Neutral Citation Number: [2014] EWCA Civ 1490

Case No: C4/2013/2473

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MR C M G OCKLETON, VICE PRESIDENT OF THE UPPER TRIBUNAL
(SITTING AS A DEPUTY HIGH COURT JUDGE)
CO/7378/2011

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 20/11/2014

Before :

LORD JUSTICE DAVIS
LORD JUSTICE CHRISTOPHER CLARKE
and
SIR BERNARD RIX

- -

Between :

The Queen on the application of GE (Eritrea)	**Appellant**
- and -	
(1) Secretary of State for the Home Department	
(2) Bedford Borough Council	**Respondent**

- -
- -

Hugh Southey QC and Joshua Dubin (instructed by **Scott Moncrieff & Associates Ltd**) for the **Appellant**
Paul Greatorex (instructed by **Bedford Borough Council**) for the **Respondent (Bedford Borough Council)**

Hearing date: 8th October 2014

- -

Judgment

LORD JUSTICE CHRISTOPHER CLARKE :

The background

1. The claimant – GE – is a national of Eritrea. She arrived in the United Kingdom on 24 May 2011. At her screening interview she said that she was born on 27 September 1994. If so, she was just over 16 ½. She claimed asylum, saying that she feared persecution if she returned to Eritrea. The Secretary of State's officials decided that her physical appearance and demeanour very strongly suggested that she was 18 years of age or over. So she was detained at Yarls Wood Immigration Removal Centre. On 11 July 2011 her asylum claim was refused. The Secretary of State proposed to remove her to Italy under Dublin II arrangements.

2. On 3 August 2011 GE issued proceedings against the Secretary of State by which she challenged the treatment of her as an adult, her detention and the proposed removal to Italy due to take place the following day. On the same day Supperstone J ordered the Secretary of State not to remove her from the United Kingdom pending her application for permission to apply for judicial review or further order.

3. On 18 August 2011 GE's solicitors wrote to Bedford Borough Council ("the Council") asserting that she was a child in need. On 21 September 2011 Lindblom J, on GE's application, ordered that the Council be joined as the second defendant.

4. On 20 October 2011 Thirlwall J refused GE's claim for interim relief in the form of an order requiring the Council to treat her as a child, i.e. to accommodate and look after her, on the grounds that there were serious inconsistencies on the face of the Applicant's case. But she ordered her release from detention. She refused, however, to release her to the care of the Council. Instead she ordered the Secretary of State to provide her with NASS support and accommodation. Accommodation was then provided for her by UKBA (through NASS) in Enfield, where she remains. On 22 March 2012 Foskett J, on the joint application of GE and the Secretary of State, but against the opposition of the Council, stayed the claim against the Secretary of State pending the application for permission for judicial review against the Council in respect of its refusal to treat her as a child in need and, if permission was granted, the final outcome of the substantive fact-finding hearing on the claimant's age.

5. On 27 September 2012 GE became, on her account, 18.

6. On 5 December 2012 Walker J granted GE permission to seek judicial review against the Council.

7. The claimant, although not a child at the time of the hearing on 23 May 2013 - before Mr CMG Ockleton, sitting as a Deputy High Court judge - claimed that the Council nevertheless owed her duties as a "*former relevant child*" under section 23C and following of the *Children Act 1989.* Whether or not they did owe such duties is the issue in the present claim.

The Children Act 1989

8. Part III of the *Children Act 1989* is headed "*Local Authority Support for Children and Families*". It sets out, or provides for, a series of duties owed to "*children in need*".

Under **section 17 (1) (a)** it is the general duty of every local authority to safeguard and promote the welfare of children within their area who are in need by providing a range and level of services appropriate to those children's needs. **Section 17 (2)** provides that for the purpose principally of facilitating the discharge of their general duty under section 17 every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.

9. **Section 17 (10)** provides that a child is to be taken to be in need if:

> "*a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;*
>
> *(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or*
>
> *(c) he is disabled*".

10. **Section 20** provides:

> "***20 Provision of accommodation for children: general***
>
> *(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of–*
>
> *(a) there being no person who has parental responsibility for him;*
>
> *(b) his being lost or having been abandoned;*
>
> *(c) the person who has been caring for him being prevented (whether or not permanently , and for whatever reason) from providing him with suitable accommodation or care:*
>
> *(3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.*"

11. **Section 22** provides as follows:

> "***22 General duty of local authority in relation to children looked after by them***
>
> *(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is–*
>
> *(a) in their care; or*

(b) ***provided with accommodation by the authority in the exercise of any functions*** *(in particular those under this Act) which stand referred to their social services committee under the [1970 c. 42.] Local Authority Social Services Act 1970.*

(2) In subsection (1) "accommodation" means accommodation which is provided for a continuous period of more than 24 hours."

12. Section 23 imposes a duty of maintenance in respect of a looked after child as well as other duties. Under section 23:

"*(1) It shall be the duty of any local authority looking after a child –*

(a) when he is in their care, to provide accommodation for him; and

(b) to maintain him in other respects apart from providing accommodation for him.

(2) A local authority shall provide accommodation and maintenance for any child whom they are looking after by–

(a) placing him (subject to subsection (5) and any regulations made by the Secretary of State) with–

(i) a family;

(ii) a relative of his; or

(iii) any other suitable person,

on such terms as to payment by the authority and otherwise as the authority may determine….;

(aa) maintaining him in an appropriate children's home;

(f) making such other arrangements as–

(i) seem appropriate to them; and

(ii) comply with any regulations made by the Secretary of State.

…….

(3) Any person with whom a child has been placed under subsection (2) (a) is referred to in this Act as a local authority foster parent unless he falls within subsection (4).

(4) A person falls within this subsection if he is–

(a) a parent of the child;

(b) a person who is not a parent of the child but who has parental responsibility for him; or

(c) where the child is in care and there was a residence order in force with respect to him immediately before the care order was made, a person in whose favour the residence order was made.

.....

(6) Subject to any regulations made by the Secretary of State for the purposes of this subsection, any local authority looking after a child shall make arrangements to enable him to live with–

(a) a person falling within subsection (4); or

(b) a relative, friend or other person connected with him,

unless that would not be reasonably practicable or consistent with his welfare."

The Children (Leaving Care) Act 2000

13. *The Children (Leaving Care) Act 2000* added sections 23A-E to the *Children Act 1989*. Their effect is as follows.

14. Section 23A defines a "**relevant child**" as a child who (a) is not being looked after by any local authority; (b) was before last ceasing to be looked after an "**eligible child**" for the purpose of paragraph 19B of Schedule 2; and (c) is aged sixteen or seventeen. The effect of paragraph 19B of Schedule 2 and the relevant regulations – *The Care Planning, Placement and Care Review (England) Regulations 2010*, regulation 40 – is that, in order to be an eligible child (and hence a "relevant child"), you have to have been looked after by a local authority for a cumulative total of at least thirteen weeks between your 14th and 18th birthdays.

15. Section 23C is headed "Continuing Functions in Respect of Former Relevant Children". A "**former relevant child**" is defined in subsection (1) thus:

"(*a) A person who had been a relevant child for the purposes of s 23A (and would be one if he were under 18) and in relation to whom [the local authority] was the last responsible authority; and*

(b) A person who was being looked after by [the local authority] when he attained the age of 18, and immediately before ceasing to be looked after was an eligible child"

The "last responsible authority" is the one which last looked after the child: s 23A (4). The effect of all that is, not surprisingly, that you cannot be a former relevant child unless you have been looked after by a local authority for a cumulative total of at least 13 weeks between 14 and 18.

16. Section 23C then sets out a series of duties including a duty on the authority to keep in touch with the former relevant child whether he or she is within their area or not: s23C (2) (a); if they lose touch with him, to re-establish contact: s23C (2) (b); to continue the appointment of a personal adviser: s23C (3) (a); to continue to keep his pathway plan under regular review: s23C (3) (b); and to give various forms of assistance as provided for in section s24B in relation to employment, education and training or other assistance to the extent that his welfare requires it: s23C (4) (a) - (c), including contribution to expenses incurred in living near places of employment, education or training. These duties for the most part subsist until the former relevant child reaches the age of 21 but some of them, particularly in relation to education, may extend until he is 25.

17. The purpose of these provisions is to ensure that a relevant or eligible child is not simply left without support the moment he reaches his 18th birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults.

Age assessments

18. During the time in which GE claimed to be a minor the Council caused age assessments to be made of her. The first was carried out by officers of the Council on 24 August 2011. GE's solicitors challenged that assessment on the grounds of procedural defects and the Council agreed to re-assess her age with independent social workers. On 12 September 2011 the Council instructed the Bain & Dahle Partnership ("B & D") to conduct an assessment. This second assessment was completed on 10 October 2011. The two assessors from B & D told GE that they had decided that her estimated date of birth was 27 September 1990.

19. The Council did not, however, carry out during that time any of the duties that it potentially owed to her under section 23 if a minor is what she was.

The judgment

20. The judge held that after GE became an adult the Council owed no duties to her as a "*former relevant child*", since, in order for her to be classified as such, it was necessary that she should *in fact* have been being looked after by the Council when she attained the age of 18. But she had not been so looked after. It was, accordingly, unnecessary to decide whether she was under 18 when she entered the UK.

21. Mr Hugh Southey QC submits that the judge was in error on three grounds, of which grounds 1 and 3 may be taken together. First, he approached the issues in the wrong way. He should have decided whether the applicant was under 18 at the time of the Council's age assessment (Ground 1) rather than beginning by considering the proper interpretation of the statutory provisions (Ground 3). GE had been granted permission for a fact finding hearing and she should have had one. The result of the judge taking the wrong approach was that he failed to consider the legality of the Council's failure to provide accommodation.

22. Second (Ground 2), the judge was wrong to hold that the applicant could not be a "*former relevant child*". As a result it was insufficient to rely on the fact that she was now 18 to determine her claim against the Council.

Is GE a former relevant child?

23. Where there is a dispute from which legal consequences may flow it is for the Court to determine the age of the child. Because of the course taken below, that has never been done. In those circumstances it is necessary to consider what the position would be on the assumption that GE was until 27 September 2012 a minor. Mr Southey submits that if, as they should have done, the Council had assessed GE as a minor, they would have come under a duty under section 20 (1) to accommodate her. In order for her to become "*a former relevant child*" under section 22 (1) it is not necessary that she should *in fact* have been provided with accommodation under section 20. It is sufficient that she *should have been* provided with accommodation in which case that consequence would have followed.

24. I do not regard this contention as supported by the language of the statute, authority or principle.

The language of the statute

25. The language is clear. To be a former relevant child the child must fulfil one of two conditions. Either she must, whilst not being looked after by any local authority, nevertheless be a 16 or 17 year old who had been looked after by a local authority for at least 13 weeks in all between 14 and 18 in relation to whom the Council was the last responsible authority: 23C (1) (a); or she must be being looked after by the Council when 18 and before that had been looked after by a local authority for that period: section 23C (1) (b). The statute does not say that someone is a former relevant child if he or she should have been looked after at the relevant time or for the requisite period.

The Authorities

26. In *R (M) v Hammersmith & Fulham LBC* [2008] 1 WLR 535 the claimant approached the housing department of Hammersmith & Fulham LBC. She was given accommodation between 6 April and a date in October 2005 and further temporary accommodation later that year. She was never referred to the social services department. After she reached 18 she claimed to be a former relevant child and to be owed duties under the 1989 Act. The House of Lords held that, since she had not been drawn to the attention of the children's services department and the local authority had not provided her with accommodation in the exercise of its social services functions under section 20, she had not been "*looked after*" by Hammersmith within the meaning of section 22 (1) and therefore was neither an eligible nor a relevant child. She was, accordingly, not a former relevant child.

27. Baroness Hale gave the judgment of the House. At [34] she said:

> "*In hindsight, perhaps we can all agree on what ought to have happened. But the claim is that we should treat what ought to have happened as if it had actually happened. The claim is for the extra help and support available to former relevant children, even after they reach the age of 18, under section 23C of the 1989 Act. To be a relevant child, one must first have been an eligible child: section 23A(1). To be an eligible child one must have been 'looked after' by a local authority for the requisite period of time: Schedule 2,*

> *para 19B(1) and Leaving Care Regulations. Who then is a 'looked after' child?* ***As M was never a child in care, the question is whether she was accommodated in the exercise of the local authority's social services functions****, and specifically their functions under section 20 of the 1989 Act. Essentially the argument is that the local authority were in fact acting under section 20 when they thought they were acting under section 188 of the 1996 Act.*"

It is apparent from that paragraph that Baroness Hale was not saying that the question was whether M *ought to have been* accommodated in the exercise of Hammersmith's functions but whether she *was in fact* accommodated.

28. Baroness Hale then turned to consider the argument that since the local authority had in fact provided accommodation for M it could not avoid its obligations under the 1989 Act by saying that it had acted under the Housing Act 1996. As to that she considered a number of cases and then said this:

> "*42 It is not necessary, for the purpose of deciding this appeal, to express a view on whether any or all of these cases were rightly decided. For my part, I am entirely sympathetic to the proposition that* ***where a local children's services authority provide or arrange accommodation for a child, and the circumstances are such that they should have taken action under section 20 of the 1989 Act, they cannot side-step the further obligations which result from that duty by recording or arguing that they were in fact acting under section 17 or some other legislation. The label which they choose to put upon what they have done cannot be the end of the matter****. But in most of these cases that proposition was not controversial. The controversy* was *about whether the section 20 duty had arisen at all.*"

29. Then in [44] she said:

> "*….. It is one thing to hold that the actions of a local children's services authority should be categorised according to what they should have done rather than what they may have thought, whether at the time or in retrospect, that they were doing. It is another thing entirely to hold that the actions of a local housing authority should be categorised according to what the children's services authority should have done had the case been drawn to their attention at the time. In all of the above cases, the children's services authority did something as a result of which the child was provided with accommodation. The question was what they had done. In this case, there is no evidence that the children's services authority did anything at all.* ***It is impossible to read the words 'a child who is…provided with accommodation by the authority in the exercise of any functions...which are social services functions within the meaning of the Local Authority Social Services Act 1970...' to include a child who has not been drawn to the attention of the local social services authority or provided with any accommodation or other services by that authority****. Once again, had this been a non-metropolitan authority, the housing authority could not have provided accommodation under section 20 and the social services authority could not have provided interim*

> *accommodation under section 188. The position cannot be different as between the unitary and the non-unitary authorities*"

30. This passage makes plain that a child whose existence has not been drawn to the attention of the children's services authority cannot be a child who is looked after by a local authority within section 22. Contrariwise, if a child is drawn to the attention of the children's services authority and is then accommodated by the local authority it may, in certain circumstances (see below) be possible to regard her as a looked after child.

31. Matters were carried a step forward in *R (TG) v Lambeth London Borough Council* [2011] EWCA Civ 527. In that case the 16 year old claimant told Ms Acquah, a social worker within the Youth Offending Service, that he intended to approach the Homeless Persons Unit (HPU) of the local authority's housing department. She gave him a "Homelessness and Social Vulnerability Report", which she had completed, which said that he was in desperate need of accommodation and he took it to the HPU. Ms Acquah did not refer him to the children's services department, which exercised social services functions. Between March and October 2006 accommodation was ostensibly provided for him by the local authority pursuant to its interim duty under section 188 of the Housing Act 1996. The housing department never referred him to the social services department. The Court of Appeal held that, although it was impossible to read the words of section 22 of the Act to apply to a child who had not been drawn to the attention of the local children's services authority or provided with accommodation or other services by that authority, the judge should have held that Ms Acquah represented the eyes and ears of the children and families division of the Children and Young Persons Service of the authority, which division exercised social services functions.

32. Wilson LJ (as he then was) put it thus:

> "*27 McCombe J expressed his conclusion as follows:*
>
> > *"Given that it has been decided in M that a firm line has to be drawn in resolving when a local authority is exercising its social services functions, it seems to me that the line has to be drawn by saying that the duty is not triggered until the child comes to the attention of the division of the local authority responsible for those functions in the ordinary course. The peripheral attention of a duly qualified official of a different team will not do."*
>
> *27 Following protracted thought I have arrived at the opposite conclusion. We are surveying an entitlement on the part of the appellant to a package of benefits which, had Lambeth lawfully conducted itself in accordance with guidance, should have arisen. But has it arisen? I am convinced that there is no more satisfactory dividing-line than that drawn by Baroness Hale in M in the passage quoted at [23] above.* [This was a reference to [44] of her judgment cited in [29] above] *But in relation to the facts of the present case I do not share the judge's view of where the line lies. Ms Acquah was not merely a qualified social worker with experience of social work in relation to children: her membership of the YOS reflected a*

> *statutory requirement that at least one of its members should have such experience. In the YOS she represented, as Lord Justice Toulson suggested in argument, the eyes and ears of the children and families division of the CYPS. On 3 March 2006 she wrote a report about the appellant in terms apt only for the consideration of that division. Unfortunately, however, she did not seek to dissuade the appellant from putting it only before the housing department. With respect, I disagree with the judge that the appellant has to show that the children and families division acted "in the ordinary course". For the reasons already given, my view is that the actions of Ms Acquah are properly to be imputed to the division, with the result that the case comes down on the side of Baroness Hale's line which is favourable to the appellant's claim.*"

33. Nothing in that judgment supports the proposition that it is possible to become a former relevant child when the local authority has never provided you with accommodation at all. The case follows *M* and was concerned with whether or not the provision of accommodation by the local authority could be attributed to its social services function.

34. It does not seem to me possible, in this case, to attribute the accommodation of GE by UKBA/NASS to the Council. Thirlwall J declined to release GE to the care of the Council and directed UKBA, a completely separate authority, to provide accommodation for her through NASS. UKBA cannot be treated as acting on behalf of the Council or fulfilling the Council's functions for it.

35. More problematic is the case of *Southwark London Borough Council v D* [2007] EWCA Civ 182. In that case the question was whether a child – S – had been looked after by the authority for at least 24 hours. The judge found that S had been looked after by the authority between January 2004 and June 2005 pursuant to the *Children Act 1989.* The local authority's case was that they had merely acted as a facilitator of a private fostering arrangement between the child's parents and the woman with whom the child had been placed.

36. The facts were these. On 20 January 2004 S had told school staff that her father, with whom she had been living in Southwark, had been violent to her. In the late afternoon the father, who had come to the school, had a meeting with a representative from Southwark Social Services (Mr Dallas) and an officer from the child protection team. S said she would like to go and live with ED, who lived in Lambeth, with whom the father had once had a relationship and with whom S had stayed for about 2 months in 2003. The father agreed that, if it were possible, she should go to stay at ED's. Mr Dallas telephoned ED who was at work. She agreed that she would care for S. Mr Dallas took S to ED's house where she had lived ever since. On 31 January D's mother, who was in Jamaica, consented to D being cared for by ED. Southwark's position was that it was for Lambeth, where S was resident, to provide support. Lambeth's position was that, as Southwark had placed S with ED, pursuant to their statutory duties, it was Southwark's responsibility to maintain her. Southwark accepted that S was a child in need and that the father was for the foreseeable future prevented from providing care for her.

37. The Court held that, in the light of what had happened and what had been said on 20 January:

> "*the only inference that can reasonably be drawn is that Southwark was asking ED to accommodate S on their behalf and at their expense. The fact that Southwark did not comply with the regulatory regime is a pointer towards the opposite conclusion but the remaining facts and circumstances all point to this being an exercise of Southwark's statutory duty to provide accommodation for S.*"

38. In other words, Southwark was taking care of S because ED was accommodating her on Southwark's behalf. However, in an earlier passage in her judgment Smith LJ, with whom May and Keene LJ agreed, said this:

> "*55…..In our judgment, the child is being looked after by the local authority as soon as the section 20 (1) duty arises.* ***It is not necessary that the child should have been accommodated for 24 hours before s/he is being looked after. We accept Mr O'Brien's submission that the child becomes looked-after when it appears to the local authority that (for one of the reasons set out in that section) the child appears to require accommodation for more than 24 hours****. If that condition is satisfied, as it was here, the section 20 (1) duty arises immediately and the authority must take steps to ensure that accommodation is provided. Either it can provide it itself by making a section 23 (2) placement or it can make arrangements for the child to live with a relative, friend or connection, pursuant to section 23 (6).*"

39. I respectfully disagree with this passage. Firstly, the proposition that a child becomes looked after when it appears that the child needs accommodation for more than 24 hours seem to me to ignore the clear wording of the definition of a child who is looked after by a local authority in section 23. That requires him/her to be either in care or provided with accommodation by the authority.

40. Secondly the proposition appears to me to be unnecessary. The section 20 duty to provide accommodation arises when it appears to the local authority that the child requires accommodation as result of the matters specified in section 20. That duty is imposed on a local authority in respect of children in need "*within their area*". It makes no reference to a 24 hour period. On the facts of the case Southwark came under a duty to provide accommodation by the afternoon of 24 January 2004. Southwark fulfilled that duty by arranging with ED that she should accommodate S, a Southwark resident, on their behalf. If it had not done so it would, under section 20, have had to provide accommodation for S in some other way.

41. The Court was concerned that, because both section 23 (2) and (6) apply when the local authority is looking after a child, it might be impossible for a duty to arise under either subsection until the child had been accommodated for 24 hours, with the possible result that he could not be accommodated at all. I accept that there is an apparent curiosity in the drafting of sections 20 - 23 in that section 20 provides for a duty to provide accommodation when its conditions are satisfied and section 23 (2) also imposes a duty to provide accommodation for a looked after child, which can only arise 24 hours after he has begun to be accommodated because of the definition of looked after child in section 22 (1) (b) and (2). However, in respect of a child in need who requires accommodation there is no period when no duty arises. I suspect that the two sections appear in this form because, once a child has begun to be

accommodated by the authority, he may be said no longer to require accommodation so that a separate section is required for the continuance of its provision.

42. If on 24 January 2004 Southwark had made a private fostering arrangement that someone else should take the child in on that day, it would not have come under a duty under section 23 (6) to seek to procure a private foster parent for a looked after child because it would not have accommodated the child for 24 hours and because, *ex hypothesi*, the arrangement had already been made. If it had not done so, the section 23 (6) duty would apply 24 hours after it provided accommodation for the child, which it would be bound to do under section 20.

43. In view of the court's finding as to what Southwark in fact did – see [37] above – it does not seem to me that its observations in [55] were necessary for its decision or are binding on us. I note that in *M* Baroness Hale did not adopt the reasoning in [55]. Instead she said this about the *Southwark* case:

> "*As the social worker had prevented the father from taking the child home from school, had taken the lead in making the arrangements, and had told the woman that financial arrangements would be made for her, it was not difficult to conclude that the authority had in fact been discharging their duties under section 20 and could not escape their financial liabilities*".

44. So far as principle is concerned, there seems to me no good reason to hold that a child who has not in fact been looked after by a local authority should be treated as if he had been, so as to be able, on that account, to become a former relevant child. The purpose of the provision is to provide some continuity of care and assistance after a child who has been looked after by the local authority becomes 18. The draftsman cannot, I think, be taken to have contemplated that provisions intended to have that effect should create a right, after the child was 18, on account of the fact that he should have been, but was not, accommodated for the relevant period before then.

45. In my view, therefore, the deputy judge was right to hold that GE was not a former relevant child, even if she was 16 ½ when she entered the United Kingdom.

An alternative approach

46. Mr Southey submitted that another approach was possible. If GE was almost 17 when she came to the attention of the Council, the Council, it is said, came under a duty to accommodate her at that point. They failed to do so. If they had done so she would, now, be a former relevant child. Accordingly they will need to consider whether, as a matter of discretion, they should now provide her with all, or at least some, of the assistance that they would have been obliged to provide if they had done what they should have done at that time. It is nothing to the point that her true age will only have become apparent several years later. The issue is not whether the Council acted unreasonably or improperly in reaching a contrary decision. GE's age is a question of objective fact for which there is a right or a wrong answer, to be determined, if necessary by the court: *R (A) v Croydon London Borough Council* [2009] LGR 24 at [26]. If GE is determined to have been nearly 17 when she came to the attention of the Council, the section 20 duty arose then, even though the need to perform it may not have been apparent to the Council until much later.

47. Support for this approach is to be found in the decision of Thirlwall J in *R (R) v The London Borough of Croydon* [2013] EWHC 4243. R came from Afghanistan. On 22 May 2008 he presented himself to the UKBA in Croydon, saying that he was 15. Croydon provided him with some accommodation. On 27 May 2008 Croydon assessed him to be over 18 and referred him back to UKBA which, through NASS, provided him with accommodation and subsistence support. On 23 June 2008 the Secretary of State notified R that his asylum application was to be referred to Greece under Dublin II. The Secretary of State later undertook to consider his asylum claim substantively and on 18 February 2011 refused it.

48. An age assessment carried out on 9 December 2010 concluded that R was over 18. A fact finding hearing took place before Kenneth Parker J on 24 and 25 May 2011. In a judgment of 14 June 2011 the judge said that the only safe conclusion was that R's date of birth was 9 December 1992. So R was, as he had said, 15 on entry and 18 on 9 December 2010. In such circumstances R claimed that he should be treated as a "*former relevant child*".

49. The judge rejected the argument that R's age was a "*judgment question*" and part of the section 20 process, in the sense that if the local authority made a judgement which was open to them, they had fulfilled their duty under the section. She held that, since it was (now) established that R was 15 in 2008, and R was then a child in need and requiring accommodation as a result of at least one of the matters in 20 (1) (a)- (c), Croydon was in 2008 under a duty under section 20 to accommodate him. In failing to do so it had acted unlawfully. It was immaterial that that unlawful action was the result of honest mistake. Accordingly, "*without more*", there was a proper basis upon which the court should intervene to right the wrong that had been done.

50. She went on to hold that R had been "*banging on Croydon's door for 3 years, asserting that he was a child*". Having considered a number of cases she said this [43]:

> "*In the course of submissions on this issue I expressed my reservation that the claimant's submission seemed to be contrary to reality but I am satisfied, having reviewed the authorities carefully as invited to do, that the court may deem accommodation to have been provided pursuant to section 20 where the local authority has acted unlawfully. Were it necessary for me to do so, I would have done so here.*"

51. As it was she did not need to do that. She expressed considerable concern that Croydon, which had made "*a serious error with grave consequences for this young man*" had not, as she inferred, given any consideration since June 2011 to whether or not it could or should do anything about him. She said that its failure had prevented it from taking what might have been thought to be "*the only proper option open to it"*, namely to treat him as if he was a former relevant child and provide him with the services to which he would on that basis be entitled. She expressed herself quite satisfied that the court ought to intervene and directed that the council "*must now treat this young man as a former relevant child and provide him with the services to which he would have been entitled had he been treated as a child from May 2008 onwards*". A similar approach had been taken by Sir George Newman in *R (MM) v Lewisham London Borough Council* [2007] EWHC 416 (Admin), where the authority would, had it possessed certain information, have been bound, as he found, to have carried

out an assessment which would have showed that the child needed to be provided with accommodation such that she should have been accommodated for at least 13 weeks before she became 18. He, however, granted a declaration that MM "*is now a former relevant child*".

52. For the reasons which I have already given it does not seem to me that it is open to the court to *deem* accommodation to have been provided pursuant to section 20 with the result that the child is to be treated as a former relevant child. That would be to sidestep the definition in section 23A. It is, also, not clear to me to what authorities Thirlwall J was referring in support of the deeming approach taken in her para [43]. If the reference was to *TG* that is not, as it seems to me, a case in which accommodation was deemed to be provided, but one in which the local authority (through its housing department) had in fact provided accommodation under the auspices of Ms Acquah, who was to be regarded as fulfilling the authority's social service functions. Nor do I see how, in R's case, accommodation provided by UKBA, after the referral of R back to them on the footing that he was not a child, could be deemed to be accommodation provided by Croydon social services.

53. However, the ground on which the judge reached her decision was that the inaction of the council was unlawful and that the council must now treat him as a former relevant child. That approach requires some analysis. If, as I think, R could not be *deemed to be* a former relevant child, the best that he could hope for would be that the council should treat him *as if* he was a former relevant child. For practical purposes that might be regarded as amounting to the same thing. But there is a critical difference. If R was to be *deemed to be* a former relevant child, he would be entitled to the whole range of duties applicable to such a person. If, however he was to be treated *as if* he was such a child, this could only be on the basis that the council should exercise its discretion to act in this way. Any such discretion, if it fell to be exercised at all, would have some flexibility. The council might, for instance, decide to provide some but not all of the services that it might have been obliged to provide if R was, in fact, a former relevant child.

54. I accept that a local authority may use its discretionary powers to make good any unlawfulness that it has committed in the past and may, in some circumstances, be obliged to do so. In *R (S) v Secretary of State for the Home Department* [2007] EWCA Civ 546 this court drew attention to the fact that the Secretary of State had a residual discretionary power to grant indefinite leave to remain to someone no longer entitled to refugee status as such; that the grant of indefinite leave might provide a remedy for unfairness; and that it was open to the court to determine that a legally material factor in the exercise of the discretion was the correction of injustice. In an extreme case the court could hold that the unfairness was so obvious, and the remedy so plain, that there was only one way in which the Secretary of State could reasonably exercise his discretion. (That appears to be what Thirlwall J decided in *R*). The Court recognised that the Secretary of State's decision would fall to be made on the basis of present circumstances but "*those circumstances might include the present need to remedy injustice caused by past illegality*": [47].

55. There is no general rule that, wherever it has acted unlawfully, a local authority must undo its past errors to the fullest extent that it can. Much will depend on the circumstances, including whether or not the claimant had sought interim relief and been refused (as here), whether he was guilty of unacceptable delay, and whether and

to what extent the authority or the claimant should be regarded as blameworthy. There may be countervailing considerations of public interest which would entitle it to refuse any relief at all. It may be relevant to consider what other remedies are open to the claimant. The matter would be one for the discretion of the local authority, to be determined in the light of whatever application is made and in the circumstances applying when it is invoked.

56. There is, however, a logically anterior question. Assume that in 2010 a council carries out an age assessment of X in compliance with the guidance given in *R (B) v Merton London Borough Council* [2004] 4 All ER 280, and comes to the conclusion that X is, at the time when the council is approached, over 18. Having come to that conclusion it takes no steps to act on the basis that X is a child because it does not appear to it that he is. Months or years later a judge, on the evidence then adduced, some of which may well have been (i) crucial but (ii) not before the council in 2010, decides that at the material time X was under 18. Does that mean that in 2010 the council was acting unlawfully?

57. Thirlwall J seems to have answered that question in the affirmative on the basis that the obligation under section 20 is owed to any child in need within the area of the local authority who meets the criteria. If X is such a child the duty is owed to him, whatever view the Council took and however reasonable, or even inevitable, that view was on the material before it. Even if the decision that X was not a child is not itself unlawful, the failure to fulfil any section 20 duty towards him would be. For practical purposes, therefore, the local authority has to get the individual's age right if it is to avoid being in breach of duty under section 20.

58. There are potential difficulties in this approach. Section 20 provides for a duty on the local authority to provide accommodation for any child in need within their area who *appears to them* to require accommodation as a result of, *inter alia*, there being no person who had parental responsibility for him. The section thus raises two issues: (i) whether the individual is a child – an objective question; and (ii) whether it appears to the council that accommodation was required as a result of the matters stated in s20 (1) (a) – (c), which is a matter for the authority's judgement.

59. The marriage of these two is not perfect. If, for instance, it does not appear to the authority that X is a child (although in fact he is) how could it appear to it that he needed accommodation because there was no person who had *parental* responsibility for him? The section might be thought to contemplate that, if it is to apply, it must be possible for it to appear to the Council that the individual in question is a child without a parent. But can this be the case if he does not appear to the Council even to be a child?

60. On that footing the duty under section 20 would arise only if the individual in question (a) was a child, and (b) appeared to the local authority to be such.

61. Such a conclusion would not, however, tally with the decision of the Supreme Court in *R (A) v Croydon LBC*. Baroness Hale formulated the issues in that case as including:

> "*whether, as a matter of statutory construction, the duty imposed by section 20 (1) is owed only to a person who appears to the local authority to be a*

> *child, so that the authority's decision can only be challenged on "Wednesbury" principles…or whether it is owed to any person who is in fact a child so that the court may determine the issue on the balance of probabilities*".

62. The House held that the answer was the latter. No suggestion appears in the judgments that there was a third possibility namely that the duty was owed to someone who both was, and who appeared to the authority to be, a child. The formulation set out in the previous paragraph would mean that a decision that the individual was in fact a child ruled out any consideration as to whether s/he appeared as such to the authority. Nor was there any suggestion that the duty only arose when the court had reached its conclusion on age.

63. In [14] of her judgment Baroness Hale referred to the argument of Mr John Howell QC for the putative child. He had pointed out the distinction in section 20 between the statement of objective fact – "*any child in need in their area*" – and the descriptive judgement – "*who appears to them to require accommodation as a result of...*" and referred to the fact that the definition of child in section 105 (10) was "*a person under the age of 18*" and not "*a person who appears to the local authority to be under the age of 18*".

64. She also referred to the fact (i) that there were other statutes which used the "*where it appears to a local authority...*" formula in relation to children, and contrasted the wording of section 20; and (ii) that the 1989 Act contained a number of coercive powers to make orders relating to children which did not suggest that such powers could be exercised in relation to someone whom the authority reasonably *believed* to be a child.

65. She concluded that in section 20 (1) there was a clear distinction between the question whether there was a "*child in need within the area*" and the question whether it appeared to the local authority that the child required accommodation for one of the listed reasons. The former was a question for the court. Lord Hope's judgment was to the same effect.

66. The Court, therefore, made a clear distinction between the two parts of the section as part of its reasoning for concluding that whether someone was a child was not a matter for the authority, only reviewable on public law grounds, but a question of fact – jurisdictional fact – for the Court.

67. In those circumstances it seem to me that it would be inconsistent with the judgment in *A* to hold that for section 20 to apply the individual must, on account of the second part of the section, both be a child and appear to the local authority to be one. If that were so, the appeal would have been dismissed, rather than allowed, because the local authority had concluded that A was not a child. Such a conclusion would also have resurrected the judgment of Ward LJ in the Court of Appeal which the House of Lords reversed. He had held that:

> "*30 … The nature and process of the decision requires the implication of words into section 20 so that it reads: "Every local authority shall provide accommodation for any person whom the local authority have reasonable grounds for believing to be a child in need . . ." as was held to be inevitable in*

Reg. v Secretary of State for the Home Department Ex parte Zamir [1980] A.C. 930."

68. Nor does *M* provide any support to the idea that the Court can deem something to have happened when it has not. The claim made in *M* was "*that we should treat what ought to have happened as if it had actually happened*" [34], and that claim was rejected.

69. Accordingly if it transpires that GE was under 18 when she came to the attention of the Council it would not mean that she is now a former relevant child. The conundrum postulated in [59] above must be regarded as illusory if age is to be treated as a matter of objective fact and not subjective appreciation. If X is an adult, section 20 does not apply. If he is in fact a child, it would plainly be possible for the Council to think that he needed accommodation because there was no one who had parental responsibility over him. The fact that they did not do so because they got his age wrong does not mean that they owed no duty since their actual perception of his age is not an issue.

The result

70. In the result, therefore, the question as to GE's true age is not wholly without relevance since, if she was under 16 ½ when she entered the UK, the Council may well have been in breach of its duty under section 20 in failing to accommodate her, since she was an unaccompanied child without accommodation for whom no one in this country had parental responsibility. She probably also fell within section 20 (1) (b) and (c). The discretion would not arise unless, on the footing that she was a child, the Council had acted unlawfully. If, however, she was a child it is difficult to see how she could have been regarded as anything other than a child in need who required accommodation. If she could only have been so regarded, then, depending on when exactly she was 18, the Council may well have been under a duty to accommodate her for a period sufficiently long as to mean that, if the duty had been performed, she would now be a former relevant child. If so, that would mean that she could legitimately ask the Council to afford her as a matter of discretion some or all of the benefits which she would have enjoyed had she been accommodated by the Council and thereby become an eligible and relevant child in fact.

71. Mr Paul Greatorex for the Council pointed out that no application had been made to the Council to exercise any such discretion, nor had there been any material response to the point made in his skeleton of 9 May 2014 that it was not clear what support or assistance GE sought to have provided to her. Mr Southey's response was that, since the Council does not accept that GE is a child, any request on her part would be likely to have been met by the assertion that in the light of her true age no discretion fell to be exercised. Given that the question of any discretion is likely to be academic unless GE succeeds on the age assessment question, and given that the application notice clearly sought a declaration that she was under 18 at the time of the age assessments I do not think it would be right to refuse relief on these grounds.

72. Mr Greatorex also submitted that it would pose an unacceptable burden on local authorities if, in effect, they had to operate some quasi-ombudsman-like scheme of review of past wrongful decisions. Where Parliament had only defined a "*former relevant child*" as someone who had in fact been accommodated by the Council,

claimants should not be allowed to obtain by a side route relief because they ought to have been so accommodated.

73. Whilst I see the force of these submissions, it does not seem to me right in principle to rule out the need to consider any remedy for past breaches of duty in this field. Parliament chose to confer an entitlement to important rights on those who were in fact children at the relevant time. If, as it turns out, they have wrongfully been deprived of that entitlement, the possible need to remedy an injustice should be addressed.

74. GE's age may also be relevant to (i) her immigration status (since, if she was a child at the relevant time, Dublin II will not apply); (ii) the legality of her detention by (and hence possible claim for false imprisonment against) the Secretary of State; and (iii) if she remains here, conceivably to a claim to be treated, while she is under 21, as if she benefited from the presumption of priority need for accommodation under s 189 of the Housing Act 1989 as extended by Article 4 of the *Homelessness (Priority Need for Accommodation Order)* 2002.

75. I do not propose to consider further the range of considerations which, if she was a child at the relevant time, might be appropriate or mandatory. That would be premature. GE's age has not yet been determined; she has not applied to the Council to consider her case as a matter of discretion; and the Council has not done so. If the question becomes relevant it will be necessary for GE, or her representatives, to indicate what services she seeks. Mr Southey told us, on instructions, that her principal concern was that there should be a needs assessment and, hopefully, the provision of, or assistance with, appropriate accommodation and assistance with education.

76. It is unfortunate that the age determination which GE had sought, and which the parties had prepared for, did not take place. This is particularly so for the Council who sought to argue that a stay of proceedings against the Secretary of State should not be ordered since, if she was held in those proceedings to have been over 18 at the relevant time, she would be likely to be removed anyway.

77. The order that I propose that we should make is (i) to set aside the order of Mr Ockleton dismissing GE's claim against the Council, which was for a declaration that she was a child when age assessed by the Council; and (ii) to order that the matter be referred back to the Administrative Court in order that it may determine GE's age. If the Court concludes that she was under 18 at the relevant time, directions will have to be given as to how any subsequent claim against the Council should be processed.

Sir Bernard Rix

78. I agree that this appeal should be allowed and that the order proposed by my Lord, Lord Justice Christopher Clarke, at para [77] of his judgment should be made. I also agree that GE cannot be deemed to be a former relevant child when she is not, for the reasons set out in that judgment; and that it is feasible that, even so, Bedford could, were a judicial determination of GE's age to establish that she was indeed a child at the relevant time when she came to Bedford's attention, be asked to exercise a discretion in her favour, as described in my Lords' judgments.

79. Nevertheless, I would prefer to reach my conclusion as to the outcome of this appeal on a narrower basis than has seemed good to my Lords. I bear in mind the circumstances that: both age assessments made by or on behalf of the Council, that of 24 August 2011 and that of 10 October 2011 (a completion date of 12 October has also been given in the papers), are attacked in these proceedings on the basis that they were unfair as well as wrong in their conclusions (see the lengthy grounds set out at paras 94ff and 103ff of GE's re-amended detailed statement of facts and grounds); that such allegedly unfair age assessments have also been relied on in connection with GE's judicial review claim against the Secretary of State for the Home Department which concerns the legality of her detention, albeit that claim has been stayed behind that against the Council; and that GE's judicial review claim against the Council has obtained initial permission to apply, as it did from Walker J on 5 December 2012. In those circumstances, it seems to me that the lawfulness, as well as correctness, of those age assessments by the Council has been properly put in issue, and that GE is therefore entitled to a judicial determination of her age, in case, were such an assessment to be in her favour, she might be entitled to some remedy from the Council or the Secretary of State.

80. I am, however, more sceptical of the proposition that a judicial age determination in GE's favour would automatically put the Council in breach of its duty under section 20 (1) of the Children Act 1989. On the assumption that Bedford's age assessments were merely wrong, but not unfair and in that sense unlawful, I would be hesitant about saying that the Council had acted unlawfully in declining to accommodate GE as a child in need who appears to require accommodation on one of the grounds specified in that subsection. It seems to me that such a conclusion has not been reached in any decision binding upon this court, and that in particular the decisions of the House of Lords in *A v. Croydon* [2009] 1 WLR 2557 and of the Supreme Court in *AA (Afghanistan)* [2013] 1 WLR 2224 do not reach that far, nor does any of their reasoning mandate such a conclusion. I am not at present persuaded that the fact that the question of whether an applicant is a child is a matter of precedent jurisdictional fact and not a matter for a council's assessment means that a council which has made a fair and lawful, but as ultimately determined incorrect, assessment of the child's age automatically puts the council in breach of its duty where it would otherwise have assessed that child as in need of accommodation. I would prefer therefore not to put my decision on that ground. It seems to me different if a council has not made a fair assessment: in such circumstances it would be in breach of its duty.

81. I recognise that in *AA (Afghanistan)* Lord Toulson was careful to state that the wording and structure of section 55 (1) of the Borders, Citizenship and Immigration Act 2009 are very different from section 20 (1) of the Children Act 1989 (at [48]). It does not seem to me, however, necessarily to follow that a merely wrong assessment by a council for the purposes of section 20 (1) is liable to put a council in breach of duty.

82. It appears that by the time of the 2009 Act the difficulties of age assessment, particularly in the case of young asylum seekers, had become manifest, and the wording of section 55 (1) reflects those difficulties and seeks to make provision for them, while fully engaging with the domestic and international consensus in favour of the welfare principle where children are concerned (see Lord Toulson at [46]-[47]). However, twenty years earlier the Children Act did not make similar provision for the

manner in which the jurisdictional precedent fact of age is to be determined; and that had to be worked out in the jurisprudence. Nevertheless, it can hardly be said that the immigrant status and liberty of an alleged child for the purposes of the 2009 Act is of less public concern than the needs of such an alleged child for the purposes of the 1989 Act. It does not seem to me that the fact that Parliament has gone out of its way to impose duties on how the Secretary of State is to deal with the assessment of a possible child's age means that the absence of similar provisions in the Children Act 1989 should lead to the view that a council is likely to have more absolute duties.

83. I am therefore left with a feeling of concern about the consequences of concluding that a council acting properly in the assessment of a child's age, but ultimately faulted by a subsequent judicial assessment, possibly on different evidence, may be retrospectively put in breach of a duty in respect of a child which it has never accommodated, *a fortiori* since such a child or former child cannot be a "former relevant child" or be deemed to have been accommodated.

84. It is for these reasons that, while recognising the cogency of the argument on both sides, I would prefer to leave the issue of the lawful but mistaken assessment of a child's age for the purposes of section 20 (1) unresolved, since I am satisfied that the other circumstances of this case require a judicial age assessment to be carried out in any event.

Lord Justice Davis

85. I agree with the judgment of Christopher Clarke LJ on the issue of interpretation of the relevant provisions of the Children Act 1989. For the reasons he gives, an individual can only be a "former relevant child", potentially entitled to assistance under the 1989 Act, if that individual in fact has been provided with assistance for the requisite period prior to attaining the age of 18. Such a conclusion accords both with the language of the statutory provisions and with the import of the principal authorities in this area (I agree that the obiter statement contained in the *Southwark LBC v D* case is not to be accepted as an accurate general proposition). I also agree that there can be no "deeming" provision in this regard.

86. It is perhaps, at all events with the benefit of hindsight, unfortunate that the point of statutory interpretation was decided as a preliminary issue in this case. An appeal has thus been generated on a point of law (albeit of wider general implication than just for this case) which, on one outcome, would not have arisen had a finding of fact as to age been made. Moreover, a decision on age would have assisted in the resolution of the other claims made by GE as to wrongful detention and as to whether GE has been liable to be returned to Italy under Dublin II.

87. The point that has caused me the most difficulty is not the issue of statutory interpretation – the principal point argued before us – but what the outcome should be for this particular appeal. In this regard I am prepared to accept that the point (the alternative approach point) was sufficiently contained in the written grounds of claim and appeal; and I also think, in the circumstances of this particular case, that it is not a conclusive answer to say – as Mr Greatorex said – that GE had not prior to issuing this claim asked the Council to exercise any discretion in her favour.

88. It seems – to me at least – a little odd that where (say) a local authority has entirely fairly and reasonably, on the information available to it, assessed an applicant as over the age of 18, it can nevertheless thereafter be held to have acted in breach of duty under the 1989 Act if it subsequently transpires that the applicant in fact was under 18 at the relevant time. That comes close to imposing strict liability on a local authority. At all events, where a local authority has reasonably, in the light of the information before it, assessed an applicant as adult, one can see the argument that such an applicant would not appear to the local authority to be without a person having parental responsibility etc for the purposes of s.20 of the 1989 Act. That is the "conundrum" to which Christopher Clarke LJ refers. But, on reflection, I agree with him, for the reasons he gives, that an analysis of Lady Hale's judgments in *M* and *A* requires such a conclusion.

89. We were referred to the decision of the Supreme Court in *R (AA Afghanistan)) v Secretary of State for the Home Department* [2013] 1 WLR 2224. That gave rise to a problem in some ways analogous to the problem arising in the present case: albeit arising in the context of detention of a minor and of the potential application of s.55 of the Borders, Citizenship and Immigration Act 2009. In that case an asylum seeker was assessed (on reasonable grounds) as being over the age of 18. He was detained. Subsequently, however, he was accepted by the Secretary of State to have been under the age of 18 at the time he was initially detained. It was further accepted by the Secretary of State that, had his true age been known at the time, he would not have been detained, having regard to the provisions of s.55 of the 2009 Act. Similarly, in the present case, it seems most likely that had GE initially been assessed as under the age of 18 then it would have appeared to the Council that she fell within one, or more, of the categories identified in section 20 (1) of the 1989 Act and so potentially would have received accommodation and maintenance.

90. In *AAM (A Child) v Secretary of State for the Home Department* [2012] EWHC 2567 (QB) Lang J had considered the position where a child had, wrongly but on reasonable grounds, been assessed by the Secretary of State as an adult and detained accordingly. She held that, in consequence of the (wrong) assessment that the applicant was an adult, his welfare had not been taken into account for the purposes of section 55 and the detention was in consequence unlawful and in breach of duty. In the Supreme Court in *AA (Afghanistan)*, however, it was held that in so far as Lang J had decided that any detention under paragraph 16 of Schedule 2 to the Immigration Act 1971 of a child in the mistaken but reasonable belief that he was over 18 would *ipso facto* involve a breach of section 55, that part of the judgment was disapproved: see paragraph 50 of the judgment of Lord Toulson.

91. It is to be noted that in *AA (Afghanistan)* an analogy with section 20 of the 1989 Act had been sought to be made by counsel for the appellant, who had been seeking to endorse the judgment of Lang J in this respect. (It is the case that Lord Toulson also pointed out that the risk of an erroneous age assessment can never be eliminated and that there were, moreover, a number of safeguards to applicants: see paragraph 49 of his judgment.) But I do not think that a conclusion on this point corresponding to the conclusion actually reached in *AA (Afghanistan)* is to be reached in the present case. As Lord Toulson observed (paragraphs 46 and 49), the structure and language of section 55 of the 2009 Act and of section 20 of the 1989 Act are very different (the more so, I might add, when one puts section 55 into the context of paragraph 16 of Schedule 2 to

the 1971 Act). Indeed, the very fact that Lord Toulson distinguished between the two statutory schemes is perhaps suggestive of the view being taken that the result, on corresponding facts, under section 20 of the 1989 Act might be different from that under section 55 of the 2009 Act. That difference, at all events, is reinforced by a consideration of Lady Hale's judgments in *M* and *A*, to which Christopher Clarke LJ has referred.

92. It therefore seems to follow that if GE was indeed a child at the relevant time the Council was in breach of duty in failing even to consider whether she appeared to be in need or in providing assistance and maintenance to her.

93. But the point remains, as explained by Christopher Clarke LJ, that just because GE was not in fact provided with such assistance and maintenance she was not a former relevant child under the statutory provisions. So by reason of the error (as has to be assumed for present purposes) on the part of the Council as to GE's age the Council is thereby relieved of any potential statutory obligation of support once GE on any view reached the age of 18.

94. That no redress is available in such a situation – as was the implication of Mr Greatorex's submissions – is not a comfortable result. Mr Greatorex submitted that in many such cases a remedy in the form of interim relief, on an application issued before the applicant has on his or her own case become adult, may be available. He suggested that a scenario under the 1989 Act whereby redress for an erroneous age assessment is in practice entirely denied is likely to be rare. That may be so. But there could be cases – and this may be one – where it is not so. Mr Greatorex's response to that was in effect: "so be it" (my words, not his). That does not appeal to me.

95. I agree that the potential remedy for an applicant in such a situation is to seek the exercise of discretion by a local authority. Mr Greatorex accepted in argument that a local authority would, in the postulated circumstances, have power to exercise such a discretion in discharge of its functions.

96. In my view, such a scenario is in line with other cases whereby a public body may be called upon to consider correcting an historic injustice (albeit it is to be noted that what a person in the position of GE is seeking is in substance looking to the future). Indeed in cases of gross maladministration and conspicuous unfairness the court may even, exceptionally, itself compel such a result: see *R (Rashid) v Secretary of State for the Home Department* [2005] INLR 550 as explained in *S* (cited above). I take it that the outcome of the case in *R* (Thirlwall J) was an application of such a principle: although I have to say that I have some reservations as to whether such an outcome was justified on the facts of that case, as revealed in the judgment.

97. I am not heedless of the potential implications of this for local authorities. The status of child – for good and proper reasons – potentially confers significant statutory benefits and advantages, designed to protect and promote the interests and welfare of the child. Regrettably, in consequence, there are some claiming asylum who are coached to say or falsely say that they are children when in truth they are adult: it being appreciated that, if their assertions are accepted, detention should be avoided and the potentially more favourable benefits under the 1989 Act may become accessible. Even after the age of 18 there remains, for some, the potential for obtaining benefits otherwise not obtainable: as the circumstances of this case illustrate (although I of

course make clear that I make no comment whatsoever on the underlying facts and merits, which remain to be determined).

98. However, I do not think that local authorities should be expected unduly to be confronted by claims under the 1989 Act made by applicants once they have attained the age of 18, claiming to be treated as though they were a former relevant child. It also must, after all, be remembered that local authorities in such a situation will have a discretion. If an applicant has not even made himself or herself known to a local authority before reaching the age of 18, the application will in the ordinary way be easily disposed of. In other cases, the matter may be resolved adversely to an applicant by a further age assessment. In other cases again, where it is subsequently accepted that the applicant was indeed under the age of 18 at the time of the original assessment, it will be relevant for the local authority to consider whether the local authority had acted fairly and reasonably at the time of the original age assessment or whether the erroneous initial age assessment was attributable to some culpable or unreasonable conduct on the part of the local authority (or those acting on its behalf). Delay in making a claim under the 1989 Act after an applicant has become adult may well also be a relevant factor. Also potentially relevant, of course, will be the nature of the benefits and services which the applicant, as an adult, now claims; and the fact that there will ordinarily not have been continuity between what the applicant now seeks by way of benefits and services as an adult and what the applicant had received as a child.

99. However, since this will be a discretionary matter it is impossible to be prescriptive or to provide an exhaustive list of what the relevant circumstances will be in any given case or what weight is to be given to them. But I think, overall, that there are safeguards available to local authorities in this context. Spurious claims, at all events, can be expected not to prosper: even if, I accept, there will potentially be greater administrative responsibilities (and associated expense) cast on a local authority to deal with any such claims.

100. For the avoidance of doubt, I see no objection, as a matter of shorthand as it were, in those who were initially wrongly age assessed thereafter asking to be considered, once a correct age assessment has been made, "as though" they were a former relevant child or "as though" they had been accepted as children at the time of the initial age assessment. But it does not follow at all that they can then expect to receive, as adults, the same accommodation, maintenance and support which they prospectively would have received had only the correct age assessment been made in the first place. That would be an incorrect conclusion. It would be incorrect both because it would prospectively confer on them the entitlements of being a former relevant child, when in fact and in law they are not a former relevant child; and because that would unduly restrict the nature of the discretion which the local authority has.

101. In the result I agree with the judgment of Christopher Clarke LJ and I agree with the disposal indicated by him. It is also important to note that in the present case GE has challenged not just the correctness but also the fairness and reasonableness (in public law terms) of her initial age assessment. Those issues also remain potentially to be decided, to the extent necessary.