



Neutral Citation Number: [2020] EWHC 109 (Admin)

Case No: CO/3209/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23 January 2020

Before :

THE HON. MRS JUSTICE THORNTON DBE

Between :

AB
- and -
Kent County Council

Claimant

Defendant

Mr Rule (instructed by **InstaLaw**) for the **Claimant**
Ms Rowlands (instructed by **Invicta Law**) for the **Defendant**

Hearing dates: 10 - 11 December 2019

Judgment
(Approved by the court)

The Hon. Mrs Justice Thornton :

Introduction

1. The Claimant, AB, is an Afghan national. He arrived in the UK, in the back of a lorry, at the Port of Dover on 26 July 2019 at 4.20am. He claimed asylum and said he was fifteen years old. Later that day social workers from the Defendant, Kent County Council, concluded that AB presented physically and in his demeanour as aged between twenty – twenty five years. The Council therefore treated him as an adult and declined to provide him with accommodation and other assistance pursuant to its duties under the Children Act 1989. In turn, in reliance on the Council’s assessment, the Home Office treated him as an adult and arrested him as liable for detention at 17.15pm the same day, before releasing him on bail. AB, by his litigation friend, challenges the lawfulness of the Council’s assessment of his age as procedurally unfair and unlawful.
2. The issues raised by the claim are:
 - (1) the lawfulness of an abbreviated assessment of age by a local authority, based on physical appearance and demeanour, which does not comply with the full panoply of procedural safeguards laid down in caselaw for such assessments and are often referred to as “Merton compliant” assessments, after the leading case of R (B) v London Borough of Merton [2003] 4 All E.R. 280; [2003] EWHC 1689 (Admin);
 - (2) The applicability of the recent Court of Appeal decision in BF (Eritrea) v Secretary of State for the Home Department [2019] EWCA Civ 872, to an abbreviated assessment by a local authority.

Factual background

Chronology of events

3. On arrival in the Port of Dover from Afghanistan, after a journey of nine – twelve months, AB claimed asylum. He was taken to a Home Office reception area and fingerprinted and interviewed at 05:00am. His claimed age of fifteen years was not disputed by the immigration official interviewing him on arrival and his date of birth was recorded on the Home Office Referral form as 01 January 2004. AB was sent to the ‘Atrium’, a designated area for unaccompanied asylum seeking children consisting of offices and rooms for new arrivals to sleep, eat or rest in. He was delivered into the care of Mr Carter from the Refugee Council based at the Atrium at approximately 8am. The Refugee Council is one of the leading charities in the UK working with refugees and asylum seekers to provide support and advice. AB was in Mr Carter’s care from 8am – 17.15pm that day. AB immediately went to sleep. When he woke up, he showered and changed into clothes provided by the Refugee Council for new arrivals.
4. Mr Stringer, an experienced social worker from Kent County Council, was informed of the arrival of AB. On reviewing the photograph on AB’s referral form, Mr Stringer became concerned that AB looked older than his claimed age. Mr Stringer sought to clarify matters with the Chief Immigration Officer who had assessed AB on arrival but was told he/she was now off duty and unavailable. Mr Stringer requested the Chief Immigration Officer then on duty, Ms Nicholls, review the decision made earlier by her colleague.

5. At approximately 11.45 am that day, Mr Stringer and a colleague, Ms Carter interviewed AB in the Atrium for approximately 30 to 45 minutes. The interview was conducted in the Farsi language, using a translator at the end of a telephone. Shortly afterwards, AB was interviewed by Chief Immigration Office Nicholls and Ms Mead from the Home Office asylum support team. Their interview with AB lasted approximately 10 – 20 minutes. Mr Stringer, Ms Carter, Ms Nicholls and Ms Mead discussed AB's age. Ms Nicholls and Ms Mead advised Mr Stringer and Ms Carter that they considered AB presented as an adult rather than a child. They would issue a Home Office form, ISM97, disputing AB's claimed age and provide written statements as to their professional opinions in this regard.
6. During the course of the afternoon, Mr Stringer and Ms Carter discussed AB's age with Mr Carter from the Refugee Council. There was a disagreement about AB's age. The social workers continued to believe that AB was older than he claimed. In Mr Carter's opinion AB's physical appearance and his behaviour outside of an interview setting presented as consistent with his experience of other Afghan minors. Mr Carter had previously worked with unaccompanied young asylum seekers in Greece and Calais including with young Afghan asylum seekers.
7. Mr Stringer and Ms Carter then discussed matters amongst themselves. Mr Stringer's witness statement dated 15 October 2019 sets out the content of their discussion:

“Ms Carter and I reflected on our observations of and interactions with AB and the views given by both Ms Mead Ms Nicholls and Mr Carter. We considered the guidance provided by the Association of Directors of Children's Services (ADCS) on age assessment 2015) and the Merton caselaw judgement 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”. From this we felt it was obvious to both ourselves and to experienced immigration officers, including KIU's [Kent Intake Unit's] Safeguarding Lead that AB presented over 18 years of age. As such we did not consider it appropriate for AB to be accommodated and supported as a child by the local authority, whilst a prolonged age assessment was completed. Particularly as to accommodate AB at his claimed age would mean him being placed with a foster family and potentially very vulnerable young children. We concluded that AB should be returned to the Home Office to be supported as an adult.”
8. At approximately 4.45pm, Mr Stringer and Ms Carter met again with AB to inform him of their decision that he was over eighteen years of age. The interview notes of the meeting records that AB stated “I do not agree with this decision”. AB was then escorted from the Atrium by Home Office officials, arrested and taken into Home Office custody at 17.15pm. He was released on bail the same day subject to bail conditions that prohibited him from working and required him to report to police/immigration officials. The bail form states that although AB has been granted immigration bail, he remains liable to be detained and that failure to comply with his bail conditions is a criminal offence. He was directed to accommodation for adult asylum seekers.
9. On 29 July 2019, AB's legal representatives sent a letter before action to Kent Council requesting a 'Merton compliant' age assessment and the interim provision of

accommodation support commensurate with the Claimant's assessed age. Kent Council declined to do so.

10. In early August 2019 AB was referred by Migrant Help, a charity supporting asylum seekers and refugees to Derby City Council. On 02 August 2019 two Derby Council social workers met with AB. They decided that AB was not presenting 'clearly and obviously' as either an adult or a child. Given the doubt, it would be necessary to conduct a 'Merton compliant' assessment. However, Derby City Council subsequently became aware that Kent Council had already conducted an age assessment of AB and thus terminated the foster care placement provided for AB on 13 August 2019.
11. On 20th August, Nicklin J granted permission for judicial review and interim relief requiring Kent Council to accommodate AB. Accordingly, AB has since been accommodated by Kent Council at a reception centre in Kent for unaccompanied asylum seekers aged 16 to 17 years.

The assessments of AB's age

12. The Home Office ISM97 form, issued sometime during the early afternoon on 26 July 2019 by Chief Immigration Officer Nicholls, disputing AB's claim that he is fifteen. However, in accordance with Home Office policy, AB was given the benefit of the doubt on the basis his physical appearance and demeanour did not 'very strongly suggest' he was twenty-five years of age or over. Salient parts of the form state as follows:

"...your claimed age has not been accepted.

However, since your physical appearance and demeanour does not very strongly suggest that you are 25 years of age or over, the Home Office will treat you according to the processes designed for handling asylum claims from children, until further evidence becomes available. This does not mean that the Home Office has accepted your claimed age. We will take a full decision on your age when all available evidence is collected, including the opinion of the relevant local authority."

13. The written statement by Chief Immigration Officer Nicholls explains her conclusions:

"An initial impression of age range is formed based on height, facial features including facial hair, skin line/folds, etc; voice tone, and general impression... The applicant has lines on his forehead, a prominent adam's apple and has 5 o'clock shadow. The applicant ...said that his parents told him his age two years ago. They did this because he said that he started shaving early. The applicant did on occasions, interrupt the interpreter when challenged over his age.

...based on his size, facial and body hair, behaviour and my experience I am fully satisfied that he is significantly over 18 years of age..."

14. Ms Mead's written statement provides as follows:

"My initial reaction on seeing AB was that he was not the age of 15 as claimed by him. He has strong stubble on his chin,

what appeared to be healed acne scars on his face, he appears comfortable in his body and is in proportion. He presented as irritated that he was being questioned, he was jigging his leg up and down and was sighing. He appears confident. On speaking to him he stated he was 15 years old and he knows this as his mother told him. He has no documentary evidence to support this claim and stated that he shaved once a week and had done so for the last two years, this information was volunteered without prompting. He gave long confident answers to questions asked and told us that he felt the UK was an advanced country and that we should have the ability to refer for medical testing of age.

Taking all of the information into account I do not believe that he is 15 years as claimed would place him at around 20 to 21 years. I make this judgement based on my work with asylum seeking children of which I have 16 years experience.”

15. Kent Council’s assessment of AB’s age concluded as follows:

“...AB presents as being approximately 5’6” in height and of a small build with his head, hands and feet presenting as proportionate for the rest of his body. AB has established facial hair growth across his jawline and around his mouth and acne scarring across his cheeks that presents as having been well established and having occurred some time ago. There are some faint lines around AB’s eyes and his Adam’s apple is visible.

AB speaks with an even toned voice and presents as calm and assertive when discussing his age and circumstances. On occasions AB presented as irritated by the questioning and gave sustained eye contact. This presentation is consistent with the reports given by Tracey Nicholls and Cassandra Mead who described AB as “confident” and openly challenging them when questioned about his age. Collectively this indicates to the assessors AB’s demeanour is not consistent with a 15-year-old child.

Although puberty can occur at different times for young people, it is considered to usually occur in a particular order with the head, hands and feet growing first before the legs and arms and the trunk of the body. This sequence of growth means adolescents may feel clumsy as they appear out of proportion... AB appears to have experienced physical development in all these parts of his body and also appears to be accustomed to his current body shape/size which indicates to me that is a young person who has already progressed some time ago through puberty and his physical development to adulthood.

As a result it is the professional opinion of the assessors that AB presents physically and in his demeanour as more consistently with someone aged between 20 and 25 years of age than a young person who is 15 years of age.

As it is considered that AB presents very clearly as an adult well over the age of 18 years old, in line with guidance given in R(B) v Merton London Borough Council... and the ADCS Age Assessment guidance (2015 page 6) Kent County Council has not undertaken a prolonged enquiry or a full Merton case law compliant age assessment.”

16. In his witness statement Mr Carter from the Refugee Council explained that AB was measured and found to be 5 foot 1 inch in flip flops. He stated:

“Based on my observations of AB over the course of the whole day I do not believe he is over the age of 18. His height and build was slight even for a 15 year old boy. I do not agree that his body hair is abnormal for an Afghan boy of his claimed age. His behaviour outside of an interview setting appears to me to be in line with other Afghan 15 year olds I have spent time with, particularly his reluctance to be alone without distraction and his polite manner in approaching me and requesting things. He was irritable later in the day but I interpreted this not as maturity but rather immaturity combined with extremely high levels of fatigue from being constantly woken and interviewed. From the discussion I had with him regarding his age, all of the information which he gave was consistent and matched up with his given age. I have no reason, based on my interactions with AB, using my past experience, to disbelieve that he is 15. Further to this I do not believe that it is possible to make a definitive assessment of a young person’s age in the circumstances in which I saw AB. His extreme fatigue will certainly have influenced his mannerisms, interactions with others and usual presentation. The effects of his journey to the UK, likely lack of access to hygiene, poor nutrition and possible semi starvation, were still very much present and these factors are known to cause minors to present as older. As well as this he was in a location surrounded by adults (as he likely was before arriving also) so it would be impossible to observe how he behaved around other individuals of his own age or how that might differ from how he interacted with adult professionals”.

17. The initial decision by Derby County Council, dated 2 August 2019 is recorded on a pro forma document:

*“Is the person presenting clearly and obviously child? No
Is the person presenting clearly and obviously an adult? No...*

...

Conclusions

It is not clear and obvious based on your appearance that you are either an adult or a child. The information that you have provided has inconsistencies that you were unable to explain and therefore to ensure a fair service, it was deemed necessary

to conduct a Merton compliant age assessment to allow a thorough assessment of your age.”

Legal Framework

18. The law requires a wholly different treatment of young asylum seekers depending on whether they have passed their eighteenth birthday. This is of course in itself an entirely artificial and inflexible dividing line, bearing little relationship to human reality but it is built into the structure of not only domestic law but international law in this area and it has to be applied as best as can be (Underhill LJ in *BF(Eritrea) v Secretary of State for the Home Department* [2019] EWCA Civ 872 at §52). Thus: a number of rights and obligations under the Children Act depend upon the distinction. Local authorities are under a general duty to safeguard and promote the welfare of children within their area who are in need (section 17). This includes the provision of accommodation (s20). ‘Child’ means a person under the age of eighteen (s105). It is unlawful for the Secretary of State to detain asylum seeking children.
19. It is common ground that assessing the age of unaccompanied children entering the UK and seeking asylum is a challenging process. There is no reliable test to establish age. The difficulties are greater the closer to eighteen years an applicant is. Both parties point to legitimate concerns about the process getting it wrong. Unaccompanied asylum seeking children are some of the most vulnerable children in the country. The consequences for a child who is wrongly assessed as an adult are profound. They will be denied accommodation and care by the local authority. They may find themselves detained by the Home Office. Conversely, however, social workers are justifiably concerned about the implications of taking an unknown adult into their care and potentially placing them with vulnerable children. Furthermore, age assessments take up scarce resources and time. For some local authorities, like Kent Council, the difficulties are particularly acute because many of the unaccompanied child migrants and refugees arrive in the UK through the Port of Dover.
20. There is no statutorily prescribed way in which local authorities are obliged to carry out age assessments. The Courts have given guidance as to the approach to be taken beginning in the leading case of *R (B) v London Borough of Merton* [2003] 4 All E.R. 280; [2003] EWHC 1689 (Admin) and built upon in subsequent caselaw. This has led to the term “Merton compliant” to refer to an interview or assessment process which complies with necessary safeguards of inquiry and fairness.
21. Counsel were agreed that the list below sets out the relevant guidelines as they currently stand. The list is an amalgamation of the requirements in *Merton* and subsequent caselaw, summarised in *VS v The Home Office* [2014] EWHC 2483 (QB) and the summary in the most recent relevant Home Office guidance (“Assessing Age” 23 May 2019). For ease of reference I have grouped the guidelines into headings as follows:
 - Purpose of the assessment*
 - (1) The purpose of an age assessment is to establish the chronological age of a young person.
 - Burden of proof and benefit of the doubt*
 - (2) There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child.

- (3) The decision needs to be based on particular facts concerning the particular person and is made on the balance of probabilities.
- (4) There is no burden of proof imposed on the applicant to prove his or her age.
- (5) The benefit of any doubt is always given to the unaccompanied asylum-seeking child since it is recognised that age assessment is not a scientific process.

Physical appearance and demeanour

- (6) The decision maker cannot determine age solely on the basis of the appearance of the applicant, except in clear cases.
- (7) Physical appearance is a notoriously unreliable basis for assessment of chronological age.
- (8) Demeanour can also be notoriously unreliable and by itself constitutes only '*somewhat fragile material*'. Demeanour will generally need to be viewed together with other things including inconsistencies in his account of how the applicant knew his/her age.
- (9) The finding that little weight can be attached to physical appearance applies even more so to photographs which are not three-dimensional and where the appearance of the subject can be significantly affected by how photographs are lit, the type of the exposure, the quality of the camera and other factors, not least including the clothing a person wears.

Conduct of the assessment

- (10) The assessment must be done by two social workers who should be properly trained and experienced.
- (11) The applicant should be told the purpose of the assessment.
- (12) An interpreter must be provided if necessary.
- (13) The applicant should have an appropriate adult, and should be informed of the right to have one, with the purpose of having an appropriate adult also being explained to the applicant.
- (14) The approach of the assessors must involve trying to establish a rapport with the applicant and any questioning, while recognising the possibility of coaching, should be by means of open-ended and not leading questions. Assessors should be aware of the customs and practices and any particular difficulties faced by the applicant in his home society.
- (15) The interview must seek to obtain the general background of the applicant including his family circumstances and history, educational background and his activities during the previous few years
- (16) An assessment of the applicant's credibility must be made if there is reason to doubt his/her statement as to his/her age.
- (17) The applicant should be given the opportunity to explain any inconsistencies in his/her account or anything which is likely to result in adverse credibility findings.

Preliminary decision

- (18) An applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him. It is not sufficient that the interviewing social workers withdraw to consider their decision, and then return to present the applicant with their conclusions without first giving him the opportunity to deal with the adverse points.

The decision and reasons

- (19) In coming to the conclusion the local authority must have adequate information to make a decision independent of the Home Office's decision.
- (20) Adequate reasons must be given.
- (21) The interview must be written up promptly.

22. In BF (Eritrea) v Secretary of State for the Home Department [2019] EWCA Civ 872, the Court of Appeal considered the Secretary of State's then policy that claims by asylum seekers that they are under 18 should be accepted unless "their physical appearance/demeanour very strongly suggests they are **significantly** over 18 years of age and no other credible evidence appears to the contrary" (emphasis as in the original policy). The Court of Appeal held that the policy did not properly identify the margin of error inherent in the conduct of initial assessments of the kind with which the Court was concerned and which tended to depend primarily on physical appearance/demeanour:

55. *...there would be cases where it is so obvious, even on an initial assessment of appearance and demeanour, that a person was over 18 that to treat them as a child would be unjustified. That is of course also in line with the observations of Stanley Burnton J in Merton...*

56. *...it cannot be illegitimate for the Secretary of State to have a policy which requires immigration officers to make a detention decision on the basis of an initial assessment of the age of young asylum-seekers in circumstances where a Merton-compliant assessment is not available and there is no objective evidence of age, even though such an assessment may of necessity be confined to an assessment of appearance and demeanour...*

57. *That, however, is only half the story. If it is legitimate for the Secretary of State to make an initial decision based on appearance and demeanour only, it is incumbent on him to ensure so far as possible that such decisions take fully into account the wide margin of error which such decisions will necessarily involve, so that only those young people whose claims to be under 18 are obviously false are detained: in other words, anyone claiming to be a child must be given the benefit of the doubt..."*

23. In his judgment, Lord Justice Underhill cited the margin of error in age assessments as five years. He stated that statistical evidence adduced before the Court demonstrating that immigration officials 'wrongly' assessed children as being over eighteen on an initial assessment in 23% of cases could not be wholly ignored. In his concurring judgment, Lord Justice Baker found "considerable support" from the statistical evidence provided to the Court in coming to the view that the Secretary of State's policy was unlawful.
24. In response to the Court's decision the Home Office has issued revised Home Office guidance (23 May 2019) which requires immigration officials to treat those claiming

to be under eighteen as their claimed age unless their physical appearance and demeanour “very strongly suggests they are 25 years or over”.

Grounds of challenge

25. There were four grounds of challenge to the age assessment by Kent Council:

- (1) The age assessment was procedurally unfair and lacked a number of appropriate safeguards (e.g. failing to provide an appropriate adult; failure to account for cultural, racial and social differences).
- (2) The Council should have conducted a Merton compliant assessment.
- (3) The assessment was unreasonable, irrational, unreliable and failed to give sufficient consideration to material evidence and facts, and failed to give reasons.
- (4) The Defendant’s assessment was wrong as a question of fact. The parties were agreed that the factual assessment of AB’s age should be transferred to the Upper Tribunal. They could not agree, however, whether permission had been granted for this aspect of the claim. I return to the point below.

Submissions of the Claimant

26. On behalf of the Claimant, Mr Rule submitted that the Defendant’s ‘peremptory, short form’ negative assessment was, in essence, ‘a decision to undertake no assessment at all’. As a matter of principle, local authorities should not be able to pick and choose amongst the Merton safeguards and conduct a ‘Merton lite’ assessment for young people who appear to be under the age of twenty-five. A local authority should only be able to restrict itself to a short form Merton assessment where the initial assessment comes to the view that the person in question is twenty-five years or above. In BF(Eritrea) v SSHD [2019] EWCA Civ 872, the Court of Appeal found that reliance on physical appearance and demeanour was unlawful without recognition of the margin of error in any such initial assessments by Home Office officials. Mr Rule pointed to the Secretary of State’s policy response which requires immigration officials to treat a young asylum seeker as a child unless they present as 25 years or over.

27. The dangers of the local authority’s approach were evident in the treatment of AB. Social workers woke him up shortly after an arduous journey to conduct a relatively brief interview. They did not explain the purpose of their assessment; failed to provide an appropriate adult, failed to make proper inquiries; failed to take account of cultural, racial and social considerations and failed to take account of the view of a representative from the Refugee Council that the Claimant was presenting consistently with the age he claimed. Their peremptory assessment arrived at the decision that AB was twenty – twenty-five years old. This was within the five – seven year margin of error acknowledged in the caselaw and the Council should therefore have gone on to conduct a full Merton compliant assessment.

Submissions on behalf of the Defendant

28. On behalf of the Defendant Ms Rowlands submitted that in many cases it is sufficiently clear that an applicant is not a child without the need for a full Merton compliant assessment. The degree of investigation required will depend on the obviousness of the case. Where an experienced social worker in the course of investigation arrives at a point where he/she is satisfied that the applicant is over

eighteen then he/she should not be required to carry on with the full Merton assessment, for the sake of it. In such cases a short form assessment should suffice, as is clear from the judgment in Merton itself in which Stanley Burnton J referred to cases where it is very obvious that a person is under or over 18 and where there is normally no need for prolonged inquiry. Any such short form assessment would be subject to general judicial review principles.

29. The analysis of the Court of Appeal in BF(Eritrea) v SSHD was not applicable to the present case. BF Eritrea was about Home Office guidance and ‘on the spot’ initial decisions by immigration officials with less expertise than local authority social workers. The five year margin of error identified by the Court of Appeal in that case should not apply to local authorities who are conducting more in depth enquiries with greater expertise.
30. The question the Local Authority social worker should ask him/herself in every case was whether he/she is sure that the person in front of him is a child. This should be left to the discretion of the experienced and competent social worker on a case by case basis. The Court should be cautious in ruling that everyone under twenty five should be treated as a child and undergo a full Merton assessment because any such decision will have significant impact on Councils like Kent. The cost of full Merton compliant assessments and accommodation pending the conclusion of the assessment is considerable.

Discussion

The law

31. When deciding to treat a young person as an adult instead of a child in circumstances where the young person is claiming that he or she is a child, the decision maker is under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person’s age. Failure to discharge this duty lawfully gives rise to a public error of law rendering the decision unlawful (Secretary of State for Education and Science v Tameside MBC [1977] 1 AC 1014).
32. The law now proceeds on the basis that the most reliable means of assessing the age of a young person in circumstances where no documentary evidence is available is by a so-called “Merton compliant” assessment (See Underhill LJ in BF(Eritrea) at §53). The guidelines constitute a judge developed code, laid down in the leading case of Merton, and built upon in subsequent caselaw. I have summarised them at paragraph 21 above. In Merton Stanley Burton J characterised the guidelines as “safeguards of minimum standards of inquiry and fairness” (§36). In BF (Eritrea) the Court of Appeal referred to a Merton compliant assessment as ‘providing a sophisticated and disciplined form of subjective assessment’.
33. In Merton, Sir Stanley Burnton recognised that there may however be obvious cases where prolonged inquiry is unnecessary:

“[27] Of course, 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; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.”

34. In the course of his analysis Stanley Burnton J observed that cases will vary from those in which the answer is obvious to those in which it is far from being so and the level of inquiry unnecessary in one type of case will be necessary in another (§50). The court should be careful not to impose unrealistic and unnecessary burdens on those required to make age assessment decisions. Judicialisation of what are relatively straightforward decisions is to be avoided (§50). In BF (Eritrea) Lord Justice Underhill cited Sir Stanley Burton’s reference to ‘obvious’ cases in Merton in his conclusion that it was not illegitimate for the Home Office to have a policy of initial assessments.
35. In this context, I accept the force of Ms Rowlands’ submission that there may come a point when an experienced social worker considers they have conducted sufficient inquiries to be confident that the person in front of them is either an adult or a child. I accept her submission that it would be pointless to nonetheless require the continuation of the inquiry process to achieve full Merton compliance simply for the sake of form. In any event, Mr Rule’s submissions before me did not seriously dispute the principle of an abbreviated assessment but focussed on the circumstances in which it would be permissible.
36. In his judgment Stanley Burnton J set out the limitations of an assessment based on physical appearance and/or demeanour. Age cannot be determined solely on the basis of appearance except in clear cases (§37). The appearance and demeanour of an applicant may justify a provisional view that he is indeed a child or adult (§38). The difficulties of assessing age are compounded when the young person is of a different ethnicity and culture (§24). Given the impossibility of any decision-maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true (§28). His judgment refers to guidance from the Royal College of Paediatricians that the margin of error in age assessments can sometimes be as much as 5 years either side (§22).
37. These limitations have been well canvassed in subsequent caselaw. For example; physical appearance is a notoriously unreliable basis for assessment of chronological age: NA v LB of Croydon [2009] EWHC 2357 (Admin) per Blake J at §27. Demeanour by itself constitutes only ‘*somewhat fragile material*’ (NA per Blake J at §28).
38. Subsequent caselaw has introduced the concept of ‘the benefit of doubt’ to reflect the imprecision of age assessments:
- “...Since there is no scientific proof available and the final decision involves the exercise of a judgement, it is never possible to be sure that the decision in a given case, particularly where an individual is close to 18, is factually correct. But perfection is unattainable and the approach adopted by the Secretary of State that, if the decision-maker is left in doubt, the claimant should receive the benefit of that doubt is undoubtedly proper”* [A v LB Croydon; WK v Kent County Council [2009] EWHC 939 (Admin) per Collins J at §9]

“We conclude on reviewing the case law that application of the benefit of the doubt is nothing more than an acknowledgement that age assessment cannot be concluded with 100% accuracy,

absent definitive documentary evidence and is in the case of unaccompanied asylum seeking children who may also have been traumatised, unlikely to be supported by other evidence. On that basis its proper application is that where having considered the evidence the decision-maker concludes there is doubt as to whether an individual is over 18 or not, then in those circumstances the decision-maker should conclude that the applicant is under 18.”

(AS v Kent County Council [2017] UKUT 00446 (IAC) at §20)

39. Counsel were agreed that I should attach weight to decisions by the Upper Tribunal in this area given its particular experience in assessing the age of applicants.
40. In BF (Eritrea) v Secretary of State for the Home Department [2019] EWCA Civ 872, the Court of Appeal expressed the ‘benefit of the doubt’ given to applicants by reference to the margin of error inherent in initial assessments by Home Office immigration officers, based primarily on physical appearance and demeanour.
41. Ms Rowlands sought to distinguish BF(Eritrea) from its application to abbreviated assessments by local authorities. She contrasted the initial ‘on the spot’ assessment by immigration officials in BF(Eritrea), with the more in-depth, albeit abbreviated, assessment by local authorities in which a decision is taken whether or not to move to full Merton compliance and cited the greater expertise of local authority social workers in assessing age.
42. I accept that Home Office policy acknowledges the greater expertise of local authorities through their experience of working with children (Home Office Guidance Assessing Age May 2019 page 64). Their expertise was recognised by the Court in A v Croydon LBC [2010] 1 FLR 193, which also made express reference to the particular expertise of a small number of local authorities like Kent Council because many migrants arrive through Dover or one of the channel ports in Kent (§7). However their expertise must be considered in the context of an assessment based on physical appearance and demeanour. I was referred to the Upper Tribunal decision in AM v Solihull Metropolitan Borough Council (AAJR [2012] UKUT 00118 (IAC):

“...we find it difficult to see that any useful observations of demeanour or social interaction or maturity can be made in the course of a short interview between an individual and a strange adult. There may of course be cultural difficulties in such interview but there are the ordinary social difficulties as well.

The asserted expertise of a social worker conducting an interview is not in our judgement sufficient to counteract these difficulties. 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 (§19 – 20).”
(decision of Mr Ockelton Vice President and Upper Tribunal Judge Peter Lane).

43. In my judgment, recognition of the margin for error in an abbreviated assessment of age based on physical appearance and demeanour is of broader application than Ms

Rowlands sought to suggest in her submissions. It stems from the well recognised difficulty in assessing the age of young people in the absence of documentary evidence, a difficulty that becomes ever greater the closer the person is to eighteen years. It is a reflection of the established understanding that physical attributes and demeanour are fragile material on which to base an assessment of age. In this respect it embodies the ‘benefit of the doubt’ being given to applicants, which Ms Rowlands did not dispute. It is consequent upon Sir Stanley’s Burton’s observation that Merton compliant assessments satisfy minimum standards of inquiry and fairness. It is moreover an aspect of the general principle of judicial review that a decision maker is under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person’s age when deciding to treat a young person as an adult instead of a child in circumstances where the young person is claiming that he or she is a child (Secretary of State for Education and Science v Tameside MBC [1977] 1 AC 1014). In addition, it is necessary on grounds of fairness to reflect the determinative role of the assessment by the local authority, which is often then relied upon by the Home Office and the significance of the outcome of an assessment for an individual asylum seeker.

44. Accordingly, whilst it may be legitimate for a local authority to assess age based on an abbreviated assessment of physical appearance and demeanour, it is incumbent on the authority to ensure that any such decision takes into account the margin for error in the abbreviated nature of the assessment.
45. Mr Rule sought a ruling from the Court that, as a matter of principle, an initial assessment, based on physical attributes and demeanour, should not be treated as determinative by the local authority unless it concluded that the person in question was twenty five years or over. In response, Ms Rowlands contended that this would radically alter the way in which local authorities currently conduct assessments (using the benchmark of eighteen years) and would have significant resource and cost implications for a local authority like the Defendant.
46. In Merton, Sir Stanley Burton warned against judicialisation of relatively straightforward decisions. In BF(Eritrea), the Court of Appeal did not consider it appropriate to specify the margin of error in relation to initial age assessments by Home Office officials. I have not been provided with any evidence of local authority practice in this regard; the resource implications of any such change or any statistical evidence of the sort before the Court of Appeal in BF (Eritrea). Accordingly, I do not consider it appropriate for this Court to specify a permissible margin of error for initial assessments by local authorities based on physical appearance and demeanour, not least, it seems to me, because the margin of error may depend on the circumstances of the assessment.

Application of the law to the facts

47. Kent Council assessed AB’s age as between twenty – twenty five years based on his physical appearance and demeanour. It is common ground the assessment did not comply with the full panoply of procedural safeguards required for a ‘full’ Merton compliant assessment. In her statement, Ms Mead, one of the two social workers assessing AB considered his age was ‘around’ twenty – twenty one years old.
48. Mr Carter from the Refugee Council did not agree with the Council’s assessment of AB’s age. He has experience of working with minors and adults in Greece and Northern France (Calais/Dunkirk). His witness evidence says he spent extended periods of time with Afghan minors. Mr Carter’s assessment was based, in part,

specifically on the physical appearance of Afghan boys. In contrast, the analysis in the Defendant's decision letter makes no reference to the cultural specifics of Afghan boys. This is despite the acknowledgment in the judgment in Merton that the margin for error in age assessment increases when the young person in question is of an ethnicity, culture, education and background that are foreign and unfamiliar to the decision maker (§24).

49. The decision letter refers to “*AB appears to be accustomed to his current body shape/size which indicates to me that he is a young person who has already progressed some time ago through puberty and his physical development to adulthood*”. Yet, as Collins J queried in A and WK v London Borough of Croydon and others [2009] EWHC 939 (Admin) at §56:

“ . . . What is meant by the observation that he appeared to be comfortable in his body? It is difficult to follow what this does mean and how a discomfort with a changing body can manifest itself. ... ”

50. The assessment refers to AB presenting as “*irritated by the questioning*”. It is not clear to me how far this advances the decision making. As Mr Rule commented in his submissions, both children and adults can get irritated. Moreover, Mr Carter said in his witness statement that he regarded AB's irritation as a sign of his immaturity combined with high levels of fatigue from being constantly woken up and interviewed.
51. Mr Carter assessed AB's explanation of how he knew he was fifteen years old as credible. The Council's interview note demonstrates that AB was asked for an explanation of how he knew his age. His credibility was not however mentioned in the decision letter, despite the exhortation from Stanley Burnton J in Merton that:

“Given the impossibility of any decision-maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16–20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision-maker in such a case to decide that the applicant is a child.”
(§28)

52. Subsequently, in these proceedings, the Council and Ms Rowlands sought to suggest that AB had been inconsistent in his account. On my reading of the interview note, there appear to be no obvious inconsistencies in his account and the allegation was not seriously pursued by Ms Rowlands.
53. A number of Mr Rule's criticisms about the conduct of the assessment amounted, in effect, to a complaint that it was not Merton compliant which cannot of themselves have force given I have concluded that it may be legitimate for an authority to conduct an abbreviated assessment. However, the social workers appear to have asked questions of AB designed to test his credibility but not then come to a view on the issue in the decision letter. Similarly, AB provided details of an uncle who might be able to verify his age and a phone number. I accept Ms Rowlands' submission that this could not feasibly be followed up in the abbreviated assessment because it would be difficult to verify who was at the end of the phone in the event that anyone answered a call. Nonetheless, the decision not to follow up on potential relevant

evidence or to come to a view on AB's credibility ought, it seems to me, to be reflected in an acknowledgement of the margin for error in not doing so.

54. Further, Mr Carter was of the view that it was not possible to make a definitive assessment in the circumstances in which AB was assessed. In his statement he said he spent most of the day with AB on 26 July and described AB as following him around to the kitchen and his excitement on seeing an Xbox. The guidance on age assessment published by the Association of Directors of Children's Services (ADCS) (October 2015) written by specialist social workers and practitioners from local authorities and refugee and legal sectors sets out best practice for age assessments. It states as follows:

"Information from other sources

Foster carers, key workers, social care workers, advocates, teachers and college tutors may be involved in working with a child... and they are likely to have high levels of contact with the child or young person. Their observations of children and young people in different settings and interactions with peers and other adults can make a useful contribution to your assessments. It is good practice to gather the information available prior to conducting the age assessment interviews with the child or young person.

You will need to consider the weight given to different sources of information. For example you may attach greater weight to the views of a professional who has worked with a number of asylum seeking children and young people from the same country of origin as a child or young person being assessed than you would to someone who has no previous experience of unaccompanied asylum seeking children and young people."

55. In her submissions, Ms Rowlands sought to justify the failure of the Council to take account of Mr Carter's views on the basis that the Refugee Council's role to support refugees meant Mr Carter had already decided that AB was to be believed. This does not seem to me to be a helpful way to characterise Mr Carter's views. He is a professional with relevant experience of Afghan boys. The Merton guidelines stipulate that the assessment process should not be based on any predisposition to assume an applicant is an adult and it is a process in which the applicant is entitled to the benefit of any doubt as to his age. In any event, the Defendant's decision letter makes no reference to Mr Carter's views or why they were not considered to be meritorious. I am not however persuaded by Mr Rule's criticisms of Mr Stringer's conduct or his submission that the location of the interview was inappropriate.
56. The Council's decision letter contains no express acknowledgement of the margin for error in its assessment. Nonetheless, Ms Rowlands pointed to the conclusion that AB presented as twenty – twenty five years and said this was consistent with any requirement to acknowledge the margin for error and appropriate in the circumstances of this case. However, given the potential margin for error identified above, I am of the view that Kent Council should have given AB the benefit of the doubt and conducted a Merton compliant assessment. Ms Mead assessed AB as 'around' twenty to twenty one years. The formal decision assessed him at twenty – twenty five years. In the circumstances of this abbreviated assessment, the assessed

age is too close to the cut off of eighteen years for the Council not to give AB the benefit of the doubt.

Conclusion

57. For the reasons given above, the Defendant's assessment of AB's age, based on his physical appearance and demeanour, was unlawful because the abbreviated assessment failed to adequately acknowledge the potential margin for error and give AB the corresponding benefit of the doubt.

Relief

58. Counsel were agreed that I should make an order requiring Kent Council to conduct a full Merton assessment in the event I found in favour of AB. I therefore do so. Mr Rule submitted that the existing assessment should be quashed given its flaws. Ms Rowlands submitted that the Court should be pragmatic and recognise that it exists and provides relevant material for the assessment process to build on. Providing the limitations of the assessment set out in this judgment are recognised, I accept it provides relevant material for the local authority to build upon. Accordingly, I decline to quash the assessment. There was no suggestion before me that I should grant a declaration that AB's date of birth is 21 July 2002 (as sought in the grounds of challenge) as this will be a matter of fact for the Upper Tribunal to determine. The parties were however disagreed on whether permission had been granted by Nicklin J to transfer the matter to the Upper Tribunal for the fact finding exercise. I accept Mr Rule's submission that it seems hard to see why the Judge would not have granted permission for this aspect of the claim given his order grants permission for the claim generally and given he was taken to caselaw setting out the test for the grant of permission for a fact finding exercise by the Upper Tribunal. Nonetheless, to the extent it is necessary to do so, I grant permission and invite the parties to agree directions on the transfer to the Upper Tribunal.