



Neutral Citation Number: [2019] EWHC 3221 (Admin)

Case No: CO/1978/2019

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26 November 2019

Before :

DAN SQUIRES QC
SITTING AS A DEPUTY HIGH COURT JUDGE

Between :

The Queen on the application of **Claimant**
HBTN
(by her litigation friend, Francesco Jeff of the
Refugee Council)

- and -

Sunderland City Council **First Defendant**

-and-

Stockton Council **Second Defendant**

-and -

Secretary of State for the Home Department **Interested Party**

Antonia Benfield (instructed by **Instalaw Solicitors**) for the **Claimant**
Joshua Dubin (instructed by Together for Children Sunderland) for the **First Defendant**
Sian Davies (instructed by Stockton Borough Council Legal Services) for the **Second Defendant**
Nicholas Ostrowski (instructed by the Government Legal Department) for the **Interested Party**

Hearing dates: 13 November 2019

Approved Judgment

Dan Squires QC sitting as a Deputy High Court Judge:

Introduction

1. The Claimant is a Vietnamese national. She claims she is a child. She was subject to an age assessment by a local authority in the north east of England earlier this year but is not sure which authority conducted the assessment and did not retain a copy of it. On 11/12 February 2019, Sunderland City Council (“Sunderland”) conducted an age assessment of a vulnerable young Vietnamese woman giving the same birth date, but a slightly different name, to the Claimant, and who Sunderland concluded was an adult.
2. The judicial review claim has been brought because a dispute arose as to whether the assessment of 11/12 February 2019 was of the Claimant or someone else. Sunderland’s position was that it did not believe that the assessment it conducted was of the Claimant and refused to disclose it to her. Stockton Council (“Stockton”), into whose area the Claimant had by then moved, along with the Home Office, considered that Sunderland had conducted an age assessment of the Claimant, and that she should be treated as an adult on the basis of that assessment. The dispute between the authorities matters. If it was the Claimant who Sunderland assessed, it is accepted by the parties that, should she wish to claim that she is entitled to support or accommodation as a “child” pursuant to the Children Act 1989, the Claimant will need to issue proceedings against Sunderland challenging its age assessment. If Sunderland had not assessed the Claimant, it is accepted that, as the Claimant is now residing in Stockton, Stockton Council may owe her duties under the Children Act, and, if it considered there is a significant doubt about her claimed age, would need to conduct an age assessment for itself.
3. I am grateful to the parties for their submissions and grateful to counsel for the clear and helpful way the rival cases were put orally and in writing.

Factual background

4. The Claimant is Vietnamese. She claims she was born on 26 November 2002 and is thus aged 16 and a child. She states she was trafficked into the UK in 2018 and then held for approximately 2-3 months before coming to the attention of the police. She states that she was arrested by the police and taken to a police station whereupon she was referred to the social services department of a local authority, though she was not aware at the time which authority it was. According to the Claimant she was then subject to an age assessment.
5. On 11 February 2019 a vulnerable Vietnamese girl/young woman was referred by Northumbria Police to Together for Children Sunderland (“TfCS”), an arm’s length provider of children’s services to the First Defendant authority. The girl/young woman was subject to an age assessment by TfCS. She had a similar name to the Claimant and gave her date of birth as 26 November 2002, the same as the Claimant. The girl/young woman, who as set out below may or may not be the Claimant, has been referred to in these proceedings as “P”.
6. TfCS’ social workers had “no doubt that [P had] experienced exploitation and possible sexual abuse or trafficking for work purposes” and was “in need of support”, but they

concluded that she was “20+” rather than aged 16 as she claimed. According to Sunderland’s Summary Grounds of Opposition, P left the premises before the social workers could provide her with a copy of the typed age assessment, and the Claimant did not retain a copy of the assessment that was conducted in relation to her.

7. On 20 February 2019 officers from the Home Office’s North East and Cumbria Immigration Enforcement were notified that a Vietnamese female had been arrested for immigration offences. It is not disputed that that person was the Claimant. Home Office Immigration Officers made contact with Sunderland Social Services and on 21 February 2019 were forwarded a copy of the age assessment of P. The relevant Chief Immigration Officer at the Home Office was satisfied, on receipt of the assessment of P, that the person arrested and P were the same person.
8. On 22 February 2019 the Home Office wrote to the Claimant. They noted that she had applied for asylum and given her date of birth as 26 November 2002. It was stated that she had not provided evidence to substantiate the claim as to her age, and that, furthermore, “a ... local authority age assessment has been conducted with a conclusion that you are 18 years old or over, which has been accepted by the Home Office.” On that basis the Home Office treated the Claimant as “an adult claimant for asylum” and placed her in adult accommodation.
9. On 13 March 2019 the Claimant was referred to solicitors by the Refugee Council. The Council had concerns about the Claimant’s young age and the unsuitability of the adult accommodation in which she was then residing. Her solicitor sent a letter to the Home Office on 14 March 2019 requesting disclosure of the age assessment being relied on by the Home Office and/or the name of the local authority who carried it out. The Home Office did not respond and on 19 March 2019, the Claimant’s solicitor sent a letter before action. On 27 March 2019, the Claimant issued a claim for judicial review against the Home Office challenging the failure to provide the requested information. On 28 March 2019, the Home Office informed the Claimant that it was Sunderland that had conducted the age assessment it was relying on. The judicial review was discontinued.
10. The Claimant’s solicitors wrote on 2 April 2019 to Sunderland setting out the information provided by the Home Office and requesting disclosure of the age assessment it had conducted. They gave the Claimant’s name and the date of birth of 26 November 2002. Sunderland responded the same day stating that they had no record of the Claimant. As set out below, it appears that was because, although the young woman assessed on 11/12 February 2019 gave the same date of birth as the Claimant, her name, while similar, was differently recorded to the Claimant’s name.
11. On 8 April 2019, the Claimant’s solicitor wrote a further letter to Sunderland stating that additional information had been received from the Home Office which disclosed a different spelling of the Claimant’s name.
12. On 9 April 2019 the Claimant’s solicitors chased Sunderland for a response. Sunderland wrote on 9 April stating that they were reviewing the information and would revert as soon as possible.
13. On 11 April 2019, the Claimant’s solicitor sent a letter before claim to Sunderland challenging its failure/refusal to provide the Claimant with support and accommodation

under the Children Act 1989, and, further, challenging the failure to conduct a lawful age assessment. Sunderland did not respond to the letter nor did it revert, as it said it would, to the Claimant's solicitors in response to their letters of 8/9 April 2019.

14. The Claimant, meanwhile, was by then residing in the area for which Stockton was the responsible local authority. On 4 April 2019, the Claimant's solicitor sent a letter to Stockton seeking support and accommodation for the Claimant as a putative child under the Children Act 1989. No response was received. On 8 April 2019, a letter before claim was sent to Stockton. On 10 April 2019, Stockton replied. They stated that enquiries had been made with the Home Office to establish the whereabouts of any age assessment of the Claimant. Stockton noted that if an assessment has already been completed by another local authority, Stockton would need to see it before making any provision for the Claimant.
15. On 17 May 2019 the Claimant issued judicial review proceedings against both Sunderland and Stockton. As at that date the position was that Sunderland had not disclosed to the Claimant the age assessment it had conducted and which the Home Office believed related to the Claimant. Stockton meanwhile considered it had no duty, under the Children Act 1989, to provide accommodation or support for the Claimant, or to assess her, because she had already been assessed by Sunderland. The Claimant's challenge was as follows:
 - i) In relation to Sunderland the Claimant noted that she had been subject to an age assessment but was not aware which local authority had conducted it. She noted that the Home Office considered that Sunderland had conducted an age assessment of her and concluded she was an adult and that the Home Office was therefore treating her as such. Without seeing the age assessment, however, the Claimant could not tell if it related to her. She stated that she had thus been put in the "invidious position" of being treated as an adult on the basis of an age assessment she could not challenge. She claimed: "if Sunderland has conducted an assessment of the Claimant's age [it] acts unlawfully and unreasonably in failing or refusing to disclose that assessment".
 - ii) In relation to Stockton, the Claimant claimed that it was aware that Sunderland's position was that the Claimant was not known to them. The Claimant claimed that in those circumstances, and where neither Sunderland nor the Home Office were willing or able to disclose the relevant age assessment, it was incumbent on Stockton to determine, for itself, whether the Claimant was a child in its area, and whether she was in need.
16. On 22 May 2019, Rowena Collins Rice, sitting as a Deputy Judge of the High Court, granted interim relief. She required Stockton to accommodate and support the Claimant as a person of her claimed age pending determination of the permission application. She also granted anonymity.
17. Sunderland submitted Summary Grounds of Opposition on 7 June 2019. It accepted it had carried out an age assessment of a vulnerable young woman, "P", on 11/12 February 2019. It was noted, however, that there were a number of variations of names and dates of birth given in relation to P and the Claimant. Sunderland also noted a series of differences between the account given of her life in the Claimant's witness statement of 9 May 2019, submitted in support of her judicial review application, and the account

given by P when she was subject to age assessment. Those differences related to where the Claimant lived, whether her parents were alive or dead, how she came to leave Vietnam and how she travelled to the UK. It was said, on that basis, that Sunderland did not believe that the Claimant was P. It was further said that Sunderland had concerns that, by giving the same date of birth as P and a similar name, the Claimant “may be seeking to adopt P’s identity in order to obtain services to which she would not otherwise be entitled”. It was further said that the information contained in P’s age assessment was private and confidential, and that it would breach P’s rights protected by Article 8 of the European Convention of Human Rights to disclose the assessment to the Claimant or to the court where it was not accepted that the Claimant and P were the same person.

18. Stockton submitted Summary Grounds of Opposition on 30 May 2019. It noted that where an age assessment of an individual has been conducted by one local authority, and it was concluded the individual was an adult, any challenge to the assessment should be made to the authority that conducted it. Stockton asserted that Sunderland had conducted an age assessment of the Claimant (albeit that there had been a misspelling of the Claimant’s name), and that Stockton therefore had no obligation to support or accommodate the Claimant as a child or conduct an age assessment of her. Its position was that any challenge in that regard should be directed at Sunderland.
19. On 13 June 2019 permission to bring judicial review proceedings was granted against both Defendants by Karen Steyn QC, sitting as a Deputy Judge of the High Court. She ordered the interim relief to continue pending determination of the claim and for the Secretary of State for the Home Department to be joined as an interested party. She also ordered that the Secretary of State disclose the assessment she had relied upon in concluding that the Claimant was an adult.
20. On 9 July 2019 the Secretary of State disclosed the age assessment of P which Sunderland had conducted on 11/12 February 2019.
21. On 1 November 2019 an unsigned witness statement was provided by the Claimant dealing with the age assessment of P (“the 1 November 2019 statement”). The statement is relevant for a number of reasons:
 - i) The Claimant explains in the 1 November 2019 statement that, after she arrived in the UK, she was held in the house of a man who knew her family, that she left after a few months and knocked on a nearby door seeking help. The woman who answered called the police. The Claimant states she was then taken to a police station and later interviewed by two women. That is identical to the explanation set out in P’s age assessment of how she came to the attention of the police and subsequently came to be interviewed by two female social workers from TfCS.
 - ii) The Claimant’s 1 November 2019 statement also deals with the various discrepancies identified by Sunderland between her witness statement of 9 May 2019, and what was said by P in her age assessment interview. The Claimant explained that in her age assessment interview she lied to the interviewers about how she came to the UK and in relation to whether her family members were alive. She says she did so because she was worried that if she told the truth she would be returned to Vietnam. In her 1 November 2019 statement she explains

that she told the women interviewing her that she came to the UK after meeting a man who “gave me cake and kidnapped me”, rather than the true account, set out in her 9 May 2019 statement, of being brought by agents.

- iii) The account the Claimant now gives of what she said in her age assessment interview is identical to the account recorded in P’s age assessment interview in terms of how she came to the UK. P is also recorded as stating in her interview that she came to the UK after being “kidnapped”. P stated that “she was sitting in the park, somebody came up to her and gave her a piece of cake she said that she ate it and did not know what happened.”
 - iv) The Claimant says in the 1 November 2019 statement that she told the women interviewing her that, before she left for the UK, she sold lottery tickets in South Vietnam. That too is recorded as having been stated by P during her age assessment interview.
 - v) The Claimant says in her 1 November 2019 statement that the details recorded in the age assessment of P are “very similar” to what the Claimant recalls telling the women conducting her age assessment. The Claimant also confirms in the 1 November 2019 statement that the physical description of P is similar to her, and, as indicated above, the date of birth recorded as having been given by P is that given by the Claimant.
22. It was confirmed by counsel for Sunderland during the course of the hearing that there is no other age assessment held by Sunderland that could correspond to the Claimant. The Claimant does not state definitively in her 1 November 2019 statement that the age assessment of “P” related to her, but I put to her counsel that, if the Claimant’s statement of 1 November 2019 is true, the overwhelming likelihood is that she and P are the same person. That was accepted. If the Claimant’s 1 November 2019 witness statement is true, it would take the most extraordinary coincidence for her to be anyone other than P. It would mean that at approximately the same time as an age assessment was conducted of the Claimant, another Vietnamese girl/young woman was encountered by another local authority in the north east of England in precisely the same circumstances and fitting her description. That young woman then not only gave the same date of birth as the Claimant and a similar name, but gave an identical account of, for example, having sold lottery tickets in South Vietnam, being given cake by an unidentified man and kidnapped and brought to the UK. That is very unlikely. The overwhelming likelihood, as the Claimant’s counsel accepted, was that if the 1 November 2019 statement accurately reflects what the Claimant said during her age assessment interview, she is describing the interview given by P.
23. I say that all of that applies if the 1 November 2019 witness statement is true. That is not to suggest that the Claimant is lying in the statement. Indeed, if anything, the statement is unhelpful to the Claimant insofar as she is seeking to argue that she is a child. That is because it appears from her 1 November 2019 statement that she was almost certainly the person assessed by Sunderland on 11/12 February 2019 as being an adult. As counsel for Sunderland pointed out, however, the 1 November 2019 statement is unsigned and it has not been subject to cross-examination. The statement was made by the Claimant having seen P’s age assessment and could have been tailored to respond to it. It is also the case that the Claimant now accepts that there was significant information she provided in her own age assessment which was untrue (such

as being kidnapped and brought to the UK and her parents being deceased). In my view Sunderland is entitled to assert that, without being able to probe the veracity of the 1 November 2019 statement and to question the Claimant on the different accounts she has given, I should not make a concluded factual finding as to whether the Claimant was, indeed, the person assessed by Sunderland on 11/12 February 2019. Sunderland further assert that that is not a matter before me given the pleaded case, nor is it something appropriate for resolution in judicial review proceedings. For the reasons set out further below, I consider those submissions to be correct.

Material legislation and policy

Children Act 1989 (“CA 1989”)

24. A “child” is defined by section 105 of the CA 1989 as a person under the age of 18.
25. Section 17(1) of the CA 1989 provides:

“It shall be a general duty of every Local Authority,

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

by providing a range and level of services appropriate to those children’s needs.”
26. Section 17(10) of the CA 1989 provides:

“For the purpose of this Part a child shall 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...”
27. Local authorities are under a duty to “take reasonable steps to identify the extent to which there are children in need within their area”: see paragraph 1(1) of Schedule 2 of the CA 1989.
28. Section 27 of the CA 1989 provides in relation to “co-operation between authorities”:

“(1) Where it appears to a local authority that any authority mentioned in subsection (3) could, by taking any specified

action, help in the exercise of any of their functions under this Part, they may request the help of that other authority specifying the action in question.

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

(3) The authorities are— (a) any local authority”

Relevant Guidance

Statutory guidance

29. The Department for Education has produced statutory guidance entitled “Care of unaccompanied migrant children and child victims of modern slavery”. It is dated November 2017 and is described as “Statutory guidance for [local authorities] and professionals who support unaccompanied migrant children, who may be victims, or potential victims, of modern slavery.” It was issued under section 7 of the Local Authority Social Services Act 1970, which requires local authorities “in the exercise of their social services functions ... [to] act under the general guidance of the Secretary of State”.

30. The guidance recognises in the introductory paragraphs the vulnerability of unaccompanied migrant children:

“1. Unaccompanied migrant children and child victims of modern slavery, including trafficking, can be some of the most vulnerable children in the country. Unaccompanied children are alone, in an unfamiliar country and may be surrounded by people unable to speak their first language. Modern slavery includes human trafficking, slavery, servitude and forced or compulsory labour. Exploitation takes a number of forms, including sexual exploitation, forced labour, forced criminality, begging, organ harvesting and domestic servitude and victims may come from all walks of life.

2. Unaccompanied children are likely to be uncertain or unaware of their rights and whom they should trust. They are at increased risk of going missing, often leaving the care of those who would protect them to return to traffickers who will continue their exploitation. All groups may have experienced emotional trauma in their country of birth, on their journey to the UK or through their treatment by adults in the UK.

3. Local authorities have a duty to protect and support these highly vulnerable children. Because of the circumstances they have faced, unaccompanied migrant children and child victims of modern slavery, including trafficking, often have complex needs in addition to those faced by looked after children more

generally. The support required to address these needs must begin as soon as the child is referred to the local authority or is found in the local authority area. It will be most effective where this support is provided through a stable, continuous relationship with the child.”

31. The guidance provides in relation to “age determination”:

“35. Many unaccompanied and trafficked children arrive in the UK without documentation or with forged or counterfeit documents. Where the age of a person is uncertain and there are reasons to believe they are a child, that person is presumed to be a child in order to receive immediate access to assistance, support and protection in accordance with section 51 of the Modern Slavery Act 2015. Where an age assessment is required, local authorities must adhere to standards established within case law. Age assessments should only be carried out where there is reason to doubt that the individual is the age they claim. Age assessments should not be a routine part of a local authority’s assessment of unaccompanied or trafficked children. Further advice and practice guidance can be found in the *Age Assessment Guidance*, published by the Association of Directors of Children’s Services (ADCS) in October 2015. It is also important to note that an ADCS – Home Office information sharing protocol has been produced.”

Non-statutory guidance

32. The Association of Directors of Children’s Services (“ADCS”), the leadership association for statutory directors of children’s services, produced guidance in October 2015 entitled “Age Assessment Guidance”. As Lavender J noted in *R (S) v London Borough of Croydon* [2017] EWHC 265 (Admin), the ADCS Guidance is not statutory but its authors have “considerable expertise in their field” (paragraph 41) and it will be relevant, at least, to any question of whether departures from the statutory guidance are justified (paragraph 50). It was not disputed before me that the ADCS Guidance is something I should take into account in evaluating the legality of the local authorities’ conduct in this case.
33. The ADCS Guidance provides at pp 20-21 in relation to “recording and sharing information”:

“At the beginning of the [age assessment] interview, it is good practice to explain to the child or young person how the information provided in the interview will be recorded and how the findings of the assessment will be shared with the Home Office.

The assessing social workers should have a clear plan about recording information. Records do not have to be verbatim, but should be sufficiently comprehensive to include all significant information. You should record whether and how the young

person has indicated they understand the purpose of the assessment, the interpreter and the role of the appropriate adult. You should raise issues concerning accuracy or consistency as soon as possible so that clarification can be sought and noted by you and the appropriate adult.

You should advise the child or young person that after the conclusion of the assessment, they will be given the outcome of the age assessment in writing, including information about how they may challenge the decision. If the child or young person and their solicitor make a request for a copy of the full age assessment, then the local authority should comply with this request...”

34. The ADCS Guidance provides at pp 27-28 in relation to “sharing results”:

“Some general principles for sharing the results of an age assessment are as follows:

- The child or young person being age assessed should be informed of the conclusion, face-to-face, at the earliest possible opportunity. This should be done in a manner which is in accordance with their assessed age and maturity and should also be provided in writing.

...

- The child or young person should be advised both verbally and in writing that they may be able to challenge the decision and how to seek further advice regarding their assessment. In most cases, there will be a three month time limit to make an application for a judicial review.
- You should keep all your hand written notes, and write up the outcome of the assessment regardless of the conclusion.
- It is recommended that the child or young person sign an acknowledgement (though not necessarily acceptance) of receiving the conclusion of the age assessment.
- The child or young person should be given a full copy of the age assessment. This should be done within a reasonable amount of time upon completion of the assessment. Delay may seriously prejudice the child or young person’s ability to understand the decision, to know whether or not they can challenge it, and to access appropriate support. The child or young person should be made aware that this document contains their personal information and should be looked after very carefully.

The assessment belongs to the child or young person, so they should decide with whom the assessment is shared. If the child or young person and their solicitor make a request for a copy of the full age assessment, then the Local Authority should comply with that request. After the assessment has concluded, you should confirm with the Home Office that they are treating the child or young person at the assessed age.

If the Home Office has disputed the child or young person's age, then they will need to know your decision promptly. This should be shared through the agreed 'Model Information Sharing Pro Forma – Outcome of Age Assessment'. The Home Office should not be provided with the complete assessment, as per the Association of Directors of Children's Services (ADCS) / Home Office Joint Working Guidance. It is very important that the Home Office know what age you have assessed the child or young person to be. In almost all circumstances the Home Office will accept your decision on age and your decision is likely to have significant consequences for the young person's immigration status. Where the Home Office has concerns about the decision they will discuss these with you. A child or young person should always give their written consent prior to you sharing their information with any other individual, unless you are ordered by the court to do so."

35. The ADCS Guidance provides at p 50 in relation to "confidentiality":

"Children and young people may struggle to understand the concept of confidentiality, and it is important that your explanation of confidentiality is tailored to their level of understanding. Confidentiality must be explained to all children and young people undergoing an age assessment. Unlike other interviews with children and young people, the outcome of the interviews will usually be shared with a third party, namely the Home Office. The child or young person should be advised that the Home Office will only be provided with a brief summary of the age assessment and the reasons for the decision. The Home Office will not generally be provided with the full written assessment without the consent of the child or young person. There may be instances in which a child or young person challenges the outcome of an age assessment; in these cases, the full age assessment may also be provided to the court and so will be available to the Home Office.

Children and young people should be advised that their full age assessment will not be shared with anyone else unless they give their consent. They should be advised that their solicitors can receive a full copy of the completed age assessment if they provide their written consent to share this information.

It may be helpful to remind young people to keep any copies they hold of their age assessment safe.

In addition to clarifying the issue of who will have access to the age assessment, it is important for social workers to explain the other limits to confidentiality. The limits of confidentiality regarding safety concerns should be explained; this includes situations where the social worker is concerned that the child or young person is at risk of harming themselves, harming someone else, or someone harming them. In these instances, the child or young person's personal information may be shared for safety reasons."

36. The ADCS Guidance deals with the approach that should be taken in circumstances where there are "disputes between local authorities". The Guidance provides at pp 64-65:

"Disputes have arisen between local authorities about who is responsible for assessing the age of a child when he or she has been moved between two or more local authority areas. In the case of *R (on the application of Liverpool City Council) v London Borough of Hillingdon & another* the Court of Appeal held that after the young person had been released from Harmondsworth Immigration Removal Centre, the London Borough of Hillingdon should have conducted an age assessment and also a full assessment of his needs for the purposes of Section 20 of the Children Act 2004, even though the young person had previously been assessed by Liverpool.

However in *R (on the application of A) v Leicester City Council and the London Borough of Hillingdon*, a case in which the claimant child had moved from one authority's area to the other and there was no dispute about her age, HHJ Farmer QC held that concurrent duties were owed. The possibility that this could be the case in age assessment cases was raised but not resolved in *R (on the application of Liverpool City Council)* and also in the later case of *The Queen on the application of HA v London Borough of Hillingdon and Secretary of State for the Home Department*. Therefore, a local authority should conduct an age assessment for any child who comes to their attention where there is significant reason to doubt the age claimed even if the child has moved from another local authority area before an age assessment is conducted.

The Age Assessment Joint Working Guidance published by the Association of Directors of Children Services and the Home Office in April 2015 offers a process to follow when there is a dispute between local authorities. Local authorities may find it useful to consult this and agree between them which body will take responsibility, but this guidance is not statutory or case law

and the courts may make a decision around responsibility for an assessment which does not fit within this guidance.”

37. The ADCS, together with the Home Office, has also produced guidance entitled “Age Assessment Joint Working Guidance”. It provides as follows in relation to conflicting local authority (“LA”) age assessments:

“6.2 Conflicting LA age assessments

LA responsibility is tied to geographical boundaries so it is possible that an age assessment may be sought from more than one LA. For example, where an asylum seeker moves to accommodation which is within a different LA boundary. In some cases the assessments may not be in agreement. LAs must work together, and with other agencies, and be sure they prioritise safeguarding the individual and adhere to the Children Act 1989 and Children Act 2004.

The following is intended to reduce unnecessary repetition of the assessment process:

Existing lawful age assessment

LAs have a duty to assess whether someone is a child in need and may require an age assessment. When an LA is approached for an age assessment/it appears one may be required, it should check with the Home Office whether any previous assessment has been carried out by another LA.

If an assessment has previously been completed, it must be established whether this was conducted lawfully (usually shown by completion of the information sharing proforma). The LA must contact the other LA to request a copy of any previous age assessments.

If the Home Office has an existing lawful LA age assessment it must inform the newly-involved LA:

- that there is an existing lawful age assessment
- which LA carried out the assessment
- when the assessment was carried out

Existing potentially unlawful age assessment

If the documentation the Home Office has does not indicate the assessment has been completed in line with case law, the Home Office must:

- inform the newly-involved LA of this

- contact the original LA to get a completed age assessment proforma

If it becomes clear there is not enough evidence to show that an age assessment was completed in line with case law the Home Office must ask the LA for this information. If the LA cannot provide this, an age assessment which is in line with case law must be carried out. The LAs must collaborate and promptly agree which LA must take responsibility for conducting the age assessment.”

Grounds of Challenge

Claim against Sunderland, the First Defendant

(i) Is the claim against Sunderland academic?

38. The claim against Sunderland, as pleaded on 8 May 2019, was that, if it had conducted an assessment of the Claimant’s age, Sunderland was acting “unlawfully and unreasonably in failing or refusing to disclose [the] assessment”. No other illegality is identified. The relevant assessment, as set out above, is that of the Claimant/P conducted on 11/12 February 2019 by Sunderland’s social workers. Whether or not it was lawful of Sunderland to refuse to disclose that assessment prior to proceedings being issued on 17 May 2019, it was disclosed by the Home Office on 9 July 2019 following the order of Karen Steyn QC. Sunderland contend that the claim regarding non-disclosure is now academic, and that there is no proper basis for the Court to consider whether or not its earlier refusal to disclose the assessment was unlawful.
39. The approach that should be taken to judicial review claims, which it is contended have become academic prior to a hearing, was considered by the House of Lords in *R v Secretary of State for the Home Department ex p Salem* [1999] 1 AC 450. *Ex p Salem* concerned an asylum applicant whose application was rejected without his being informed. As a consequence, some six months later, his benefits were stopped. He sought to challenge the latter decision. His claim failed before the Court of Appeal but he was given leave to appeal to the House of Lords. Prior to the House of Lords hearing the appeal, the appellant succeeded in overturning the decision to reject his asylum application and his benefits were restored. The Secretary of State contended that the House of Lords should decline to hear the claim as it had become academic, as far as the appellant was concerned, by the time of the hearing.
40. Lord Slynn, with whom the other members of the House of Lords agreed, noted that in private law cases the courts would not entertain claims which would not affect the rights or duties of the parties. Lord Slynn accepted that “in a cause where there is an issue involving a public authority as to a question of public law, your Lordships have a discretion to hear the appeal even if by the time the appeal reaches the House there is no longer a lis to be decided which will directly affect the rights and obligations of the parties inter se” (p 456G-H). He continued at 457A:

“The discretion to hear disputes, even in the area of public law, must, however, be exercised with caution and appeals which are academic between the parties should not be heard unless there is

a good reason in the public interest for doing so, as for example (but only by way of example) when a discrete point of statutory construction arises which does not involve detailed consideration of facts and where a large number of similar cases exist or are anticipated so that the issue will most likely need to be resolved in the near future.”

The House of Lords did not consider there was “good reason” to hear the appeal in *ex p Salem* and declined to do so. It is a notable footnote that the issue ultimately did reach the House of Lords a few years later in *R v Secretary of State for the Home Department ex parte Anufrijeva* [2004] 1 AC 604, and their Lordships determined the underlying issues in dispute in the appellant’s favour.

41. The principles set out in *Salem* in relation to academic claims have subsequently been applied to proceedings at first instance in the Administrative Court (see for example *R (Zoo Life International Limited) v Secretary of State for Environment, Food and Rural Affairs and Others* [2000] EWHC 2995 (Admin) and *R (Brooks) v London Borough of Islington* [2015] EWHC 2657 (Admin), [2016] PTSR 389, with the court in the former declining to hear an academic challenge while the court in the latter considered there was “good reason” to do so).
42. Whether there is a sufficiently “good reason” to hear an academic judicial review claim is ultimately a matter of judgment. It is, however, possible to identify the kinds of factors that are likely to be required to justify hearing such a claim. They are, first, that the case concerns issues of general application. That is not necessarily limited to statutory constructions, as referred to in *Salem*, but could also include the legality of a policy or generally applicable practice of a public authority. Secondly, the case needs to raise issues of importance likely to affect others, such that there is a public interest in its determination. It is unlikely to be appropriate to determine an academic case turning largely on its individual facts. Thirdly, there should be a public interest in the issue in dispute being determined in the particular proceedings before the court. In order to be appropriate to consider an academic claim, it is likely to be necessary that, unless the case proceeds, the issues in dispute will not otherwise be determined, or will not be determined as expeditiously or efficiently as if the now academic claim is permitted to proceed. That may arise, as in the example given in *ex parte Salem*, because there are a large number of existing or anticipated cases raising the same issue so it will need to be resolved in any event in the near future. Or it could arise, for example, where a challenge is brought to a practice occasioning short-term but significant interference with individuals’ rights, but where the interference will usually have ceased by the time cases come to court. If such cases are regarded as academic and not permitted to proceed, it may be very difficult for the courts to adjudicate on the legality of the practice.
43. In the present case, it is not disputed by the Claimant that, insofar as she is seeking to challenge Sunderland’s failure to disclose the age assessment conducted on 11/12 February 2019, the claim is academic. She now has the assessment and there is no remedy sought in relation to disclosure that will be of any benefit to the Claimant. As to whether there is, nevertheless, “good reason” to consider the legality of Sunderland’s earlier failure to disclose the assessment, it was suggested by Ms Benfield for the Claimant that the case raises broader issues of importance about the protection afforded to migrant children. In fairness to Ms Benfield she did not push the point with any great

vigour, and in my opinion this is not a case in which there is a good reason to determine an academic claim. I consider briefly below Sunderland's initial refusal to disclose the relevant age assessment, but it is not apparent that the legality of the refusal raises issues of general importance or that any determination of it would likely affect other cases. To the contrary, the legality of the decision would be likely to turn on its own facts, and it is not therefore a matter I consider it appropriate for this court to determine now that it has become academic as between the parties.

(ii) Should the court determine other issues concerning Sunderland's conduct?

44. Ms Benfield submitted in oral argument that there have been failings by Sunderland beyond the initial non-disclosure of the age assessment. She submits that there has been a failure by Sunderland to act collaboratively with Stockton and the Home Office in seeking to clarify whether the assessment it had carried out of "P", in fact, related to the Claimant. The Claimant accepts she cannot in these proceedings challenge any age assessment that concluded she was an adult. She recognises that will require fresh proceedings which, as set out below, are very likely to be transferred to the Upper Tribunal. In her skeleton argument, however, the Claimant nevertheless set out a further remedy now sought, namely "a declaration that [Sunderland] is the assessing local authority ... and that any further challenge [of the assessment] should be directed at [Sunderland]."
45. Admirably though the submissions were put by Ms Benfield, there are fundamental problems with the approach she now invites the Court to adopt. As Mr Dubin for Sunderland noted, the pleaded case against Sunderland related solely to the failure to disclose the relevant age assessment. There was no pleaded case alleging wider failures to act collaboratively, or other more general failures, nor was it said that a failure, by Sunderland, to satisfy itself whether P was the Claimant was unlawful. Those are not, in my view, merely technical objections. If the illegality alleged by the Claimant went beyond the failure by Sunderland to disclose the age assessment it had conducted of P, the Claimant needed to identify which legal duties it was said Sunderland had breached, and how it had breached them. Sunderland would then have had the opportunity to respond. Without that being articulated in the Claimant's Grounds, it is difficult to see how I can fairly determine that Sunderland has acted unlawfully.
46. There is another difficulty with the course of action the Claimant invites me to adopt. The remedy that the Claimant now seeks is "a declaration that [Sunderland] is the assessing local authority". That is a declaration that the person assessed as "P" on 11/12 February 2019 by Sunderland was the Claimant. Firstly, it is not clear that the court in judicial review proceedings has the power to make declarations of fact, in the abstract and unconnected to some underlying illegality. Secondly, even if there was such a power, it does not appear to me to be appropriate to exercise it in this case.
47. As set out above, whether or not the Claimant and P are the same person turns very much on the credibility of the Claimant, and, in particular, the veracity of her unsigned witness statement of 1 November 2019. Determining the veracity of the statement, and otherwise weighing the evidence about the Claimant's identity, however, is an exercise that the Administrative Court in judicial review proceedings is ill-suited to perform. As the Court of Appeal observed in *R (FZ) v London Borough of Croydon* [2011] EWCA Civ 59 at paragraph 31 "the Administrative Court does not habitually decide questions of fact on contested evidence and is not generally equipped to do so. Oral evidence is

not normally a feature of judicial review proceedings or statutory appeals”. That does not mean that the Administrative Court is prohibited from undertaking fact-finding exercises or hearing live witnesses. None of the parties have, however, invited me to take the unusual step for a judicial review claim of hearing live evidence and permitting cross-examination and conducting the kind of factual trial required to determine if the Claimant and P are the same person. As set out below, those matters can be determined by the Upper Tribunal if a case challenging the age assessment is brought by the Claimant. It is that forum, in my view, which is appropriate for adjudicating any factual disputes in this case, and not these judicial review proceedings.

Claim against Stockton, the Second Defendant

48. In the light of the above, I can deal briefly with the case against Stockton. The Claimant’s pleaded case is that “in circumstances where the Claimant is recorded as having been assessed but where that assessment is conspicuously absent, and no party to the proceedings, nor the Home Office, is able or willing to disclose that assessment, Stockton as the local authority in whose area the Claimant presently resides was under a duty themselves to act proactively to protect the interests and welfare of a putative child”. There are a number of steps it is said Stockton should have taken, such as liaising with Sunderland or ascertaining for itself the Claimant’s age.
49. I make some brief observations below about Stockton’s position, and the steps it could have taken, prior to the disclosure of the 11/12 February 2019 age assessment. In my view, however, in the light of the disclosure of the assessment, and the Claimant’s position in relation to it, the claim against Stockton is also now academic. The Claimant accepts that if she has been assessed by Sunderland, any claim she has is against Sunderland. As Stockton submitted, if an age assessment has been carried out that finds an individual to be an adult, they should not generally be permitted to move to another local authority and seek a fresh assessment in the hope of a different outcome. That would create administrative difficulties and would incentivise a form of local authority shopping, with individuals seeking repeated assessments from different authorities until they obtained one they were satisfied with. Where a person disagrees with an age assessment which concludes they are an adult, the correct approach, as the Claimant accepts, is to challenge that assessment. She accepts that, in those circumstances, her claim would be against Sunderland and Stockton would owe her no duties under the CA 1989, whether to conduct a further age assessment or otherwise.
50. The Claimant has now seen the 11/12 February 2019 assessment. As set out above, while her position is that she cannot definitively say whether that assessment related to her, as reflected in her 1 November 2019 statement she accepts that it is overwhelmingly likely that it was her that was assessed by Sunderland. On that basis, whether or not Stockton had some duty to ascertain the Claimant’s age or provide her with support at some earlier stage when the position was unclear, it cannot be said that it owes such duties now. Where the Claimant’s position is that it is overwhelmingly likely she has already been assessed by Sunderland, I do not consider Stockton is acting unlawfully in not itself assessing her age.

The Claimant's current position

51. This does not, in my view, leave the Claimant without a means to establish that she is, in fact, a child, as she claims, and that she should be provided with support and accommodation as such.
52. The Claimant accepts that it cannot be determined in these proceedings whether she is or is not a child. Even if I was to accede to the Claimant's request to declare that Sunderland was the authority that assessed her, that would then leave her in the position of having been assessed to be an adult and thus not receiving the support and accommodation, as a child, to which she claims she is entitled. If, as is now the case, the Claimant's position is that it is overwhelmingly likely that she was the person assessed by Sunderland on 11/12 February 2019, she would need to issue proceedings against Sunderland challenging its assessment.
53. As the Supreme Court held in *R (A) v London Borough of Croydon* [2009] UKSC 8, [2009] 1 WLR 2557, whether a person is or is not a child is a matter of fact for the court to determine. Challenges to an age assessment must be brought by way of judicial review proceedings in the Administrative Court, but the usual practice, following the decision of the Court of Appeal *R (FZ) v London Borough of Croydon*, is that, if permission is granted, the case is then transferred to the Upper Tribunal to make the factual determination of the individual's age. As the Court of Appeal observed in *FZ* at paragraph 31, transfer to the Upper Tribunal is "appropriate because the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims". When the Upper Tribunal makes the relevant factual findings, unlike ordinary judicial review claims in the Administrative Court, it will often hear live witnesses, including the putative child and experts.
54. In the present case, if the Claimant were to issue a judicial review challenging the age assessment conducted by Sunderland on 11/12 February 2019, the Administrative Court would consider whether to grant permission in the usual way. The Court will consider, as in other judicial review claims, whether, for example, there has been delay. On the factual claim that the Claimant was wrongly determined to be an adult, the usual practice is for the Administrative Court to grant permission if there is a "realistic prospect" that at a substantive fact-finding hearing a court will reach a conclusion that the person assessed was, in fact, a child (see *R (F) v London Borough of Lewisham* [2009] EWHC 3542 (Admin) paragraph 15). In the present case, if the Claimant issues proceedings challenging Sunderland's age assessment, Sunderland may decide to contend that that assessment related to someone other than the Claimant, so that the Claimant has no standing to challenge it. If so, that could be raised as a defence by Sunderland. It will be a matter for the judge considering permission how to proceed in relation to that issue, but I see no reason why he or she could not decide whether the Claimant has a "realistic prospect" of establishing, at a fact-finding hearing, that the assessment related to her, as well as whether she has a "realistic prospect" of establishing she is a child, and to grant permission if she does.
55. If permission was granted, and if the issue of whether Sunderland had, in fact, conducted an age assessment of the Claimant remained disputed, the Upper Tribunal could determine that dispute at the same time as determining whether the Claimant is a child. As Mr Dubin submitted, both issues are likely to be inter-connected. That is because an assessment of the Claimant's credibility is likely to be critical for both. If

the Claimant is found to be credible, and her unsigned 1 November 2019 statement is believed, it seems very likely, from the evidence I have seen, that it would be concluded that the Claimant was the person assessed by Sunderland on 11/12 February 2019. If she is found to be credible, it will also be relevant to whether the Upper Tribunal accepts her evidence that she is 16 years old. Conversely if she is found not to be credible, that will affect any weight given to her evidence about her age as well as any conclusion about whether she was the person assessed on 11/12 February 2019. As Mr Dubin submitted, all of those are factual questions that are far more appropriate for the Upper Tribunal to decide than the Administrative Court.

56. Furthermore, while again it would be a matter for the parties and the judge considering a permission application, I see no reason why Stockton could not be an Interested Party in any challenge to the 11/12 February 2019 age assessment. It is accepted by Stockton in its skeleton argument that if it transpires the Claimant has not already been age assessed by Sunderland, “[Stockton] would be required to provide support to the Claimant as a child in need in its area and further ... it would be required to conduct an age assessment if it considered there to be significant doubt as to her claimed age”. If Stockton is an Interested Party in any challenge to Sunderland’s age assessment, it could make whatever submissions it considered appropriate in the knowledge, as it accepts, that if Sunderland is found by the Upper Tribunal not to have assessed the Claimant’s age, Stockton will, most likely, have responsibilities towards her.

The position prior to disclosure of the 11/12 February 2019 age assessment

57. For the reasons set out above, I would dismiss this judicial review claim. I would not, however, wish to leave matters giving the impression that the Claimant was somehow wrong to issue these proceedings or that she was not entitled to contend that matters should have been handled differently by the Defendants prior to the Home Office disclosing the 11/12 February 2019 age assessment to her.
58. The position prior to the disclosure of the age assessment was that the Claimant was left in an impossible position. She asserted that she was a child, but she could not obtain accommodation and support as such because Stockton and the Home Office considered she was an adult based on Sunderland’s assessment of P of 11/12 February 2019. The Claimant could not challenge Sunderland’s assessment of P because Sunderland denied that the assessment was of the Claimant and would not disclose it to her. She could not therefore challenge the assessment that was being relied on by the Home Office and Stockton to treat her as an adult.
59. I do not underestimate the difficulty of the position in which Sunderland and Stockton’s staff found themselves. Given the obviously confidential nature of an age assessment, I can appreciate Sunderland’s concerns about disclosing an assessment to the Claimant where they doubted she was the person they had assessed. I also appreciate Stockton’s concern about conducting its own assessment of a person who the Home Office believed had already been assessed as an adult by another local authority. Stockton also raised concerns that it had sought to correspond with Sunderland about the case but the latter had not been responsive.
60. Notwithstanding these matters, in my view the dispute in this case could and should have been resolved many months ago without requiring the issuing of proceedings. Everyone involved recognises that the Claimant is vulnerable. Sunderland considered

that the person assessed on 11/12 February 2019 was an adult, and the Home Office considered that she was aged 19 or 20, but it was nevertheless considered she needed support and Sunderland's social workers had "no doubt that [the person they assessed had] experienced exploitation or possible sexual abuse or [had been] trafficked for work purposes". It is also well-recognised that, if the Claimant is a trafficked child, she is likely to be someone in particular need of support. As is stated in the applicable statutory guidance (see above at paragraph 28 *et seq*): "Unaccompanied migrant children and child victims of modern slavery, including trafficking, can be some of the most vulnerable children in the country" (paragraph 1). Such children are "alone, in an unfamiliar country and may be surrounded by people unable to speak their first language"; they are particularly vulnerable to exploitation whether that is "sexual exploitation, forced labour, forced criminality, begging, organ harvesting and domestic servitude" (*ibid*). As the guidance continues "[t]hey are at increased risk of going missing, often leaving the care of those who would protect them to return to traffickers who will continue their exploitation" (paragraph 2) and they "often have complex needs in addition to those faced by looked after children more generally" (paragraph 3).

61. Prior to the issuing of proceedings, Sunderland and Stockton were faced with a vulnerable individual claiming to be a child where it was disputed between the two authorities whether an age assessment of that individual had or had not been carried out. It ought to have been possible to resolve that dispute. CA 1989 s 27 imposes duties on local authorities to coordinate their actions. As set out at paragraph 6.2 of the ADCS Age Assessment Joint Working Guidance, where there is an apparently unlawful age assessment conducted by one local authority, and a putative child moves to another authority, "an age assessment which is in line with case law must be carried out. The LAs must collaborate and promptly agree which LA must take responsibility for conducting the age assessment." In my view a similar approach should have applied to the present case. In this case, at the time proceedings were issued, it was not clear whether an age assessment had been conducted in relation to the Claimant. It ought to have been possible for the two local authorities to "collaborate and promptly agree" on a way forward. It may have been possible for Sunderland to disclose the existing age assessment to the Claimant's solicitors on a confidential basis so she could see if it related to her. Or the two authorities could have agreed between them which would conduct a fresh assessment of the Claimant so that it would have been irrelevant whether she had or had not previously been assessed. Matters have, of course, moved on, and it is not necessary for me to determine if the failure to take such steps was unlawful. The Claimant has now seen the assessment Sunderland carried out, and, on her case, it is overwhelmingly likely it relates to her. She can choose whether she wishes to challenge it. It is unfortunate, however, that she needed to issue judicial review proceedings to reach that position, and if a similar situation were to arise in the future, it is hoped that it would be resolved very much more quickly and without requiring this kind of litigation.

Conclusion

62. Notwithstanding those observations, however, for the reasons given above, the Claimant's application for judicial review against both Defendants is dismissed.