4.7 Detention

A number of reported cases have addressed the issue of unlawful detention of separated children as a result of age disputes. In the case of *R (J) v Secretary of State for the Home Department*²⁵⁰ a 14 year old was unlawfully detained on the basis of a local authority age assessment that had been conducted at a police station on the day the child had arrived in the UK. In a third of CCLC's own client cases reviewed, young people were detained as a result of their age being disputed, in clear contravention of government policy.

There is much research evidencing the harmful impact of detention, especially on children,²⁵¹ and this has been acknowledged by the current coalition government which pledged to end the detention of children for immigration purposes. Yet, a significant proportion of age dispute cases still involve children who have been detained as adults, with extremely damaging consequences. While all detention can be damaging for children, for those who are being treated as adults, with no parent/s accompanying them and able to provide emotional support and protection, this is even more the case.

In one CCLC case, the child was detained in an Immigration Removal Centre for over three months as he had been assessed to be 18 although he claimed to be 16. Once his solicitor had secured his release, his age was re-assessed and he was found to be a child, the assessment noting that he 'talked about crying when he saw the gates of the detention centre and having panic attacks in his cell'. More worrying still, the child told his assessors that he was subjected to physical abuse from adult male detainees, but was too afraid of repercussions to discuss these concerns with staff.

In a reported case from 2011, a child was detained after being assessed to be 18 years old and only released once concerns were raised by his GP, who outlined that he was being seen regularly for post traumatic stress disorder resulting from 13 day detention at the hands of the Taliban when aged 15. The doctor reported that he had 'suffered extreme physical and psychological trauma during that time in detention, including repeated submersion in ice water and witnessing brutal murders, including discovering a beheaded body of this older brother at the young age'.²⁵² That such a vulnerable child could be placed in detention, rather than provided with appropriate support and care, as the result of the current age assessment process is of great concern.

4.8 Impact on professionals

Social workers can feel a burden of responsibility when making decisions about the age of young people referred to them, and can feel that they are faced with a choice of whether to take on the role of a 'border guard', 'policing the gates to service provision' or 'the role of advocate for these vulnerable young people'.²⁵³ While on the one hand, for a social worker to exclude a child from local authority support provision by finding them to be an adult goes against social work principles of protecting the vulnerable, this must be weighed against the social work value of 'the fair and equitable distribution of resources'²⁵⁴ and the financial costs outlined below.

While the threat of legal action may, arguably, have resulted in some improved practice, social workers who have had to go to court have reportedly found the experience traumatic and ethically difficult, as they were having to stand against a young person for whom they carried out the role of corporate parent. Many do not like being cross-examined any more than the young people themselves and the expense and stress of litigation can result in their accepting the claimed age of a child even if they fundamentally do not believe it to be accurate. In one case, the local authority wished to stand by its own assessment, but said that, because it was 'uneconomic to indulge in litigation', it did not feel able to do so.²⁵⁵ In another, the local authority opted to carry out a total of four separate assessments as this was more financially prudent than defending a judicial review. This is hugely inefficient and a great draw on social workers' time.

Conversely, the threat of challenge can leave some practitioners feeling more defensive, and less willing to review their original decision. In one case, the social worker giving evidence 'indicated that if the assessment that he had made had not been the subject of current litigation, he might have considered withdrawing it, but in the end his firm view appeared to be that he could tell whether a person was or was not a child... [that] you could tell, he said, if you sat next to a young person on a bus or the tube whether he was under or over 18'.²⁵⁶ In CCLC's experience working with practitioners, some have reported being advised to assess 'defensively', always keeping in mind any potential challenges. While the wish to avoid criticism is understandable, it would be hoped that social workers are assisted by their legal teams not just to conduct *challenge-proof* assessments, but *good and thorough* assessments.

250 [2011] EWHC 3073 (Admin), para 17.

251 See, for example, Medical Justice, 'State Sponsored Cruelty: Children in immigration detention', 2010 at <http://www.medicaljustice.org.uk/content/view/1420/89/>

252 *R (AK) v SSHD and Leicester CC* [2011] EWHC 3188

253 S. Gower, 'How old are you? Ethical dilemmas in working with age-disputed young asylum seekers', *Practice*, DOI:10, August 2011

254 British Association of Social Work, *Ethics in Social Work; Statement of Principles*, para 4.2

255 *AAM (by his litigation friend, Francesco Jeff) v SSHD* [2012] EWHC 2567 (QB), para 48

256 *R (W) v LB of Croydon* [2012] EWHC 1130 (Admin)

CASE STUDY 9: T

'I do not know my exact date of birth. I lived in a village in Afghanistan and I attended school until I left the country at the age of 14.

My problems in Afghanistan started three or four months before I left. My father started going away for a few days at a time, and he would not tell me where he went. I think that he supported the Taliban and I think he was with them. When his friends came to our house they would discuss what was happening in Afghanistan. They were unhappy that there were British and American troops in the country.

One day my father went out as usual. He did not say where he was going and I assumed he was going out with his friends, but he was gone for three months. My mother and I were worried about him. Then five or six of my father's friends came to the house. I asked them where my father was and they said he wanted to see me, and I should go with them. They said that if I did not go with them, they would kill me right there. My mother was upset and crying.

We travelled in a small truck and they took me to Helmand. When we got there they said my father had gone somewhere and he would be coming soon. Then they put me in a small, dark hut. There were four other boys there. I was too scared to speak. I was there for one night. The next day, they came and said: 'Be with us, be a Talib'. I said no.

The same day, they told me that if I wore a waistcoat and blew myself up and killed the English, I would be immortal. I said no, but they put the jacket on me. They took me to a place where there were shops on one side of the road and cars driving around. They told me to wait there and when the American army came, I should blow myself up. They showed me the button to press. I was very scared and crying. They told me they were going away but would be back soon.

When they left, I waited a while and took the jacket off, threw it away and ran away. I went home to my mother. I told her everything and she took me to my uncle's house, who spoke to an agent who would take me out of Afghanistan. I did not know where I was going.

Journey

I travelled from Afghanistan in different vehicles. Sometimes I travelled in cars, sometimes in lorries and sometimes on foot. There were different agents along the way. I had no documents with me when I left.

My journey took three or four months. I have been told that I travelled through Iran, Turkey and Greece but I don't really know. The lorry was closed. I have been fingerprinted since I arrived in the UK, but nowhere along the way. I did not claim asylum in any other countries. I was always in the control of the agent, and I was not free to walk around.

I entered the UK hiding under a bus. There were two of us. We got under the bus in Calais. The bus stopped at a bus stop and people got off, so we got off as well. A lady came to me.

We were told to stop but we ran into a field. A helicopter flew over and landed near us. Two people got out and we waited with them, then we were taken to a police station. I was very tired. I'm not sure how long I was at the police station, and then we were taken to hospital. Then two ladies took us to a children's home.

Age

I do not know exactly when I was born. My mother told me I was 14 a few months before I left Afghanistan in 2009. I don't think I had a special reason to ask her, I was not expecting to leave Afghanistan at the time. I just accepted what she said.

I had been here for around three weeks before I had my screening interview with an immigration officer. After this my fingerprints were taken. I told them I was 14 years old, but they said I was 17. They said I had written I was 17 years old, but I didn't. I don't know who wrote that on the form.

There was an interpreter in the room. Sometimes, I told her one thing and I knew she was saying something else. When I told her my village name she said something else, and when I told her my father's name she said something else.

After a month or so, the social workers did another age assessment. I was not expecting it. They told me they had decided I was over 18 years old. Then I was told I had to go to the police station, and from there they would take me to Liverpool. I was very upset and I ran away. I hid in a park. I stayed out all night, and then I went back because I was scared and I had nowhere else to go.

The next day I was sent to Liverpool. I stayed in a house with a person from the same part of Afghanistan as me. I told him my problems and he said he would try to contact my family so I could get ID to prove my age.

In Afghanistan the document to prove your age is called a taskera. I can remember when my father went to obtain one, but I don't know why. Maybe it was needed in my school, I don't know.

I got my taskera through a person I met in Liverpool. He told me he knew people from my province, and he called someone back home, and they went to my village and got it sent to him.

I was sent back to the city where I had been living before but social services still do not accept my age, even though I have been assessed again. My solicitor is having to challenge them in court – once this has happened, I hope to get on with my life.

Life in England

I found it difficult when I came back from Liverpool, as I was put in a house with older people and I didn't know how to do things like cooking or shopping. Soon afterwards I was moved to another big house, but with four young people there and lots of staff to help and someone there at night to make you feel safer.

I have since been moved to live in a different house, and there are four men who share the accommodation. They are much older than me. I think more than 30 years old. Their lives are different to mine and we don't have a lot in common. They stay in their rooms and I stay in mine. One of them walks in his sleep and shouts, and bangs on the doors in the middle of the night. This makes me frightened.

They are not like my parents, but if I want to cook meat or rice they help me. I like cooking and they sometimes share food with me, but I would prefer to live with people my own age, and closer to college.

The other men I live with are Muslim and sometimes they take me to the Mosque. Last year I observed Ramadan for the first time, although I only managed to do half of it. In Afghanistan I was too young to fast.

I have been attending an ESOL course at college for about a year or so. It is far away from my new home and takes me about an hour to get to college in the morning. I go every week from 9.30am until 1pm. I would like to learn other things, like art, and I have asked my social worker if there was anything they could do to get me on the courses. She wrote on a piece of paper but then nothing happened. I would also really like to play cricket and I have asked my social worker, but she didn't do anything about it. I don't really know what I can do about trying to play cricket.

I feel very upset with how social services have treated me. I get very little support from them at the moment. Every time I have asked for something, nothing has happened. My social worker changed recently but when I call him he does not answer or call me back.

I am really struggling with my finances. I get £40 per week to live on. It used to be £45 but they have reduced it – I don't know why. I have to use the money to buy bus tickets so I can go to college. That costs £11.50 per week. I am supposed to give the tickets to my social worker so he can pay me the money back. So far I think I have given him £90 worth of bus tickets but I haven't got the money back. I cannot save any money because I have to spend the rest on food and basic things.

I believe that my mother is still alive but I don't know about my father. Since I have been here, I have spoken to nobody. I have lost the family number. I last spoke to my family from Calais.

I am frightened to return to Afghanistan because my life is in danger there.

4.9 Financial cost

*'Judicial age assessment is likely to be simply an expensive lottery.'*²⁵⁷

Many age assessment challenges are settled out of court, with either the young person accepting the local authority assessment, the local authority accepting the child's stated age, or a 'compromise' age being agreed on by both parties. As a result it is difficult to get an accurate picture of the number of assessments that are challenged and with what outcomes. Certainly what is clear from CCLC's casework is that, while cases may settle before they get to court, the threat of judicial review is at present the most effective means of obtaining a re-assessment or a change in the local authority's stance towards a young person.

Yet litigation is undesirable for a number of reasons. It is lengthy and can be stressful for all involved. The legal costs and the impact on local authority resources of going to court are considerable. In the 2012 report *The Fact of Age*, one local authority interviewed 'estimated that a case they had taken to court had cost in excess of fifty thousand pounds', not including the additional costs in terms of time and resources.²⁵⁸ The Freedom of Information request responses received by Coram Children's Legal Centre placed the cost of an age assessment challenge at ranging from £15,000 to £75,000 per case. Responses from the Ministry of Justice suggested a cost to the Upper Tribunal of just under £5,000 per hearing. When comparing the cost of a full challenge to the cost of accommodating a child as a child, in many cases there is no significant saving to be made by disputing a child's age.²⁵⁹ And in certain areas of the UK, there are

clearly huge financial savings to be made through improving the age assessment process. In 2009/2010, for example, Croydon spent £827,000 in legal costs on court cases related to age assessments.²⁶⁰ In 2011/12 and 2012/13 it spent £852,709.82 and £765,188.43 respectively (the latter figure only covers the period March 2012 to the end of 2012).²⁶¹ Of these costs in the past two years, over £500,000 each year went on costs awarded against the local authority, as opposed to their own legal costs.²⁶²

Furthermore, the financial costs are not limited to local authorities and the courts. In 2012 it was revealed that over £2 million had been paid in an earlier court settlement to 40 child asylum-seekers who had been wrongly detained as adults by the Home Office due to the flawed age assessment process.²⁶³ Three years later and the detention of children who have been held to be adults continues to be a significant problem.

While it might be argued that the development of a more robust multi-agency age assessment process will incur further costs to local authorities, this 'has to be offset against the current mounting costs of legal challenges [and] ongoing disputes'.²⁶⁴ A key part of any improvement should be an emphasis on the Home Office and local authorities disputing age only when necessary, rather than routinely and re-framing their approach by believing children unless there is a compelling and cogent reason to doubt their account, giving young people the benefit of the doubt. The contentiousness and costs involved in legal challenges are also driven by a lack of alternative routes of mediation. The development of a form of Alternate Dispute Resolution could save vulnerable young people from having to go through a costly and often traumatic court process.

257 *R(W) v LB of Croydon* [2012] EWHC 1130 (Admin), para 39

258 Brownlees & Yazdani, *The Fact of Age: Review of case law and local authority practice since the Supreme Court judgment on R(A) v Croydon LBC [2009]*, Office of the Children's Commissioner, 2012, p 73

259 Based on a cost comparison of a scenario where a child arrives at 16, their age is accepted, and they receive support from the local authority until their turn 21, contrasted against the same child being treated as age 19, receiving asylum support from the Home Office and then successfully challenging the local authority assessment in court. The local authority figure was based on the amount that UK Border Agency reimburses local authorities for supporting unaccompanied asylum-seeking children - see 'Home Office Grant Instructions to Local Authorities Financial Year 2013/14 - Home Office Grant: Unaccompanied Asylum-Seeking Children (UASC)', at: <http://www.ukba.homeoffice.gov.uk/sitecontent/documents/aboutus/workingwithasylumseekers/local-authority-grants/uasc2011/grant-instructions.pdf?view=Binary>. If a young person is supported beyond three months after they become appeal rights exhausted, the cost is also borne by the local authority itself. The No Recourse to Public Funds Network has estimated the annual cost of supporting an appeal rights exhausted care leaver to be £9000 per year, or £10,000 per year in London. See Social Services Support to People with No Recourse to Public Funds: A National Picture (March 2011), available at: http://www.nrpfnetwork.org.uk/policy/Documents/NRPF_national_picture_final.pdf. The estimated cost of Home Office support was based on the estimated cost of accommodation (based on the value of the Compass Programme contracts (£1.7m) awarded by the UK Border Agency to private accommodation providers for the provision of accommodation to 19,000 asylum applicants over a period of 60 months (see <http://www.ukba.homeoffice.gov.uk/aboutus/workingwithasylum/compassprogramme/>) plus the estimated cost of cash support, currently £36.62 per week (see <http://www.ukba.homeoffice.gov.uk/asylum/support/cashsupport/currentsupportamounts/>). The estimated legal costs to the local authority of a successful challenge were £50,000, and the estimated cost to the judicial system is £5,000 (figure provided by the Ministry of Justice).

260 'Asylum seeker funding fight could cost millions', *This is Croydon*, 14 January 2011, at www.thisiscroydontoday.co.uk/Asylum-seeker-funding-fight-cost-millions/story-11372371-detail/story.html

261 Information provided in FOI response to Coram Children's Legal Centre, 7th March 2013

262 In 2011/12, £546,955.05 went on costs awarded against the local authority. In 2012/13 this figure was £537,430.10

263 '£2m paid out over child asylum seekers illegally detained as adults', *The Guardian*, February 2012, at www.guardian.co.uk/uk/2012/feb/17/home-office-payout-child-asylum-seekers. In *R (J) v SSHD* [2011] EWHC 3073 (Admin) £10,000 damages awarded to the claimant unlawfully detained as a child

264 C. Mougne & A. Gray, *A new approach to age assessments of Unaccompanied and Separated Children: Current practices and challenges in the UK*, December 2010

5. Conclusion

*'..The fact that this court is having to consider an appeal on a pure point of fact and that it is the fifth time that this young man's age has been determined do perhaps suggest that more thought needs to be given to whether this is the best way to deal with such disputes.'*²⁶⁵

*'The assessment does not require anything approaching a trial and judicialisation of the process is to be avoided. The matter can be determined informally provided that there are minimum standards of inquiry and fairness.'*²⁶⁶

*'In an ideal world, there would be a single examination at which all interested parties were present and at the end of which consistent decisions were made by both the SSHD and the local authority.'*²⁶⁷

It is important for an effective system of protection and support in the UK that children are recognised as children as early as possible. Where there is good reason to doubt a child's stated age, there is a need for a process to exist that can, as accurately as possible and with the least harm and disruption, assign the most appropriate age to the child.

Both international law and domestic law and policy place great weight on chronological age, and it is clear that wrongly identifying a child as an adult can have life-changing consequences. Yet in the development of the current process for determining a young person's age, it could be argued that many professionals have lost sight of the important question, which is not one of age, but one of need. The search for certainty regarding age can be the expense of a thorough assessment of the child's emotional and developmental well-being and their growth and development.

Rather than focussing on assessing what help can be provided to a child (or even young adult) who is alone in the UK seeking protection, the focus on chronological age and means of determining it as a gateway to services can lead

to many young people being challenged, disbelieved, and abandoned. Many age dispute cases concern children and young people in complex situations, but too often their unique circumstances and characteristics are neglected, and their needs are not identified.

The needs and vulnerabilities of young refugees and migrants can often be forgotten in the race to prioritise immigration control over individual rights. This is all the more the case for those whose ages are disputed, who are often treated with suspicion and hostility simply because they come from a country that does not register all births, or because they had to destroy their documentation while fleeing to the UK.

Three important conclusions emerge from this report. First, the culture of disbelief remains a key issue both for immigration services and for social care professionals, and, as with the asylum process, this goes to the heart of many of the problems with the age assessment system. The Home Office and local authorities should not dispute age, and initiate an expensive and time-consuming process, where there is no reason to do so.

Second, where age assessments are necessary, there is still much room for improvement in the initial age assessment process carried out by local authorities. Despite repeated calls internationally and domestically for a multi-agency approach to assessment, with the need to front-load expertise at the start of the process, little action has been taken to formally expand the assessment process beyond that of social work assessment, which in practice often amounts to one of two 'interviews'. It is hoped that if a concerted effort is made to develop this, rather than search for a magic bullet in the form of X-rays, then more assessments will be carried out fairly and lawfully.

Third, the current process whereby a child can only receive a satisfactory finding on his or her age by embarking on a lengthy process of litigation is far from ideal. Judicial review is the only means by which it can be ensured that an age assessment was conducted in a way that is legal, rational and fair, but the current process often serves only to increase conflicts, inflate costs and prolong the time taken to resolve the dispute, and does not always result in outcomes that are any better and/or acceptable to all the parties involved.

²⁶⁵ *R (AE) v London Borough of Croydon* [2012] EWCA Civ 547

²⁶⁶ *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin)

²⁶⁷ *R (Khadri) v Birmingham City Council and ors* [2012] EWCA Civ 1432

Judicial review is a vital safeguard, but before children are forced into a formal judicial review hearing, they should be given the chance to engage in a prior mediation process. A less contentious system for resolving disputes would be valuable for all concerned.

A final point to highlight is the extent to which some age-disputed children will not necessarily have access to legal representation or a legal remedy. It is vital that all putative children need to be referred to trained and experienced lawyers and advocates so that they are aware of their rights and entitlements, and assisted in ensuring these are upheld.

Many of the findings of this report are concerns that have been raised repeatedly by practitioners and academics over the past decade. While absolute numbers of children seeking asylum have fallen since 2009, the problem of age disputes has remained pressing in practice and still needs addressing. Whatever developments in migration flow are seen in the future, the government has a clear responsibility under international and domestic law to safeguard and promote the welfare of all separated migrant children, and ensure that the best interests of these children are upheld in all actions taken concerning them. The current system is not working for the Home Office, for local authorities, for the courts, for lawyers, or for advocates and support organisations. Most importantly, it is failing children and young people.

'When I first came in this country the first person I meet give me an age she think I might be. But I would say what she forgot is, I came from the sadness moment of my life where I have lost everything - my parents, siblings and friends. The only thing left with me was my identity but she denied it by giving me what she believes I am.

Since that moment my life never be the same. I could find no one to help me, everything was new for me. I have to live with constant sadness and stress it was very difficult for me to find help because I am not use to ask for help everything I needed was given to me by my parents.

All I need is to be recognising for who I am.'

Young person

6. Recommendations

Home Office

- The Home Office must move away from disputing the age of all young people without documentation as a default setting. Its policy should be changed so that the absence of documentation is not on its own a reason to dispute a child's age. The account of the child is evidence of their age and the Home Office must refrain from initiating an age dispute, and beginning a long, distressing process, when there is no reason to.
- The Home Office should revise its 'Assessing Age' policy and revisit its policy of treating those whose 'physical appearance / demeanour very strongly suggests that they are significantly over 18 years of age' as adults. Given the difficulties in making judgements on a person's age based on their appearance and the safeguarding implications of using this policy to treat someone as an adult, this category must be used with extreme caution.
- The Home Office should revise its Enforcement Instructions and Guidance so that if there is any doubt whatsoever regarding an individual's age they are not placed in immigration detention, including the Detained Fast Track or Detained Non-Suspensive Appeals. Alternatives to detention and reporting requirements could be imposed as an alternative, if necessary
- Case law has highlighted that the current Joint Working Protocol between the UK Border Agency and Association of Directors of Social Services is inadequate for addressing situations where there are conflicting views held by the Home Office and a local authority regarding a young person's age. This protocol should be updated as a matter of urgency.
- Statistics concerning which young people have had their age disputed should be kept as a matter of course. The Home Office must record, and make publicly available, data on:
 - The number of cases in which the UK Border Agency treats an individual as an adult on the basis that their appearance/demeanour strongly suggests that they are significantly over the age of 18.
 - All cases where an individual who claims to be a child is placed in immigration detention.

Local authorities/Department for Education

- Local authorities should not undertake an age assessment as a matter of course, but only when there is good reason to doubt the child's account of his or her age. A child's claimed age should be accepted unless there is a solid reason not to do so.
- An age assessment process should be developed that allows for a holistic multi-agency process, conducted over an adequate period of time, drawing on the expertise of those who play a role in the child's life, including health professionals, psychologists, teachers, foster parents, youth workers, advocates and social workers. Paediatric and medical evidence should also be used where appropriate.
- Statutory guidance should be issued to ensure consistency and clarity in the process, without being too prescriptive of formulaic. This guidance should include the requirements for a holistic, multi-agency process.
- The benefit of the doubt principle should be applied when dealing with all young people who claim they are children so that they are treated as the age they claim to be until such time as a holistic, multi agency age assessment has been concluded and any dispute has been resolved.
- The consistent provision of 'appropriate adults' during age assessments should be used to help ensure procedural fairness, but those undertaking this role must be fully aware of their responsibilities. If possible, the appropriate adult should be chosen by the young person.
- An accredited training programme for social workers should be developed with input from a range of statutory and voluntary agencies.
- Guidance and training similar to Achieving Best Evidence should be provided to those undertaking age assessments.

General

- Further work should be undertaken to establish form of alternative dispute resolution prior to the appropriate judicial proceedings in order to reduce the contentiousness and costs involved in this issue, and enable faster resolution.
- Age assessments should not be undertaken at port, screening units or at police stations. The difficulties inherent in the assessment of age are exacerbated when a child or young person is assessed immediately upon arrival and in an immigration or criminal setting.
- All separated asylum seeking children – including those whose age is disputed – must be referred to the Refugee Council Children’s Panel.
- Solicitors dealing with age disputed young people should receive more specialist training. Immigration solicitors must be aware of the importance of the child’s age and of the need to refer to community care or other suitable solicitors if there is an age dispute.

Coram Children's Legal Centre

Migrant Children's Project: 020 7636 8505, mcp@essex.ac.uk

Child Law Advice Line: 08088 020 008

University of Essex, Wivenhoe Park, Colchester, Essex CO4 3SQ

T: 01206 877910 F: 01206 877963 E: clc@essex.ac.uk

Coram Community Campus, 49 Mecklenburgh Square, London, WC1N 2QA

DX: 44640 Mayfair

T: 0207 713 0089 F: 0207 713 0748 E: clclondon@essex.ac.uk

www.childrenslegalcentre.com