Neutral Citation Number: [2023] EWHC 744 (Admin)

Case No: CO/4067/2021

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

Friday, 31st March 2023

Before:
MR JUSTICE FORDHAM
- -

Between:

THE KING (on the application of HP)	**Claimant**
- and -	
THE MAYOR AND BURGESSES OF THE ROYAL BOROUGH OF GREENWICH	**Defendant**

- -
- -

Philip Rule (instructed by Instalaw Ltd) for the **Claimant**
Michael Paget (instructed by Royal Borough of Greenwich) for the **Defendant**

- -
Hearing dates: 26/1/23 and 1/2/23
- -

Approved Judgment

I direct that no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

- -
THE HON. MR JUSTICE FORDHAM

MR JUSTICE FORDHAM:

Introduction

1. This case is about the power of a local authority ("the Discretionary Power") to provide support services to a young adult who, as a consequence of the local authority's historically flawed "child in need" assessment, is denied the statutory duties and entitlements applicable to a "former relevant child". The Discretionary Power was authoritatively identified by the Court of Appeal in R (GE (Eritrea)) v Secretary of State for the Home Department [2014] EWCA Civ 1490 [2015] 1 WLR 4123 (§17iii below). I will need to analyse the Discretionary Power (see §§23-24 below), in light of the statutory framework (see §§11-16 below) and the case-law (§17 below).

Three Decisions

2. Three key decisions are at the heart of this claim for judicial review.

   i) The Local Authority Age Assessment. The first key decision was made on 11 September 2019 by Social Workers Cat Williams and Amie-Louise Clement for the Defendant ("the Council"). By that decision, the Council Age-Assessed the Claimant as being – in September 2019 – "20 years of age" with an estimated date of birth of "1999". On the basis that he was not a "child", it was concluded that the Claimant was not a "child in need". The Local Authority Age Assessment completed a Social Services file of documents generated over the three days 9-11 September 2019 ("the Social Services File").

   ii) The Tribunal Age Determination. The second key decision was made on 5 August 2021 by Upper Tribunal Judge Smith ("the Judge"), after an oral hearing on 29 June 2021 and 1 July 2021. The Tribunal Age Determination was the outcome of a claim for judicial review, by which the Claimant challenged the Local Authority Age Assessment on objective-correctness grounds (see §3ii below) with fresh and updating evidence (§§4-6 below). By the Tribunal Age Determination, the Judge Age-Assessed the Claimant as being – in August 2021 – "19 years old" with the date of birth assigned as "1 January 2002". The Tribunal Age Determination is binding as to the Claimant's legally correct age and date of birth. It is found within a 47-page and 210-paragraph ruling ("the Judgment"). Anonymity protection was granted and remains in force.

   iii) The Impugned Refusal. The third key decision was communicated by email on 18 August 2021 ("the Decision Email": §36 below) sent by the Council's Head of Legal Services ("HLS") Azuka Onuorah to the Claimant's solicitors, refusing the solicitors' request by email on 2 August 2021 ("the Email Request") that the Council exercise the Discretionary Power favourably in the Claimant's case. The Impugned Refusal is the target for this claim for judicial review, commenced on 17 November 2021, for which Eyre J granted permission on 28 June 2022. The decision-maker was social worker manager ("SWM") Carol Bilham. On 12 January 2022 the Council disclosed the contemporaneous telephone attendance note dated 17 August 2021 ("the Contemporaneous Note": §35) recording SWM Bilham's decision as communicated to HLS Onuorah.

Two Standards of Review

3. Judicial review can succeed where a public authority's decision is unlawful, unreasonable or unfair. It will be helpful in the present case to bear in mind two distinct standards of substantive review, which can apply where the outcome of a public authority's decision is challenged by judicial review.

    i) The Reasonableness Standard. This involves asking whether the outcome was reasonable. This conventional standard of review is non-substitutionary. The decision is not being retaken afresh by the Court or Tribunal. Review on the Reasonableness Standard is conventionally confined to the material which was available to the decision-maker; not fresh and updating evidence. The Reasonableness Standard applies to a judicial review of the outcome of a Needs Assessment: a local authority's assessment of the "in need" component of the statutory "child in need" test. The Reasonableness Standard also applies to this judicial review of the Impugned Refusal.

    ii) The Objective-Correctness Standard. This involves asking whether the outcome was objectively correct. This special standard of review is substitutionary. The decision is being retaken afresh by the Court or Tribunal. Review on the Objective-Correctness Standard is not generally confined to the material which was available to the decision-maker; it considers fresh and updating evidence. The Objective-Correctness Standard applies to a judicial review of an Age Assessment: an assessment of the "child" component of the statutory "child in need" test. This is explained in GE at §66. So, in the present case, the Judge was asked by the Claimant to apply the Objective-Correctness Standard in determining the claim for judicial review of the Local Authority Age Assessment, and did so in arriving at the Tribunal Age Determination.

A Different Picture (2019 and 2021)

4. One key feature of the present case is that the Tribunal Age Determination (5.8.21) was based on different and much fuller evidence about the Claimant than the Local Authority Age Assessment (11.9.19). That was the consequence of (a) the Objective-Correctness Standard (b) the passage of time and (c) observable conduct over that period in the UK.

5. To explain, the Local Authority Age Assessment, which completed the Social Services File, was a decision within 3 days of the Claimant's arrival in the UK from Afghanistan. Indeed, as the Judge observed in the Judgment, one of the "unusual features" of the case was:

> ***the speed with which the age assessment process took place.***

The Tribunal Age Determination was carried out two years later, with extensive information about the Claimant, derived from his presence in the UK over an extended period. There was a considerable body of evidence adduced before the Tribunal. There were documents and reports; witness statements; and oral evidence with cross-examination. From the Council, the Judge had witness statement evidence about what happened in September 2019, from Social Worker Williams, Social Worker Clement and Foster Carer Bygrave (§7 below). On behalf of the Claimant, witness statement evidence was put forward from a 23 year old friend (Ahsnuliah Ahsas) and support letters from Ella Montgomery-Smith of the Children's Society and Laura Weser of the

Red Cross. Witness statement evidence and oral evidence was adduced from Alexandra Swadling, a Support Worker at the organisation "Positive Action For Refugees and Asylum-Seekers" (PAFRAS); and Sharon Browne a Mental Health Support Worker at PAFRAS. The Claimant gave witness statement evidence and oral evidence. The oral hearing took two days. Witnesses who gave oral evidence were cross-examined. The Judgment discusses in comprehensive detail the written, oral and documentary evidence which was before the Judge for the purposes of her objective evaluation of the Claimant's true age.

6. It has been regarded as significant that the Tribunal Age Determination was based on markedly different, and fuller, information about the Claimant. This point has been emphasised on behalf of the Council, in the context of the Claimant's age. HLS Onuorah in the Decision Email (§36 below) at paragraphs [1] and [2] describes the "long and detailed" Judgment, in which the Judge's decision was "reached … on evidence that was obtained after the age assessment [which] included [the Claimant's] interaction with support workers and a teacher"; that "the evidence upon which the Judge decided the case" was "never before the age assessors"; and that "the case was decided on the basis of subsequent supporting evidence".

The Claimant

7. The Claimant's country of origin is Afghanistan. He arrived in the UK on 9 September 2019, and presented at Plumstead Police Station. Asked his age, he said – through an interpreter – that he was 13 years old. Police Inspector Sharpington referred him to the Council who placed him with Jennifer Bygrave, a full-time Foster Carer. He was Age-Assessed by Social Workers Williams and Clement, on 10 and 11 September 2019, as "20 years of age". The Social Services File (§2i above) was created. Two things came to be determined subsequently.

8. First, that the Claimant was a refugee. He had a well-founded fear of persecution. His legal entitlement to be and stay in the UK was subsequently recognised by the Home Secretary in April 2022. He had made his asylum claim on 12 September 2019. Having been Age-Assessed to be an adult, he was 'dispersed' by the Home Office and placed in National Asylum Support Service (NASS) accommodation, with adults, in Leeds.

9. Secondly, that the Claimant had been 17 years old – a "child" – in September 2019. Assisted by legal representatives, he brought his judicial review claim (11.12.19) challenging the Local Authority Age Assessment. Permission for judicial review was granted (17.1.20). No application for interim relief was made, seeking an interim order that he be accommodated by the Council as a child, rather than by the Home Office as an adult. The outcome of the judicial review was the Tribunal Age Determination (§2ii above). It found that the Claimant had been 17 years 8 months old, when Age-Assessed as an adult (11.9.19). That means in September 2019 he had been a child refugee; an unaccompanied asylum-seeking child ("UASC"); and a "child in need". Had his age been correctly recognised in September 2019, to be what the Judge in August 2021 subsequently found it to have been, the Claimant would have had 16 weeks as a "looked after child" on turning 18, giving him the statutory entitlements of a "former relevant child" (§§12-13 below). This is what brings the Discretionary Power into play (§23 below).

The Request

10. After the Judgment was circulated to the parties in draft, the Claimant's solicitors sent the Email Request (2.8.21), asking the Council to exercise the Discretionary Power favourably. The Judgment was then handed down (5.8.21). The Decision Email (§36 below) was sent (18.8.21), communicating the decision declining to exercise the Discretionary Power favourably. There were then exchanges of emails between 13 and 28 October 2021, followed by a Letter Before Claim (2.11.21) and this claim (17.11.21).

The Statutory Framework

11. Parliament has imposed statutory duties on local authorities in relation to a "child in need". There are two components: "child"; and "in need". Where the local authority age-assesses the individual as not being a "child", the question of age is judicially reviewable on the Objective-Correctness Standard (§3i above). When the local authority needs-assesses the individual as not being "in need", the question of need is judicially reviewable on the Reasonableness Standard (§3ii above). Section 17 of the Children Act 1989 ("the 1989 Act") imposes a "general duty" on each local authority "to safeguard and promote the welfare of children within their area who are in need", "by providing a range and level of services appropriate to those children's needs" (see GE §8). By section 20 of the 1989 Act, Parliament has imposed duties on a local authority to "provide accommodation for any child in need within their area", among other things if the child "appears to them to require accommodation as a result of … there being no person having parental responsibility for [the child]" (GE §10).

12. The 1989 Act contains a number of definitions. By section 22, a "child" who is "provided with accommodation by the authority in the exercise of its functions" meets the statutory definition of being a "looked after child" (GE §11). By section 23A of and Schedule 2 §19B to the 1989 Act, read with relevant regulations, a "relevant child" is one who has been "looked after" by a local authority for a cumulative total of at least 13 weeks between their 14th and 18th birthday (GE §14). By section 23C of the 1989 Act, a "former relevant child" is a "relevant child" (having 13 weeks as a "looked after" child) who "was being looked after by [the local authority] when [they] attained the age of 18" (GE §15). To be a "former relevant child", you need to have accumulated the 13 weeks of being "looked after" (provided with accommodation), and you need to have been "looked after" at the point when you turned 18. As GE decided (§17iii below), this must have happened as a historic fact: it cannot be "deemed", as a matter of statutory interpretation, or by operation of public law.

13. If you are a "former relevant child" then, as a young adult, you are owed statutory duties (and so you have statutory entitlements) as to support services. Some of these can extend to the age of 25. In GE, Christopher Clarke LJ summarised them in this way at §16:

> ***Section 23C [of the 1989 Act] sets out a series of duties including a duty on the authority to keep in touch with the former relevant child whether he or she is within their area or not (section 23C(2)(a)); if they lose touch with [them], to re-establish contact (section 23C(2)(b)); to continue the appointment of a personal adviser (section 23C(3)(a)); to continue to keep [their] pathway plan under regular review (section 23C(3)(b)); and to give various forms of assistance as provided for in section 24B in relation to employment, education and training or other assistance to the extent that [their] welfare requires it (section 23C(4)(a)-(c)), including contribution to expenses incurred in living near places of employment, education or training. These duties for the most part subsist until the former relevant child reaches the***

> ***age of 21 but some of them, particularly in relation to education, may extend until [they are] 25.***

14. The duties and entitlements applicable to a "former relevant child" are important. As Hayden J said in A v Enfield LBC [2016] EWHC 567 (Admin) [2017] 1 FLR 203 (§17iv below) at §46:

> ***the status of 'former relevant children' … has considerable legal significance, establishing an entitlement to a wide range of support …***

As Thirlwall J explained in R (R) v Croydon LBC [2013] EWHC 4243 (Admin) (§17ii below) at §21, the statutory welfare assistance for a "former relevant child" has been recognised "to extend to a duty to provide … accommodation where necessary". She added (at §22):

> ***the consequences for a young person of having been treated as a relevant child or an eligible child, and then a former relevant child, are of great practical importance.***

15. Mr Rule (who appeared for the Claimant) showed me that three core components of the statutory duties and entitlements – which can extend to the age of 25 – are (i) a "personal adviser" (section 23D); (ii) an "assessment of needs"; and (iii) a "pathway plan" (section 23E). These core components can be seen: at section 23B(2)(3) in the case of a "relevant child"; at section 23C(3)(4) in the case of a "former relevant child"; and at section 23CZB(3)(4) in the case of a "former relevant child" who is aged 21-25. They can also be seen at section 23CA(2)(3)), in the case of a "former relevant child" aged under 25, in relation to "further assistance to pursue education or training".

16. As to the statutory purpose of these young adult duties and entitlements, in GE Christopher Clarke LJ said this at §17:

> ***The purpose of these provisions is to ensure that a relevant or eligible child is not simply left without support the moment [they] reach[their] eighteenth birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults.***

This echoes the observations of Lady Hale in R (G) v Southwark LBC [2009] UKHL 26;[2009] 1 WLR 1299 at §8.

The Five Cases

17. Mr Rule and Mr Paget (who appeared for the Council) showed me the following five cases as being relevant to the Discretionary Power. They relate to affected individuals, said to have been a "child in need", but not recognised by the relevant local authority. They raise questions about support service duties and entitlements, where the affected individual was said to have missed out on being a "former relevant child":

    i) R (MM) v Lewisham LBC [2009] EWHC 416 (Admin) (Sir George Newman, 6.3.09) was an "in need" domestic case. It accorded a judicially-recognised "former relevant child" status, to the young adult deprived of that status by an unreasonable Needs Assessment. The claimant was from Bexley. She had fled domestic violence. She was a recognised "child" (aged 17), when twice Needs-Assessed by Lewisham LBC in July and December 2007. She had turned 18 by the time her judicial review claim was commenced in 2008. Lewisham's two

2007 Needs Assessments, failing to recognise that she was "in need", were flawed on unreasonableness grounds (§§16, 20, 29). A reasonable assessment of "need" would have led to her being accommodated aged 17 (§20), so that on turning 18 she would have been a "former relevant child". Sir George Newman held that in these circumstances she was "entitled" to a declaration that she "is now a former relevant child" (§36).

ii) R (Croydon) (Thirlwall J, 10.2.12) (§14 above) was a "child" asylum case. It accorded a judicially-recognised "former relevant child" status, to the young adult deprived of that status by an incorrect Age Assessment. The claimant was from Afghanistan. He arrived in the UK unaccompanied. He was recognisably "in need" (§30), when Age-Assessed to be an adult in May 2008 by Croydon LBC (§3). An objective correctness judicial review then found (§8) that he had been 15½ when assessed, so that he had been a UASC, albeit he had turned 18 prior to the judicial review judgment in June 2011. His subsequent claim, made as a continuation of the same judicial review proceedings (§9), to be treated as a "former relevant child" (§23), succeeded. Although an "honest mistake", Croydon's incorrect Age Assessment meant there had been "unlawful action" (§32) and "a grave error" (§44). Thirlwall J held that in these circumstances it was appropriate for the Court to "direct" Croydon to "treat [him] as a former relevant child" (§45).

iii) GE (CA, 20.11.14) (§1 above) was a "child" asylum case. It rejected the notion of according a judicially-recognised "former relevant child" status, identifying instead the Discretionary Power, where a young adult is deprived of that status by an incorrect Age Assessment. The claimant was from Eritrea. She arrived in the UK unaccompanied. She was recognisably "in need" (§70) and claimed to be 16½ (§1) when Age-Assessed in 2011 as an adult by Bedford Borough Council (§4). Her objective correctness judicial review had been left undetermined, on grounds that it was "unnecessary" (§20), given that the claimant accepted that she had now turned 18 (§5). The Court of Appeal, although the claimant accepted that she was by now 20, directed the High Court to determine the objective-correctness question of her age and any other issues (§§77-78, 101). The Court of Appeal explained that, if the claimant had been a "child" (as well as recognisably "in need") in 2011, and so incorrectly Age-Assessed as an adult, the correct analysis would be as follows. (1) There would have been an "unlawfulness" and "breach of duty" by reason of the objective-incorrectness of the Age Assessment, even if "fair" and "reasonable" (§§70, 73, 88, 92). (This was a point which Sir Bernard Rix would have preferred to leave open: see §§80, 84.) (2) There could be no statutory duty to treat the claimant as a "former relevant child", no "deeming" and no "general rule", because the statutory precondition involved necessary historical facts: 13 weeks actual accommodation including on turning 18, which was absent (§§44, 55, 78, 93, 100). (3) There was, however, the Discretionary Power, if requested to exercise it (§§75, 78, 95): "to make good any unlawfulness" (§54); "to remedy an injustice" (§73); and "to consider correcting an historic injustice" (§96).

iv) A (Enfield) (Hayden J, 16.3.16) (§14 above) was an "in need" domestic case. It secured a declaration requiring consideration of the Discretionary Power (§§51(d), 58), in the case of a young adult deprived of "former relevant child"

status by an unreasonable Needs Assessment. The Court made clear that it could not "foresee any circumstances" where it would be "fair to exclude" the claimant from "services … linked to the identification of her welfare requirements" (§57). The claimant was from Enfield. She was recognisably a "child" (aged 16 and 17), when Needs-Assessed by Enfield LBC in 2014 and 2015. The Needs Assessments had wrongly assumed that she was not "in need" while her parental home remained available. They were "manifestly irrational" and "fundamentally flawed" (§§37 and 43). Interim relief had secured accommodation, but not early enough to secure the 13 weeks before her 18th birthday which would have achieved "former relevant child" status (§56).

v) R (AB) v Ealing LBC [2019] EWHC 3351 (Admin) (Mathew Gullick, 11.12.19) was an "in need" domestic case. It secured quashing orders, including in relation to the 2019 decisions refusing to exercise the Discretionary Power (§66). The claimant was from Ealing. She was recognisably a child (aged 17) when Needs-Assessed by Ealing LBC in 2018 as not being "in need of accommodation" (§§14-16). That 2018 Needs Assessment was flawed for error of law (§50) and unreasonableness (§53), albeit that an assessment that the claimant needed to be "accommodated" was not the sole lawful outcome in 2018 (§64). Since the 2019 refusals to exercise the Discretionary Power had been based on the (flawed) 2018 Needs Assessment (§§19-20), those 2019 refusals were also quashed (§66).

The Anonymity Issue

18. The first issue which I have had to decide is the question of anonymity. Eyre J's Order (28.6.22) granted provisional anonymity, making clear that the issue would need to be revisited by the Judge at the substantive hearing. I have a duty to order that the Claimant's identity shall not be disclosed if I assess that non-disclosure as being necessary to secure the proper administration of justice and in order to protect his interests (CPR 39.2(4)).

19. If this claim for judicial review stood alone, I would refuse anonymity. That is because: (i) the Claimant was an adult (and had authoritatively been determined to be an adult) when the judicial review claim was commenced, and indeed when the Impugned Decision was made; (ii) the Claimant is no longer an asylum-seeker facing a prospect of removal to Afghanistan, but a recognised refugee with a recognised entitlement to remain in the UK; and (iii) references to a "somewhat fragile" mental health and risks of ill-treatment in the UK do not, in my judgment, substantiate a necessity for anonymity.

20. But this judicial review does not stand alone. Having asked for written submissions, the following four points of common ground emerged between the Claimant and the Council: (a) the Upper Tribunal's order for anonymity was appropriately made (and so evaluated as being necessary); (b) that anonymity order, by its deliberate design, did not expire (i) when the Claimant reached adulthood (an event found in the Judgment to have preceded the anonymised handed-down Judgment and final Order) or (ii) upon his being recognised as a refugee; (c) this claim is intimately linked to the Judgment and to its anonymity-protected contents; and (d) the absence of anonymity in this claim risks "completely undermining" the Upper Tribunal's anonymity protection, a consequence which engages concerns as to "the proper administration of justice" as well as the

Claimant's legitimate interests. Mr Rule for the Claimant adds further points: that the Judge expressed herself with a 'free hand' because of the anonymity order; and that the principled appropriateness of anonymity, to reflect a linked and continuing anonymity order, makes sense of a series of 'adult' judicial review claims.

21. Not without hesitation, I have been persuaded – in light of the four points of common ground – that a contingent anonymity order is necessary to secure the proper administration of justice and protect the Claimant's interests. It is contingent, because I will direct "liberty to apply" for any person to apply to this Court, on notice to the parties, to vary or discharge the anonymity Order. If there is thought to be more to say, or to consider, about indefinite anonymity orders, or about interrelated proceedings, that will afford an opportunity for it to be ventilated and the position reconsidered.

The Fresh Evidence Issue

22. The Claimant's representatives have placed before this Court 'fresh evidence' in the form of updating (August 2022) witness statements, from the Claimant and Support Workers Swadling and Browne. This is evidence about the Claimant and his circumstances. In my judgment, the fresh August 2022 evidence could only really be relevant to a question about this Court's discretion to grant or refuse a remedy, including any issue of utility of a remedy. That is how I will treat it. The Impugned Decision is being judicially reviewed in this Court on conventional grounds, by reference to the Reasonableness Standard (§3i above). I accept, in a case engaging the Tameside duty of reasonable enquiry, that 'fresh evidence' which was not before the decision-maker can in principle be relevant to illustrate what the claimed reasonable enquiry would or could have elicited, so that "the evidence being proffered goes to the issue of what would have been discovered had due enquiry been made" (R v Haringey LBC, ex p Norton (1998) 1 CCLR 168 at 180F-G). But these August 2022 witness statements are not focused on what would have been elicited by an enquiry in August 2021. The best source before me for that purpose is the evidence, adduced and considered by the Judge at the June and July 2021 hearings, and discussed in the Judgment. This was, or could have been, available to the decision-maker at the time of the Impugned Refusal.

The Discretionary Power: An Analysis

23. I turn to address the Discretionary Power, on which Mr Rule and Mr Paget made submissions. In my judgment, the following propositions can be derived from GE and the line of authority (the Five Cases: §17 above) within which GE sits:

    i) Where it is established that there has been a relevantly-flawed Age Assessment or Needs Assessment, whose consequences have denied the affected individual the past entitlements of a "child in need" and the present status of "former relevant child", there is no "general rule" requiring the local authority to treat the individual "as if" they were a former relevant child. I derive this proposition from GE at §§44 & 55 (Christopher Clarke LJ), §78 (Sir Bernard Rix), §§93 & 100 (Davis LJ). See too A (Enfield) at §52. The logic applies to both species of relevant case (discussed in GE at §51): a relevantly-flawed Age Assessment (as in R (Croydon)); or a relevantly-flawed Needs Assessment (as in MM (Lewisham) and A (Enfield)).

ii) A relevantly-flawed Age Assessment or Needs Assessment, whose consequence was to deny the affected individual the past entitlements of a "child in need", constitutes an "unlawfulness". I derive this proposition from GE at §§70 & 73 (Christopher Clarke LJ); and §§88 & 92 (Davis LJ).

iii) Where the additional consequence of the relevantly-flawed Age or Needs Assessment is that the affected individual is at present denied "former relevant child" status – with its important social support entitlements – that constitutes an "injustice". I derive this proposition from GE at §73 (Christopher Clarke LJ) and §96 (Davis LJ). As to the importance of the entitlements, see A (Enfield) at §46 and R (Croydon) at §21 (§14 above).

iv) The Discretionary Power – to choose to treat the affected individual as a former relevant child – is in the nature of a remedial power to "remedy", and for "correcting", the present "injustice" (§23iii above) arising from the past "unlawfulness" (§23ii above). I derive this further proposition from GE at §73 (Christopher Clarke LJ) and §96 (Davis LJ).

v) It can be important to establish whether the Age/Needs Assessment was relevantly-flawed, and whether the consequence is a present denial of "former relevant child" status, because that will engage the Discretionary Power. I derive this proposition from the outcome in GE. There, the High Court had concluded that an Age Assessment was "unnecessary" (§20). The claimant accepted that – by the time of the Court of Appeal's judgment – she was now aged 20 (§§1, 5). But the High Court's conclusion was overturned: the remedy was remittal to the High Court for determination of the claimant's age (§§77, 78, 101). This was important precisely because it could engage the Discretionary Power (§§70, 75, 79, 101).

vi) An Age Assessment will be relevantly-flawed on the Objective-Correctness Standard and a Needs Assessment will be relevantly-flawed on the Reasonableness Standard. I derive this proposition (see §3 above), inter alia, from GE §§46 and 66 (Age Assessment) and A (Enfield) at §§37 and 42 (Needs Assessment).

vii) The duty to consider exercising the Discretionary Power will be triggered by a request by or on behalf of the affected individual; and delay in making that request can be a relevant consideration in the exercise of the Discretionary Power. I derive this proposition from GE at §75 (Christopher Clarke LJ), §78 (Sir Bernard Rix), §§95 and 98 (Davis LJ).

viii) In considering whether to exercise the Discretionary Power, regard should be had to all the circumstances of the case, with relevance and weight being matters for the local authority's reasonable judgment. I derive this proposition from GE at §55 (Christopher Clarke LJ: "much will depend on the circumstances… The matter would be … to be determined … in the circumstances applying"). As to relevance and weight, being in principle primarily matters for the decision-maker's reasonable judgment, this is reflected in GE at §99 (Davis LJ).

ix) The circumstances of the case may involve matters of such obvious seriousness that the Discretionary Power can only be exercised favourably, as the sole

justifiable outcome. I derive this proposition from GE at §54 (Christopher Clarke LJ: "In an extreme case the court could hold … that there was only one way in which the [decision-maker] could exercise [their] discretion") and §96 (Davis LJ: "the court may even, exceptionally, compel such a result"). See too A (Enfield) at §54.

x) One relevant consideration is the degree to which the relevantly-flawed Age or Needs Assessment stands to be criticised, including by reference to the degree of fault or blameworthiness. I derive this further proposition from GE at §55 (Christopher Clarke LJ: "Much will depend on the circumstances, including … to what extent the authority … should be regarded as blameworthy") and §98 (Davis LJ: "it will be relevant for the local authority to consider whether [it] had acted fairly and reasonably at the time of the original age assessment or whether the erroneous initial age assessment was attributable to some culpable or unreasonable conduct"). See too A (Enfield) at §55.

xi) The degree of unfairness, blameworthiness, culpability or other serious maladministration may be what makes a favourable exercise of the Discretionary Power the sole justifiable outcome (§23ix above). I derive this proposition from GE at §54 (Christopher Clarke LJ: "In an extreme case the court could hold the unfairness was so obvious, and the remedy so plain, that there was only one way in which the [decision-maker] could exercise [their] discretion"), §96 (Davis LJ: "in cases of gross maladministration and conspicuous unfairness the court may even, exceptionally, compel such a result").

xii) Another relevant consideration is whether the action by or on behalf of the Claimant in challenging the relevantly-flawed Assessment was pursued promptly and whether an application for an interim remedy was made. I derive this proposition from GE at §55 (Sir Christopher Clarke: "Much will depend on the circumstances, including whether or not the claimant had sought interim relief and been refused (as here) [and] whether he was guilty of unacceptable delay"). Interim relief was sought and refused in GE (see §4); it was sought and granted in A (Enfield) (see §§30, 56).

xiii) Another relevant consideration is the nature of the services requested by or on behalf of the affected individual. I derive this proposition from GE at §55 (Christopher Clarke LJ: "The matter would be … to be determined in the light of whatever application is made"), §75 ("If the question becomes relevant it will be necessary for the claimant, or her representatives, to indicate what services she seeks") and §98 (Davis LJ: "Also potentially relevant, of course, will be the nature of the benefits and services which the applicant, as an adult, now claims").

xiv) Given that the statutory duties and entitlements owed to a "former relevant child" apply to an affected individual who was – as a historical fact – a "looked after child" when they turned 18, it may be relevant to the Discretionary Power that it does not involve the envisaged "continuity" of services. I derive this proposition from GE at §98 (Davis LJ: "Also potentially relevant [is] the fact that there will ordinarily not have been continuity between what the applicant

now seeks by way of benefits and services as an adult and what the applicant had received as a child").

xv) Another clearly relevant consideration is the flexibility of the Discretionary Power, under which the local authority may decide to afford only some and not all of the entitlements which would have applied to the affected individual as a former relevant child. I derive this proposition from GE at §53 (Christopher Clarke LJ: "Any such discretion … would have some flexibility. The local authority might, for instance, decide to provide some but not all of the services that it might have been obliged to provide if [the affected individual] was, in fact, a former relevant child") and §100 (Davis LJ: "it does not follow … that they can then expect to receive, as adults, the same accommodation, maintenance and support which they prospectively would have received had only the correct age assessment been made in the first place. That … would unduly restrict the nature of the discretion which the local authority has"). However, the sole justifiable outcome (§23ix above) may involve the Discretionary Power being exercised favourably in relation to "the entire range of services" (A (Enfield) at §57).

24. To these propositions I add the following observations:

i) First, about the idea of aggravated injustice. The starting-point is that there is an "injustice", and the function of the Discretionary Power is as a remedial response to this "injustice" (§23iv above). It therefore makes sense that the decision-maker, in considering the Discretionary Power, should be expected to think about anything which serves to aggravate the injustice. That includes what the person conducting the Age or Needs Assessment did. Even a blameless, but objectively-incorrect, Age Assessment means an unlawfulness (§23ii above) and an injustice. But an objectively-incorrect Age Assessment which was also unreasonable (irrational) or unfair is the more serious an injustice – it is aggravated – because it is the less excusable. An unreasonable (irrational) or unfair Needs Assessment, as well as being relevantly-flawed to give rise to the injustice, is also aggravated in the same way as an unreasonable or unfair Age Assessment. An Age or Needs Assessment which was blameworthy or culpable (§23x, xi above) is even less excusable. Alongside what the local authority did in making the Assessment, it is relevant for the decision-maker to think about what was done or not done by or on behalf of the affected individual. One aspect of that is whether there was a prompt challenge, and whether there was an application for interim relief (§23xii above). The nature and degree of the "injustice" can properly be affected by such features. It may be said that the individual and their representatives have 'done all they possibly could'. In my judgment, there is a theme here which asks whether there are aggravating – or for that matter mitigating – features so far as the injustice is concerned.

ii) Secondly, about the idea of the sole justifiable outcome. One question is whether the circumstances are so powerful that the favourable exercise of the Discretionary Power is the sole justifiable outcome (§23ix, xi above). In such a situation the local authority cannot reasonably decline to exercise the Discretionary Power. It is right for the decision-maker to address whether the circumstances are of that nature. This could include an injustice seriously aggravated, including by virtue of blame or culpability. But there may be other

reasons why a favourable decision is the sole justifiable outcome. These could include needs on the part of the affected individual which are so powerful and so pressing that it could not be reasonable to exercise the Discretionary Power unfavourably. Whether favourable exercise is the sole justifiable outcome is an important question. But it cannot exhaust the consideration that has to be given to the favourable exercise of the Discretionary Power. Any discretionary power is required to be exercised reasonably. If there is a sole justifiable outcome then, in the circumstances, the discretion hardens into a duty. Often, that will not be the case. What is left is the area of latitude, within which the Discretionary Power is exercised on the merits. Here, the local authority decision-maker exercises a choice, without rigidity but with open-minded consideration of the circumstances, to do what is evaluated as being the 'right' thing on the 'merits'. And here – within the area of latitude for judgment and appreciation – the law will require that relevant considerations are taken into account.

iii) Thirdly, about the idea of what is now at stake. In my judgment, this is a further important theme. It explains why it is relevant for the decision-maker to think about the nature of the services requested by or on behalf of the affected individual (§23viii above). It also explains why it is relevant to think about the flexibility which enables the local authority to respond by making some – but not all – services available to the affected individual (§23xv above). Asking 'what is at stake' is not a function of how the original and relevantly-flawed decision is to be characterised; or how it was sought to be challenged. It is a function of 'where are we now'. The services which are requested relate to what the affected individual's needs are said to be. The flexibility is about responding to some needs, and the ability to prioritise needs. The needs of the affected individual are, in principle, relevant. They may even be such as to make a favourable exercise of discretion the sole justifiable outcome. All of this, in my judgment, makes good sense. After all, the unlawfulness and the injustice have arisen in the context of statutory entitlements which recognise and address needs. The services to which a former relevant child has an entitlement are services which address needs. They are matters of importance, because they address important needs.

The Sole Justifiable Outcome Issue

25. I can turn now to deal with the grounds on which the Impugned Decision is challenged. As one of his arguments, Mr Rule for the Claimant submits that the outcome of the Impugned Refusal was unreasonable, and that this is a case where the sole justifiable outcome was the favourable exercise of the Discretionary Power.

26. I cannot accept these submissions. On this issue, I agree with Mr Paget for the Council. My reasons are straightforward:

i) First, it is right that this is a case of an "injustice" (§23iii above), because the consequences of a relevantly-flawed Age Assessment involving an "unlawfulness" (§23ii above) have denied the Claimant the past entitlements of a "child in need" and the present status of "former relevant child". However, GE establishes the important proposition that there is no general legal rule that such an injustice must be remedied (§23i above). It is important not to subvert that proposition.

ii) Secondly, the present case is not one – in my judgment – in which the circumstances and features involve matters of such obvious seriousness that the Discretionary Power can only be exercised favourably (§23ix, xi above). The Age Assessment was relevantly-flawed because it was wrong on an objective-correctness standard. That was established in the Judgment. But the Judge did not conclude – as she could have been invited to conclude (see GE at §101) – that the Council breached public law standards of fairness or reasonableness. That point was made in the Decision Email at paragraph [5a] (§37 below). The Judge did not find "fault" or "blameworthiness" in the Local Authority Age Assessment, as Mr Paget's submissions emphasised. This is not a case where the injustice is so aggravated – as by blameworthiness or culpability or otherwise – that the discretion hardens into a duty. Nor is it a case where the needs by their nature are so overwhelmingly powerful that the discretionary power, in order to be exercise lawfully and reasonably, could only be exercised favourably. The Email Request did not point to features of this nature. Nor did the subsequent email correspondence or Letter Before Claim. Nor, in my judgment, have Mr Rule's submissions done so.

The Equivalent Needs Assessment Issue

27. The next argument with which I will deal is this. Mr Rule invokes common law standards of fair procedure and of reasonably sufficient enquiry (Secretary of State for Education and Science v Tameside Metropolitan BC [1977] AC 1014). He submits that these (or either of them) support the following proposition: before any adverse decision is made in the exercise of the Discretionary Power, a needs enquiry must take place which is "equivalent" in content to the Needs Assessments arising as statutory duties under the 1989 Act.

28. Mr Rule supports that proposition with the following key reasons. Needs are at the heart of the relevant statutory framework, alongside which the Discretionary Power arises. Needs Assessments are a familiar, basic discipline in reaching an informed view about the affected individual. Public authorities owe a contextual public law duty to act fairly, and to take reasonable steps to acquaint themselves with relevant information (Tameside). The local authority cannot reasonably refuse to exercise the Discretionary Power without using this familiar, basic discipline. Failure to do so puts the authority in ignorance of what is at stake for the individual. In principle, there must be the proactive discipline of a needs enquiry. In principle, this enquiry must be the "equivalent" as would arise where a Needs Assessment duty is required for young adults by statute. Nothing short of that can suffice.

29. I cannot accept Mr Rule's proposition. On this issue, I agree with Mr Paget. My reasons are as follows:

i) First, the statutory scheme expressly identifies triggering situations where a Needs Assessment is required (§15 above). No statutory duty to conduct a Needs Assessment is applicable in the present case.

ii) Secondly, a Needs Assessment, for which the 1989 Act provides, is one of the support services which can apply as a statutory duty and entitlement in the case of a "former relevant child" (§15 above). That means it is one of the very support services which a local authority may choose to provide, as a consequence of the

favourable exercise of the Discretionary Power. It would be very striking if it were, in substance in principle and in every case, a precondition of considering whether to exercise the Discretionary Power. This would be a species of "general rule" which would clash with the clear recognition in GE that there is no general rule (§23i above).

iii) Thirdly, in GE itself, one of the "services" being sought was "a needs assessment", which moreover was the "principal concern" (see GE at §75). The Court of Appeal plainly did not think the equivalent of that service was invariably and in substance required, as a "general rule". There may be a case where a Needs Assessment – equivalent to that required under the statutory scheme – is the sole justifiable outcome for the reasonable exercise of the Discretionary Power. But that cannot, in my judgment, be said of the present case.

iv) Fourthly, it is important to appreciate that there can – in principle – be other sources of relevant information on the question of needs and what is at stake. One source is whatever is put forward by or on behalf of the affected individual. Another is the process by which the relevantly-flawed Age or Needs Assessment comes to light. Where – as in this case – there has been some legal process to identify the relevantly-flawed Assessment, information is likely to have been elicited which can inform the consideration of the Discretionary Power. The focus of that legal process may have been on Age Assessment ("child"), but information on present needs can nevertheless have come to light, suitably and sufficiently to inform a decision whether to exercise the Discretionary Power. The opportunity to consider that information weighs strongly against there being a public law obligation to undertake an equivalent Needs Assessment.

The Now-Known Needs Issue

30. Mr Rule's final argument is as follows. The common law duty of reasonably sufficient enquiry (Tameside), or alternatively the duty to take account of relevant considerations, require of the decision-maker that the exercise of the Discretionary Power be undertaken by having regard to what is now known to the local authority about the needs of the affected individual ("Now-Known Needs"). That includes what is now known as a result of the legal process by which the relevant local authority Assessment was shown to be relevantly-flawed. In the present case, that means the picture (§§4-6 above) which emerged from the evidence before the Judge, reflected in the Judgment. Mr Rule points to the fact that the Email Request was made, the Impugned Decision arrived at, and the Decision Email issued against the backcloth of the Judgment (§10 above). His skeleton argument set out, as follows, 8 points about Now-Known Needs which had emerged from the evidence before the Judge, all reflected in the Judgment:

> ***The UT's judgment revealed evidence of certain needs of the Claimant: [i] Numeracy needs – he was unable to correctly identify if 15 or 24 was the greater number and thus age. He also had little understanding of age… [ii] Literacy needs (in addition to limited numeracy): he was uneducated save for a limited education in the Quran at the Mosque. [iii] Inability to cook or clean for himself when he arrived. [iv] Problems adhering to schedules – late to court; sleeps a lot and often misses appointments; difficulty following instructions when given medication for a medical condition. Trouble sleeping due to his medical condition (scabies), impacting on attendances at his then college. However [he] had a personal desire to attend college and had "a fervent aim" to take up education. [v] He missed his mother and was very***

emotional. [vi] Lacking self-care skills, including to budget, resulting in a poor diet. [vii] Suffering low mood. His then tutor Ms Godwin explained that he seemed to suffer low mood that isolated him a little. He sought a lot of reassurance from teachers and teaching assistants. [viii] C is emotional in his interactions, scatter-brained and disorganised. He had been late in attendances due to sleep problems (suffering anxiety in the age assessment process).

31. Mr Paget had three lines of response to this argument:

    i) It was done. On the evidence, SWM Bilham – as the decision-maker – did have regard to the Now-Known Needs as reflected in the Judgment. I deal with this at §§43-45 below.

    ii) It did not need to be done. There is no public law duty on the decision-maker to have regard to Now-Known Needs in exercising the Discretionary Power, still less to do so in circumstances where the triggering request (here the Email Request) did not draw attention to any particular need, including by reference to the Judgment. I deal with this at §§32-33 below.

    iii) It could not make a difference. Failing to do so could not be a material public law error, or alternatively the 'highly likely: not substantially different' test is applicable, given what was known about the Claimant from the Social Services File. I deal with this at §§46-48 below.

32. I will start with the second line of response. Mr Paget submitted, in essence as I saw it, as follows. Nothing in GE identifies the Now-Known Needs as a legally relevant consideration when addressing the Discretionary Power. Had that been a legally relevant consideration, regard to which is a public law duty, the Court of Appeal would have said so. The primary judgment as to whether a consideration is relevant is for the decision-maker (§23viii above), subject to express or implied obligation (of which there is none) or unreasonableness. It is entirely open to the decision-maker in considering the Discretionary power to focus on questions of blame and culpability (§23ix above). Having done so, the decision-maker can entirely reasonably conclude without more, in the absence of blame or culpability, that it chooses not to exercise the Discretionary Power. There is no legal requirement, as a matter of reasonableness or reasonably sufficient enquiry or otherwise, that the Discretionary Power can only be exercised unfavourably after Now-Known Needs have been taken into consideration.

33. I cannot accept these submissions. On this issue, I agree with Mr Rule. In my judgment, there is a minimum standard of reasonableness and reasonably sufficient enquiry, and of action taken so as to have regard to an obviously relevant consideration. It is that the decision-maker, in the exercise of the Discretionary Power, must take reasonable steps to take into account what is now known to the local authority about the needs of the affected individual. My reasons are as follows:

    i) The Discretionary Power is an important power to address an injustice (§23iv above), in a situation where a relevantly-flawed Age Assessment means there was an unlawfulness (§23ii above), and where what are being denied are important support services (§14 above). Although it is important to consider whether there is an aggravated injustice, such that a favourable exercise of discretion is the sole justifiable outcome (§23ix, xi above), the Discretionary Power operates at large – as a discretion to be addressed open-mindedly – beyond those situations (§24ii above). A key theme, in the exercise of the

discretion, is the question of what is at stake (§24iii above). This is in a context where needs are at the heart of the statutory scheme alongside which the Discretionary Power operates, making sense of the relevance of the requested services and the local authority's flexibility.

ii) It is right that the local authority should be protected against any general rule that requires it to undertake the equivalent of a statutory Needs Assessment (§29 above). But one of the important points which weighs against recognising any such precondition is that the local authority can be expected to take advantage of what is now known to it (§29iv above). The position which reconciles the competing considerations is this. The Now-Known Needs constitute a legally relevant consideration. The Discretionary Power cannot be exercised adversely without having first had regard to that as a relevant consideration. That means taking reasonable steps to do so.

iii) There is room for latitude and judgment as to the nature and scope of the enquiry. I would not, for example, accept that the decision-maker was obliged to read all of the witness statement and documentary evidence which was filed before the Judge. Moreover, as Mr Paget emphasises, the Email Request did not draw attention to any particular need; nor to any specific services. The "services" could include a Pathway Plan and a Personal Advisor, as was recognised in the subsequent email correspondence. It is true that the Email Request could have articulated the same eight specific points as I have been identified by Mr Rule in his skeleton argument (§30 above). So could the subsequent email correspondence and the Letter Before Claim. They did not. However, the Email Request was made by the Claimant's legal representatives to the Council's legal department, specifically in the context of the Judgment which had been provided in draft (§10 above). In the circumstances of the present case, I agree with Mr Rule: the minimum standard of reasonable enquiry required the decision-maker to have regard to what was now known about the Claimant's present needs, under the different picture before the Judge (§§4-6 above); and it would have been legally sufficient to have regard to the contents of the Judgment to elicit the nature of the Now-Known Needs as reflected in the Judgment.

iv) I can test the legal logic in this way. Suppose the Email Request had said "we ask you to have regard to the Claimant's now-known needs as identified in the Judge's Judgment". Suppose SWM Bilham had chosen not to take account of those needs, assessing them as "irrelevant". That, in my judgment, could not have been a reasonable exercise of a judgment on relevance. Rather, it would have been a clear failure to have regard to a relevant consideration. The Now-Known Needs could not, in my judgment, reasonably be characterised as being other than relevant. As it was, the Email Request was written in the specific context of the Judgment, and asked for the Discretionary Power to be exercised favourably. In my judgment, the Discretionary Power could not be exercised unfavourably with at least thinking about the Now-Known Needs as reflected in the features of the case discussed in such a helpful detail in the Judgment. So far as practicality and proportionality are concerned, there would have been no difficulty. Indeed, I am fortified by the fact that one of Mr Paget's lines of

response is that, on the evidence, that is exactly what did happen. I will need to address whether he is right about that.

Reasons: The Sequence of Events

34. Before I can turn to deal with Mr Paget's first line of response (§31i above), I will need to introduce and address an issue of controversy about what constitute the decision-maker's reasons. I will start by identifying the relevant sequence of events during these judicial review proceedings. (1) The Claimant's Judicial Review Grounds (17.11.21) included the pleaded claim that what "was said on the Defendant's behalf" in the Decision Email (18.8.21) from HLS Onuorah (§§36-37 below) "appear[ed] to be an extract adopted of legal advice from counsel" and that the Council was "put to proof that a decision has been taken by a duly delegated official upon due and proper consideration of the circumstances" and "asked to discharge the duty of candour in this respect". (2) The Council's Summary Grounds of Resistance (23.12.21) took the pleaded position that "the Council's decision was taken by Carol Bilham, the relevant social work manager and then communicated to the Claimant by [HLS Onuorah as] its authorised internal lawyer". (3) The Council then (12.1.22) disclosed the Contemporaneous Note (§35 below). (4) The Claimant's representatives then filed a Permission-Stage Reply (15.1.22), with the required N244 Application Notice (Judicial Review Guide 2022 §8.5.1), contending that the "terms" of the Decision Email are "not the decision-maker's reasons" since the disclosed Contemporaneous Note "shows" that the points it records were "the reasons of the decision-maker". (5) After permission for judicial review was granted (28.6.22), the Council filed its Detailed Grounds of Resistance (5.8.22) and a witness statement (§38 below) from SWM Bilham (8.8.22). The Detailed Grounds, which were described as "supplemental to the Summary Grounds", refer to the Decision Email as the Council's "Decision". Based on the Decision Email, the pleaded position of the Council is: that "the Defendant expressly noted in its decision" that "the Council has fully considered [the Claimant's] circumstances"; and that "the Claimant's needs were taken into consideration in the Defendant's decision".

The Contemporaneous Note

35. The Contemporaneous Note (17.8.21) was written by HLS Onuorah. Here are its contents, expanded by me from their note form and abbreviations, with added paragraph numbers in square brackets. The sub-paragraphs [4a] to [4d] take the place of four indented points below the original paragraph [4]. I interpose that nobody could tell me who the SWM described as "BE" is. The Contemporaneous Note records the following:

> ***[1] 17 August 2021. Telephone call with Carol Bilham regarding the Claimant. [2] We discussed the Claimant's solicitors' request for 'leaving' care. [3] Carol Bilham has spoken with SWMs "BE" and Karen Sholtz and has reviewed the file with Social Workers. [4] The Council will not treat the Claimant as a former relevant child: [4a] The Claimant has never been a looked after child by the Royal Borough of Greenwich. [4b] There was no evidence in September 2019 that he was a child. [4c] Credibility was always an issue. The Upper Tribunal also picked that up. [4d] If the approach had been one month later and the Claimant had been accommodated, he wouldn't have had 13 weeks.***

The Decision Email

36. The Decision Email (18.8.21) was sent by HLS Onuorah. The paragraph numbering [1] to [5] below reflects paragraph numbering in the original. The contents of the Decision Email really fall into two parts. The first part gives an introduction and then paragraphs [1] to [4], as follows. The underlining has been added by me, to identify content which matches the content of the Contemporaneous Note:

> ***I refer to the [Upper Tribunal's] order dated 5th August and look forward to receiving your submissions on costs in due course. In the meantime the outstanding matter remains your client's request that the Council exercise its discretion and agree to treat your client as a "Former Relevant Child". [1] Upper Tribunal Judge Smith produced a long and detailed judgment. She reached a decision on age which was 4 years older than that advanced by your client. She did not accept his evidence on a number of credibility issues. She reached her decision on evidence that was obtained after the age assessment. This included your client's interaction with support workers and a teacher. In other words the evidence upon which the judge decided the case was never before the age assessors. In September 2019 there was no reliable evidence that your client was a child and the only evidence then available has been held by the judge not to be true namely your client's own assertion that he was 13 years old. [2] The Council reached a different view on age to the Tribunal Judge but there is nothing blameworthy in the assessors' conduct; indeed there is nothing inappropriate in their conduct at all because the case was decided on the basis of subsequent supporting evidence. [3] At no stage has your client been looked after as a child by the Council. Following the assessment your client applied for judicial review on the last day available – 11 December 2019, he did not seek interim relief then nor when permission was granted on 17 January 2020. [4] Former relevant children are owed a series of duties – section 23C Children Act 1989. However these duties only apply to children who have been looked after. An adult who asks for support under section 23C cannot be deemed to be a former relevant child – see R (GE (Eritrea)) v Secretary of State for the Home Department [2015] PTSR 854. However the Council has a discretion to treat such an adult 'as if' they were a former relevant child. The Court of Appeal provided some guidance on the exercise of discretion.***

The four underlined passages in this first part of the Decision Email reflect the contents of the Contemporaneous Note, respectively, at paragraphs [2], [4c], [4b] and [4a]. The remaining content of this first part of the Decision Email extends beyond the content of the Contemporaneous Note.

37. The second part of the Decision Email is paragraph [5]. The points [i], [ii] and [iii] in paragraph [5] have been added by me, as have the sub-paragraphs [5a] to [5f] which take the place of six bullet points in the original paragraph [5]. Again, the underlining has been added by me, to identify content which matches the content of the Contemporaneous Note:

> ***[5] The Council [i] has fully considered your client's circumstances and [ii] taken account of the guidance provided by the Court of Appeal and [iii] has concluded that it is not appropriate to exercise its discretion in your client's favour for the following reasons: [5a] [The] Council has acted fairly and reasonably. [5b] There was no evidence to determine that your client was a child in September 2019. [5c] Your client only brought the judicial review at the last minute and did not seek interim relief. [5d] On the basis of the now assessed age your client was only a child for 16 weeks after the assessment. Had he approached the Council one month later he would not even be a former relevant child because he would not have been looked after for 13 weeks whilst a child. [5e] Your client currently has accommodation and support provided by NASS and access to service pending the outcome of his asylum application. [5f] If the Council had been minded to exercise its discretion in your client's favour it is unlikely to have afforded any higher level of assistance. The only additional service/ support that the Council would have provided is a Pathway Plan which it would review every 6 months and the support of an allocated Personal Advisor.***

The three underlined passages in this second part of the Decision Email reflect the contents of the Contemporaneous Note, respectively, at paragraphs [4], [4b] and [4d]. The remaining content of this second part of the Decision Email extends beyond the content of the Contemporaneous Note.

SWM Bilham's Witness Statement

38. Then there is the witness statement of SWM Bilham filed in these proceedings, which includes this:

> ***I have read the Summary and Detailed Grounds of Resistance and I produce here as exhibit "CB1" a bundle of documents comprising the Claimant's Social Services File to which I referred in making the decision under challenge which was communicated to the Claimant's solicitors by email by the Head of Legal Services … on 18th August 2021. The file contained all the information the [Council] had on record about the Claimant. In arriving at the decision under challenge I reviewed the file with the Claimant's allocated Social Workers and liaised with my managers. I am therefore satisfied that I had all the Claimant's known circumstances in mind.***

"CB1" – "the file" – is the Social Services File (§2i above) of the documents dated 9 to 11 September 2019, culminating in (and including) the Local Authority Age Assessment (11.9.19). In my judgment, it is entirely appropriate that SWM Bilham should provide the Court with evidence about what the "file" was that she "reviewed" with "Social Workers" (Contemporaneous Note paragraph [3]). I will return to the rest of this witness statement evidence below.

Identifying the Decision-Maker's Reasons

39. I can turn to the arguments about what were the decision-maker's reasons:

i) Mr Rule argues, in essence, as follows: that the Decision Email needs to be read as a "legal submission", except insofar as its contents reflect the Contemporaneous Note; that "the original record of the decision" and "reasons of the decision-maker" are those found in the Contemporaneous Note; and that there is no evidence that the contents of the Decision Email were "actually considered by the decision-maker".

ii) Mr Paget argues, in essence, as follows: that the Decision Email constitutes "the decision-maker's reasons"; that the discussion between HLS Onuorah and SMW Gilham recorded in the Contemporaneous Note at paragraph [2] can be taken to have included, as the relevant context, the additional (non-underlined) points in the Decision Email; that HLS Onuorah's noted points in the Contemporaneous Note will have been "the key points only", and the rest of the Decision Email will have conscientiously reflected the rest of what was said in the conversation with SWM Bilham; that this was an 'entirely conventional' process of the Council's duly-qualified in-house lawyer, writing up the reasons of the Council's duly-authorised decision-maker, to produce the Council's reasoned decision; and that the reference in SWM Bilham's witness statement to "making the decision under challenge which was communicated to the Claimant's solicitors by email by the Head of Legal Services … on 18th August 2021" is evidence making clear that the Decision Email constituted SWM Bilham's reasons.

40. In my judgment, Mr Rule is correct on this issue. I cannot accept Mr Paget's submissions. The legal position, in my judgment, is as follows:

i) The decision-maker was SWM Bilham. Her decision was communicated internally, during the phone conversation with HLS Onuorah, and recorded in the Contemporaneous Note at paragraph [3]. The reasons for arriving at that decision needed to be SWM Bilham's reasons. HLS Onuorah carefully and conscientiously wrote down, in the Contemporaneous Note, the key points. They are at Contemporaneous Note [3a] to [3d].

ii) It was entirely appropriate for HLS Onuorah, as duly-qualified in-house lawyer, to assist in the 'writing-up' of a reasoned decision. But there was an important division of labour to be observed. The reasoned decision written by HLS Onuorah could properly express what SWM Bilham had communicated as her reasons with suitable presentational clarity. The written-up decision could also add in points of context and commentary, provided that these were not presented as "reasons". That is how Decision Email paragraphs [1] to [5] are to be understood, because paragraph [5] ends by identifying "the following reasons", with those "reasons" being paragraphs [5a] to [5f]. That means Decision Email paragraphs [1] to [5] are by way of context and commentary, as a setting for the "reasons" that follow at paragraphs [5a] to [5f].

iii) Three specific points [i] to [iii] are made at Decision Email paragraph [5], before the reference to "reasons". They are each being attributed to the decision-maker. There is no problem with point [iii]: it reflects Contemporaneous Note paragraph [4]. Point [i] was only correct if the process undertaken by the decision-maker SWM Bilham, and communicated to HLS Onuorah, was being conscientiously considered by HLS Onuorah to constitute having "fully considered" the Claimant's "circumstances". Point [ii] was only correct if the process undertaken by the decision-maker SWM Bilham, and communicated to HLS Onuorah, was being conscientiously considered by HLS Onuorah to constitute having "taken account of the guidance provided by the Court of Appeal [in GE]". The Contemporaneous Note does not record points [i] or [ii]. Those points could have been the subject of written communication between HLS Onuorah and SWM Bilham: for example, if HLS Onuorah had emailed SWM Bilham prior to the decision being taken, saying it was necessary in making the decision fully to consider the Claimant's circumstances; or providing SWM Bilham with a summary of the guidance provided by the Court of Appeal in GE. Or SWMs "BE" or "Karen Scholz" might have said or written this to SWM Bilham. Or SWM Bilham might have said during the conversation with HLS Onuorah that she had fully considered the Claimant's circumstances; or had taken account of the Court of Appeal's guidance. The problem is that the only further evidence of what happened is SWM Bilham.

iv) True, SWM Bilham's witness statement describes "making the decision under challenge which was communicated to the Claimant's solicitors by the [Decision] Email". But the decision at Contemporaneous Note paragraph [4] was communicated by the Decision Email paragraph [5] point [iii]. The witness statement says nothing about reasons. I am not told, for example, that the contents of the Decision Email were sent in draft to SWM Bilham at the time, to confirm that it accurately reflected her decision, decision-making process and

> "reasons", and that she did so confirm. Even the paragraph [5a] to [5f] "reasons" in the Decision Email are six "reasons" whereas Contemporaneous Note paragraphs [4a] to [4b] were four reasons. There are obvious question-marks. The Council has had fair warning, ever since the Permission-Stage Reply (15.1.22). And the Council has a duty of candour and cooperation to assist the Court "with full and accurate explanations of all the facts relevant to the issues which the Court must decide" (Judicial Review Guide 2022 §15.3.1). If there was more to say and explain, it should have been provided.

41. I therefore find as follows. I can rely, as SWM Bilham's "reasons" for the Impugned Decision, on the four points in the Contemporaneous Note at paragraphs [4a] to [4d] (§35 above). I can rely on the Decision Email "reasons" at paragraphs [5b] and [5d] (§37 above), because they reflect the contents of the Contemporaneous Note paragraphs [4b] and [4d]. Point [i] in paragraph [5] of the Decision Email communicates the decision, reflecting paragraph [4] of the Contemporaneous Note. Points [ii] and [iii] in paragraph [5] of the Decision Email are statements about the decision-maker's approach, but I cannot rely on them absent evidence from the decision-maker to support them. I can take account of the rest of the Decision Email, as contextual observations and contentions which were made on behalf of the Council at the time of communicating the decision, by the lawyer. They are reflected in submissions made by Mr Paget. They are submissions which can be tested against the evidence. They are not "reasons" of the decision-maker.

42. By way of post-script on this topic, I think it appropriate to reiterate the importance of the 'distinction' and 'division of labour' between a decision-maker's reasons and a lawyer assisting with their presentation. I can appropriately record the following observations, made a quarter of a century ago by Jowitt J in the context of a statutory duty to give reasons, in R v Wandsworth LBC, ex p Dodia (1998) 30 HLR 562 at 565-566. He said this:

> ***[T]here is a certain knowledge required as to what matters should be dealt with in decision letters. Provided the distinction is clearly observed between the decision-maker's role which is to decide where the truth lies, to decide on the relevant facts and to provide the reasons for those decisions and any assistance given in formulating a decision letter in a way which deals with clarity with the decision and the reasons for it, I can see no objection to a decision-maker receiving advice in the drafting of the decision letter, provided, I stress, that division of labours is observed: the boundary between a decision-maker's function and his or her reasons for it and assistance then about how the decision letter should be drawn so that it can properly fulfil the duty under the Act to give reasons.***

Did the Decision-Maker Have Regard to Now-Known Needs?

43. I am now able to return to Mr Paget's first line of response (§31i above). The question is whether SWM Bilham, as the decision-maker, had regard to the Claimant's Now-Known Needs as reflected in the Judgment. Mr Paget says the answer, on the evidence, is "yes". He argues that "the Council was well aware of the Claimant's relevant circumstances from the age assessment claim" (as well as from "its social care records" and "the Claimant's lawyer's correspondence"). He argues that it is "clear from" the Contemporaneous Note that SWM Bilham had the Judgment "in mind".

44. I am unable to accept that – on the evidence – SWM Bilham took into account the Claimant's Now-Known Needs as reflected in the Judgment. I agree with Mr Rule's submissions to the contrary. My reasons are as follows:

i) The Contemporaneous Note (§35 above) makes clear that SWM Bilham was aware of the Judgment and some points about what it had decided. To that extent, I agree with Mr Paget's submission that it is "clear from" the Contemporaneous Note that SWM Bilham had the Judgment "in mind". First, paragraph [4c] records, as SWM Bilham's reasoning, that the Tribunal "picked … up" the issue of "credibility". Secondly, paragraph [4d] records, as SWM Bilham's reasoning, that an "approach" made by the Claimant "one month later" (ie. October 2019) would not have satisfied the "13 weeks" to be a former relevant child. The Contemporaneous Note also makes clear that SWM Bilham was aware that the Judgment considered a different evidential picture in August 2021 than had Social Workers Williams and Clement in September 2019. Paragraph [4b] records, as SWM Bilham's reasoning, that there was "no evidence in September 2019 that he was a child". That shows a recognition that the Tribunal's Age Assessment was arrived at based on a different picture (§§4-6 above). I accept all of that. But the evidence does not tell me that the Judgment was sent to SWM Bilham; still less that it was read by her. The evidence establishes that the points about the Judgment, to which reference was made, came to SWM Bilham's attention and were taken into account by her. These points were communicated to her by some means. The evidence does not say.

ii) Importantly, the Contemporaneous Note describes SWM Bilham as having "reviewed [the] file with the Social Workers". The witness statement of SWM Bilham explains, properly and helpfully (§38 above), that the "file" which she read and reviewed with the Social Workers was the Social Services File. This is positive evidence about what happened. But the Social Services File was the documentation produced over the 3 day period 9 to 11 September 2019, culminating in the Local Authority Age Assessment (11.9.19). That file was two years old. It was the old picture. It was not the Now-Known Needs (§§4-6 above).

iii) Next, the witness statement of SWM Bilham (§38 above) is positive evidence which tells me <u>how</u> she says she "had all the Claimant's known circumstances in mind". She describes:

> ***the Claimant's Social Services File to which I referred in making the decision under challenge …***

She then says:

> ***The file contained all the information the [Council] had on record about the Claimant.***

Pausing there, it is striking that "all" the information held by the Council on "record" in August 2021 should be described by the decision-maker as being within the Social Services File compiled in September 2019. This does not support recognition of other later "information", and regard being had to it. SWM Bilham then says:

> ***In arriving at the decision under challenge I reviewed the file with the Claimant's allocated Social Workers and liaised with my managers. I am therefore satisfied that I had all the Claimant's known circumstances in mind.***

This description – including the word "therefore" – clearly tells me that the "known circumstances" were "in mind" through the Social Services File, earlier described as containing "all" the information about the Claimant held by the Council on record. There is no explanation of what liaising "with my managers" added to that information. There is no reason to go behind this positive evidence. It is a helpful and candid explanation, identifying what source was used in the decision-making by the decision-maker.

45. In these circumstances, I cannot agree with Mr Paget that – on the evidence – SWM Bilham, as the decision-maker, did have regard to the Now-Known Needs as reflected in the Judgment. I cannot accept the contention in the Decision Email paragraph [5] point [i] (§37 above). I cannot accept Mr Paget's suggestion that the decision-maker was "well aware of the Claimant's relevant circumstances from the age assessment claim and its social care records and the Claimant's lawyer's correspondence". The evidence does not support such contentions and conclusions. What the evidence supports is an awareness of the Claimant's "circumstances" from the "social care records" dated September 2019: the Social Services File.

Materiality

46. That leaves Mr Paget's third line of response (§31iii above). He says that any failure by SWM Bilham, as the decision-maker, to have regard to the Now-Known Needs as reflected in the Judgment could not be a "material" public law error, or alternatively the 'highly likely: not substantially different' test (Senior Courts Act 1981 section 31(2A)(2B)) is applicable, given what was known about the Claimant from the Social Services File, to which regard was had.

47. I cannot accept that submission. I have set out (§30 above) features relevant to need which Mr Rule identified by reference to the Judgment. I do not accept that the Social Services File included those same features. Mr Paget was unable to demonstrate that it did. I cannot accept that the Social Services File – compiled in those first 3 days when the Claimant was first in the United Kingdom in September 2019 – involves materially the same picture of needs as reflected in the materials discussed in the Judgment. Nor can I accept that the Social Services File from September 2019 would be a basis for predictively extrapolating the position two years later. I cannot say that it is inevitable at common law that SWM Bilham would have exercised the Discretionary Power unfavourably, or highly likely, under the statutorily-overlaid test, that her decision would have been substantially the same. In the circumstances of the present case, such conclusions would involve an exercise in speculation, by a Judge with a secondary review function, about how things would have worked out if no unlawfulness had occurred. The Now-Known Needs argument succeeds, and the appropriate course is to quash the decision refusing to exercise the Discretionary Power, so it can be considered afresh. There is no present lack of 'utility' in that remedy, given the importance of the support services (§14 above) and all the evidence, including – on this point – the fresh updating evidence about the Claimant (§22 above).

48. Whether it is the right response now, on the merits, to remedy the unlawfulness and injustice in this case, by providing any support service or services, treating the Claimant as if he were a former looked after child, remains a decision for a duly authorised decision-maker to take afresh, under the Discretionary Power which I have analysed earlier in this judgment.

Conclusion

49. For these reasons, the claim for judicial review succeeds on the Now-Known Needs Issue. Having circulated this judgment in confidential draft, I am able to deal here with any consequential matters. That circulation in draft (3.3.23) told the parties that the judgment (with typos corrected) would be handed-down electronically on 10.3.23. It has transpired that this did not happen, which has needed remedying by rescheduled hand-down (31.3.23). There was one contested consequential issue: costs. Mr Paget submitted that the appropriate order was that the Defendant pay 50% of the Claimant's costs, in essence because (a) two arguments failed and (b) avoidable time was spent analysing background matters. I do not agree. The Claimant is the winner. The analysis of the statutory scheme, case-law and power (see §§11-17, 23-24 above) were necessary for the winning argument of substance, which overcame three distinct lines of response (§§31-48). The Claimant's two failed arguments were short branches (§§25-29 above) from the same necessary trunk. A second morning had to be found to complete the argument, but that was because human error in the Defendant's team lost us court time and meant the hearing could not conclude in the allocated one day. I will order that the Defendant should pay the Claimant's costs on the standard basis, to be the subject of detailed assessment if not agreed.