Neutral Citation Number: [2021] EWHC 2843 (Admin)

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/10/2021

Before :

Mr Justice Poole

- -

Between :

The Queen on the application of AB	**Claimant**
- and -	
The London Borough of Brent	**Defendant**
	Claimant
The Queen on the application of NLK	
- and -	
The London Borough of Brent	**Defendant**
The Queen on the application of AD	**Claimant**
- and -	
The London Borough of Brent	**Defendant**

- -
- -

Philip Rule (instructed by **Instalaw Solicitors**) for the **Claimants AB and NLK**
Zia Nabi (instructed by **Instalaw Solicitors**) for the **Claimant AD**
Michael Paget (instructed by **Brent Legal Services**) for the **Defendant**

Hearing date: 13 October 2021

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JUDGMENT

Mr Justice Poole:

Introduction

1. These three claims for judicial review concern the Defendant local authority's obligations to provide accommodation under section 20 of the Children Act 1989 for unaccompanied asylum seekers pending the completion of assessments of their age. In each case the Defendant declined to accommodate the Claimant under s.20 of the Children Act 1989 on the grounds that they did not appear to the local authority to require accommodation.

2. The relevant statutory duties and powers, and statutory and non-statutory guidance were reviewed by Lavender J in *R(S) v Croydon LBC* [2017] EWHC 265 (Admin), [2017] PTSR 744 in which he held that it was unlawful for Croydon LBC not to treat the claimant as a child pending determination of his age assessment and allowed a claim for judicial review of a refusal to provide accommodation and support to the claimant pending the conclusion of an age assessment. In the present cases the Defendant local authority accepts that, pending the conclusion of an age assessment, each Claimant fell to be treated as a child but contends that given the timeframe for their age assessment and their placement at a hotel, it was lawful for it to decline to provide accommodation to them.

3. I have received witness statements from each Claimant, from social workers for the local authority, from AD's foster carer, and from Helen Johnson , Head of the Refugee Council's Children's Section.

Background

4. On or around 4 September 2020 the Home Office placed some 180-200 asylum seekers in the Holiday Inn, Empire Way, Wembley, London, under s.98 of the Immigration and Asylum Act 1999, using the National Asylum Support Service ("NASS"). Over time, some occupants were dispersed and new occupants arrived but the overall numbers placed in the hotel remained roughly constant. Before placing the asylum seekers at the hotel, the Home Office had taken the view that each one of them was an adult. They could not be provided with NASS accommodation unless they were adults. In the last few months of 2020, the Defendant local authority received referrals for at least ten of those asylum seekers, including the three Claimants, for services to be provided to them as putative children. The local authority owes certain obligations to children, including under s.20 of the Children Act 1989, but those obligations are not owed to adults.

AB

5. AB states that he is an unaccompanied child from Afghanistan who arrived in the United Kingdom on 27 September 2020. He was placed in the Holiday Inn, Empire Way, on the same date. As set out in its letter of response to his solicitor dated 10 December 2020, the local authority first received a referral in relation to AB on 30 October 2020. The local authority carried out an initial visit on 2 November 2020 and sought to arrange assessment interviews. On 4 December 2020 solicitors for AB referred his case to the local authority for Children Act support. On 8 December 2020

a pre-action letter was sent to the Defendant challenging the failure to afford such support. On 10 December 2020 the Defendant responded: it stated that age assessment interviews had been scheduled for 11 and 17 December 2020 and that the age assessment process "will therefore be completed within a short period of time". It denied that it had unlawfully failed to provide AB with accommodation under s.20 of the Children Act 1989, and wrote,

> "As a significant number of alleged UASC (Unaccompanied Asylum Seeking Children) have approached the Local Authority, it was proposed that the Local Authority will:
>
> 1) Within two working days of the referral through Brent Family Front Door (and legal services) seek to undertake an initial assessment of the person subject of the referral.
>
> The Local Authority will take a preliminary view as to the welfare of the person and assess whether there are any apparent safeguarding issues. Provided that there are no immediate issues and that the person is not going to be dispersed imminently;
>
> 2) The person will remain in the accommodation provided by the Home Office, for a short period whilst the Local Authority make arrangements to carry out a Merton Compliant age assessment.
>
> Should the subject of the referral face immediate risk of dispersal in advance of us completing the age assessment, provided that the Local Authority has been notified by the Home Office of the risk of dispersal, the Local Authority will seek to accommodate such person.
>
> If at any stage it is apparent that the person subject to the referral is a child the Local Authority will seek to accommodate that person in a placement in accordance with the preliminary assessed age and needs until such time that a full Merton complaint age assessment can be completed.
>
> The Home office has provided your client with NASS accommodation at the Holiday Inn – Empire Way. This accommodation is comprised of hotel rooms with their own shower facilities and provision of basic toiletries. The Home Office has put in additional support and facilities for the residents… These include: 24 hour security, a manager and 3 support staff, meals, medical assistance and three meals a day.
>
> The Local Authority contends that for at least a short period, the NASS accommodation provided by the Home Office is suitable accommodation, considering the circumstances and subject to the Local Authority's initial assessment and age assessment."

6. Also on 10 December 2020, the local authority emailed AB's solicitors that,

> "… although the second assessment interview will take place on 17.12.20 you will appreciate that the assessor requires time to complete the report and this can take up to in the region of 14 days and go through the local authority's approval process. We must also allow for the upcoming Christmas period."

7. AB's claim for judicial review was issued on 21 December 2020. On the following day Julian Knowles J granted interim relief, ordering the Defendant to "treat the Claimant as a child pending a completed age assessment" and to secure that the Claimant "is accommodated under s. 20 Children Act 1989 … until 14 days after notification to the Claimant's solicitor of the completion of an age assessment said to show the Claimant to be an adult." Permission to apply for judicial review was granted on 4 March 2021. Following the grant of interim relief, AB was placed with a foster family. He has told the court that "I feel stable and secure and for the first time [since coming to the UK] I am feeling happy." Whilst with foster carers he has been taught basic living skills and started on-line English classes. Whilst in the Holiday Inn he felt scared, trapped, stressed, and isolated. He had no educational provision and no activities. He did not like the food and sometimes missed meals.

8. AB's age assessment was concluded on 6 May 2021. The written assessment is 41 pages long. It concludes that AB was born on 7 April 2004, so he was 16 when placed at the Holiday Inn.

NLK

9. NLK states that he came to the United Kingdom unaccompanied from Sudan. He arrived on or around 20 August 2020. He says that he experienced traumatic early life experiences including torture. He was dispersed to the Defendant's area and was placed in the Holiday Inn, Empire Way from on or about 4 September 2020. On 16 November 2020 his solicitor referred him to the local authority for services as a putative child. The following day a pre-action letter was sent to the Defendant challenging the failure to afford Children Act support. On 19 November 2020 the Defendant visited NLK and responded to the pre-action letter. The local authority did not set out any timetable for conducting an age assessment but otherwise the letter is in identical terms to those quoted from the letter of response regarding AB at paragraph 5 above.

10. NLK issued a judicial review application on 3 December 2020. On the same day NLK was removed into immigration detention. The local authority had not been informed in advance. NLK's belongings remained in his room at the Holiday Inn. On 7 December 2020 Fordham J granted interim relief to the same effect as that granted by Julian Knowles J in the case of AB. Permission to apply for Judicial Review was granted on 2 January 2021.

11. Following the interim relief order the local authority managed to secure the return of NLK to its area and on 10 December 2020 placed him in a semi-independent unit for young people. Ms Grahovac, Social Worker, says that it was "at this point" that Brent decided that it would undertake a full age assessment. NLK speaks Fur (a rare Western

Sudanese dialect) and it was difficult to find an interpreter. The age assessment process was completed on 9 April 2021. The written assessment is 33 pages long and concludes that NLK is an adult born on 1 January 1995, so he was 25 years old when placed at the Holiday Inn.

AD

12. AD says that he entered the United Kingdom unaccompanied from Afghanistan. He entered on 4 September 2020 and claimed asylum. He was placed by the Home Office at the Holiday Inn, Empire Way. His solicitor made a referral to the local authority on 24 September 2020 stating that he was a putative child. A pre-action letter was written on 12 October 2020 and the Defendant replied on 19 October 2020. The letter of response includes the same wording as that set out at paragraph 5 above. It further states that "it is at the Local Authority's discretion whether to accommodate someone under section 20 of the Children Act 1989 as illustrated by Lady Hale in A v Croydon LBC [2009]." No timetable for the age assessment of AD is set out in that letter. On 22 October 2020, three days after the Defendant's letter of response AD was dispersed by the Home Office to Napier Barracks. His whereabouts were unknown to his solicitor or the local authority. He was eventually returned to the Holiday Inn in November 2020. Proceedings were issued on 22 December 2020. The following day Saini J granted interim relief in similar terms to that granted for AB and NLK (above). That day, AD was accommodated under s. 20 and placed with a foster family. Ms Goddard, Social Worker, states that, "It was at that point when it was decided to conduct a full age assessment." In January 2021 concerns were raised about AD's presentation and as to whether he had learning difficulties. An Educational Psychologist saw AD in March 2021 and put in place some goals for AD to work towards. The benefits to AD of being placed in foster care are evident from the evidence of his foster carer and from AD himself. He reports his time in the Holiday Inn as being "horrible" and affecting his mental health. He felt constantly worried and sometimes depressed. AD's age assessment was concluded as recently as 11 October 2021, the written assessment runs to 45 pages and concluded that AD is 24 years old.

Statutory and Regulatory Provisions

13. Sections 17 and 20 of the Children Act 1989 are within Part III of that Act. Subsections 17(1) and (6) of the Children Act 1989 provide:

> "(1) It shall be the general duty of every local authority (in addition to the other duties imposed on them by this Part)—
>
> (a) to safeguard and promote the welfare of children within their area who are in need; and
>
> (b) …,
>
> by providing a range and level of services appropriate to those children's needs."
>
> …

> (6) The services provided by a local authority in the exercise of functions conferred on them by this section may include providing accommodation and giving assistance in kind or in cash."

Subsection 17(10) of the Children Act 1989 defines what is meant by a child being "in need". Paragraph 1 of Schedule 2 to the Children Act 1989 requires every local authority to take reasonable steps to identify the extent to which there are children in need within their area.

14. Section 20 of the Children Act 1989 provides:

> "(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—
>
> (a) there being no person who has parental responsibility for him;
>
> (b) his being lost or having been abandoned;
>
> (c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care.
>
> …
>
> (3) Every local authority shall provide accommodation for any child in need within their area who has reached the age of sixteen and whose welfare the authority consider is likely to be seriously prejudiced if they do not provide him with accommodation.
>
> …
>
> (6) Before providing accommodation under this section, a local authority shall, so far as is reasonably practicable and consistent with the child's welfare – (a) ascertain the child's wishes and feelings regarding the provision of accommodation; and (b) give due consideration (having regard to his age and understanding) to such wishes and feelings of the child as they have been able to ascertain."

15. Section 105(1) of the Children Act 1989 defines "child" as meaning a person under the age of eighteen. By s.22 of the Act a child accommodated by a local authority under s.20 for more than 24 hours becomes a "looked after" child and the local authority has duties to safeguard and promote the child's welfare, including to promote their educational achievement, and to make use of services available for children cared for by their own parents as appears reasonable to the local authority. S.22 is sometimes said to require a local authority to act as effective corporate parents.

16. Section 22C of the Children Act 1989 makes provision for the ways in which looked after children are to be accommodated and maintained. If a looked after child ("C") is not to live with a parent, a person with parental responsibility for them, a person named in a child arrangements order, or a foster parent, or they are not to live in a children's home, they may be placed in accordance with "other arrangements" – s. 22C(6)(d).

17. Regulation 27 of the Care Planning, Placement and Case Review (England) Regulations 2010 (S.I. 959/2010), provides that:

> "Before placing C in accommodation in an unregulated setting under s.22C(6)(d) the responsible authority must –
>
> (a) be satisfied that the accommodation is suitable for C having regard to the matters set out in Schedule 6…

Those matters set out in Schedule 6 include the facilities and services provided, state of repair, safety, location, support, tenancy status, and C's views about the accommodation.

18. Section 11(2)(a) of the Children Act 2004, which applies to the Defendant, provides:

> "Each person and body to whom this section applies must make arrangements for ensuring that–
>
> (a) their functions are discharged having regard to the need to safeguard and promote the welfare of children;"

Statutory and Non-Statutory Guidance

19. The Department of Education has issued statutory guidance for local authorities, "*Care of unaccompanied migrant children and child victims of modern slavery*", the relevant version being dated November 2017. The guidance is issued under s.7 of the Local Authority Social Services Act 1970 which requires local authorities, in exercising its social services functions - which include functions under Part III of the Children Act 1989 - to act under the general guidance of the Secretary of State. The guidance states that it "must be complied with by local authorities when exercising these functions unless there are exceptional reasons which justify a departure" – paragraph 6. I adopt the approach of Lavender J in *R(S) v Croydon LBC* (above) in relation to this guidance. Although he was considering an early version of the guidance, it was materially the same as the November 2017 version. The definition of "child" now at paragraph 8 of the 2017 version, is,

> "Anyone who has not yet reached their 18th birthday…. Note that, where the person's age is in doubt, they must be treated as a child unless, and until, a case-law compliant age assessment shows the person to be an adult."

A footnote to the definition explains that all local authority age assessments must be compliant with the case law of *R(B) v Merton London B* [2003] EWHCC 1689 (Admin), [2003] 4 All ER 280 and subsequent judgments. Lavender J held that the defendant local authority was "obliged to follow the statutory guidance and to treat the claimant as a child unless there were cogent reasons for departing from the statutory guidance" [38].

20. Paragraph 10 of the Statutory Guidance states,

> "An unaccompanied child will become looked after by the local authority after having been accommodated by the local authority under section 20(1) of the Children Act 1989 for 24 hours. This will mean that they will be entitled to the same local authority provision as any other looked after child. Assessment and care provisions for the child should commence immediately as for any looked after child, irrespective of whether an application (e.g. an asylum claim) has been submitted to the Home Office."

21. Paragraph 35 of the Statutory Guidance refers to age determination. It re-iterates that when an age assessment is required local authorities must adhere to standards established by case law and it refers to further guidance in the *Age Assessment Guidance* published by the Association of Directors of Children's Services (ADCS) in October 2015. That non-statutory guidance includes the following:

> "You will need to plan for suitable accommodation before, during and after the assessment…
>
> "Other than in exceptional circumstances, children and young people will be looked after under Section 20 of the Children Act 1989 whilst the age assessment process continues.
>
> "Bed and breakfast accommodation is not suitable for any child under the age of 18. Even on an emergency basis.
>
> "Most age assessments should be completed within 28 days, however the timescale for assessment should be responsive to the needs of the child or young person. In cases where you have clear reasons to believe that an individual is a child (or indeed an adult), then a decision on age may be made more quickly.
>
> "The dangers inherent in not taking a child into your care are multiple.
>
> "Where there is doubt whether or not the young person is a child, the dangers inherent in treating a child as an adult are in almost all cases far greater than the dangers of taking a young adult into your care."

Case Law

22. There is a wealth of case law concerning the use by local authorities of s.20 of the Children Act 1989 when a child's parent is identifiable. Those cases, such as *Williams and another v Hackney LBC* [2018] UKSC 37, [2019] 1 FLR 310, focus on ss.20(7) to (11) which concern parental objection. They do not have direct relevance to the present cases where there is no-one with parental responsibility in a position to object. As already noted, very similar issues to those which arise in the present cases were considered by Lavender J in *R(S) v Croydon LBC* (above). He concluded that a putative child was to be treated as a child unless there were cogent reasons for departing from the statutory guidance. He also had regard to s.11(2)(a) of the Children Act 2004, the effect of which is that a local authority discharging its functions under s.20 of the 1989 Act must make arrangements for ensuring that their functions are discharged having regard to the need to safeguard and promote the welfare of children. He rejected the local authority's argument that the putative child was not someone "who appears [to the defendant] to require accommodation" because he was already provided with a place at a place at a hostel for adult asylum seekers which could be accompanied by "welfare checks". In that case the claimant had entered the United Kingdom on 7 September 2016, a referral for children's services had been made on 20 September 2016. An age assessment process started on 21 September 2016 but was still ongoing at the time of the issue of an application for Judicial Review on 30 September 2016 and at the date of the hearing before Lavender J on 18 January 2017.

23. The construction of s.20(1) of the Children Act 1989 has been considered by the House of Lords in *R(G) v Southwark London Borough Council* [2009] UKHL 26; [2009] 1 WLR 1299, and by the Supreme Court later in the same year in *R(A) v Croydon London Borough Council* [2009] UKSC 8, [2209] 1WLR 2557. The latter is the case referred to by the Defendant local authority in the letter of response regarding AD. At [28] of *R(G) v Southwark* Baroness Hale referred to the judgment of Ward LJ in the Court of Appeal in the *R(A) v Croydon* case. She referred to s.20(1) as entailing "a series of judgements". So far as relevant to the present case there are seven, and Baroness Hale noted the consequence of those judgements being assessed in favour of the applicant:

> "(1) Is the applicant a child? …
>
> (2) Is the applicant a child in need? …
>
> (3) Is he within the local authority's area? …
>
> (4) Does he appear to the local authority to require accommodation? In this case it is quite obvious that a sofa surfing child requires accommodation. But there may be cases where the child does have a home to go to, whether on his own or with family or friends, but needs help in getting there, or getting into it, or in having it made habitable or safe. This is the line between needing "help with accommodation " (not in itself a technical term) and needing "accommodation". …
>
> (5) Is that need the result of [one or more of s.20(1)(a) to (c)]?

> (6) What are the child's wishes and feelings regarding the provision of accommodation for him? [This is a reference to the requirement in section 20(6) of the 1989 Act].
>
> (7) What consideration (having regard to his age and understanding) is duly to be given to those wishes and feelings.
>
> It follows therefore that every item in the list had been assessed in A's favour, that the duty had arisen, and that the authority were not entitled to "sidestep" that duty by giving the accommodation a different label."

If the criteria under s.20 of the Children Act 1989 are met, the authority must provide accommodation. At [31] Baroness Hale said,

> "Section 20 involves an evaluative judgment on some matters but not a discretion."

24. Baroness Hale developed her analysis of the construction of s.20(1) of the Children Act 1989 in *R(A) v Croydon LBC* (above). At [14] she noted the submission that

> "The words of section 20(1) themselves distinguish between the statement of objective fact – "any child in need within their area" – and the descriptive judgment – "who appears to them to require accommodation as a result of" the three listed circumstances – which is clearly left to the local authority. "

Baroness Hale accepted that analysis and said at [26],

> "… where the issue is not, what order should the court make, but what services should the local authority provide, it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the public authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and "*Wednesbury reasonableness*" there are no clear cut right or wrong answers."

25. I have been referred to two recent judgments granting permission and interim relief to unaccompanied asylum seeking (putative) children. In *R(LS) v London Borough of Brent* [2020] EWHC 3072 (Admin) Foster J was concerned with another individual who was placed by the Home Office at the Holiday Inn, Empire Way. In *R(NG) and others v London Borough of Hillingdon* [2020] EWHC 2847 (Admin) Lang J considered three cases arising from very similar circumstances to those in the cases before this court. Although these decisions are of interest, the tests applied to grant interim relief and permission were, of course, different from the test which this court has to apply.

26. The Defendant emphasises the range of styles of age assessment that can be deployed in order to be *Merton* compliant. In *BF (Eritrea) v SSHD* [2019] EWCA Civ 872, [2020] 1 All ER 396, the Court of Appeal considered a policy that claims by asylum seekers to be under 18 should be accepted unless their physical appearance/demeanour very strongly suggests that they were significantly over 18 years of age and no other credible evidence exists to the contrary. The Court of Appeal held that the policy did not properly identify the margin of error inherent in the conduct of an initial assessment which depended primarily on physical appearance/demeanour.

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

27. In response to that judgment, the Home Office issued revised guidance in May 2019 requiring immigration officials to treat those claiming to be under 18 as their claimed age unless their physical appearance and demeanour "very strongly suggests they are 25 years or over". Similarly, there may be cases where an individual is obviously a child. In very obvious cases there will be no need to undertake a detailed age assessment. At the other end of the spectrum there will be cases in which a much more thorough enquiry is required before the assessment can be concluded. Some cases may involve a less thorough investigation but something more than an assessment of appearance and demeanour alone. However, whenever an age assessment is undertaken it should be case-law compliant, or *Merton* compliant. Certain minimum standards must be met and the decision-maker has to do what is necessary in any particular case. In *R(AB) v Kent County Council* [2020] EWHC 109 (Admin), [2020] 4 All ER 235, Thornton J said at [43]:

> "… a decision maker is under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person's age when deciding to treat a young person as an adult instead of a child in circumstances where the young person is claiming that he or she is a child …"

The Claimants' Case

28. The Claimants challenge the Defendant's decisions to deny them the provision of accommodation under s.20 of the Children Act 1989 as being unlawful breaches of their statutory duties and/or in breach of the policy and guidance applicable to the treatment of putative children pending age assessment. For AB and NLK, Mr Rule contends further that the denial of accommodation, care or support is inconsistent with the best interests of the child principle, contrary to section 6 of the Human Rights Act 1998 which requires positive safeguarding of the private and family life interests of the Claimants by the proper and lawful administration of the statutory scheme, and/or that the decision not to provide accommodation, care or support pending completion of the age assessment is *Wednesbury* unreasonable or irrational.

The Defendant Local Authority's Case

29. It is accepted by the local authority that in the case of each of the three Claimants:

    i) There was doubt as to his age and the local authority had decided to undertake an age assessment.

    ii) The age assessment had to be case-law compliant.

    iii) Unless and until a case-law compliant age assessment showed him to be an adult, the local authority was required to treat him as a child pending the outcome of the age assessment.

    iv) They treated the Claimant as a child, and he was a "child in need" within the meaning of s.17(10) of the Children Act 1989.

    v) At least one of the conditions at (a) to (c) of s.20(1) of the Children Act 1989 was satisfied.

    vi) The Holiday Inn, Empire Way, would not have been "suitable" accommodation if provided to the putative child under s.20 of the Children Act 1989.

    vii) There should be no departure from the statutory guidance without cogent reasons. Non-statutory guidance should be applied unless there are good reasons for not doing so, although (the Defendant contends) non-statutory guidance has a lower status than statutory guidance.

30. The local authority's case is that it noted the accommodation and services available and concluded that the Claimants did not require accommodation (s.20(1)) and that their welfare would not be seriously prejudiced without it providing accommodation (s.20(3)) pending completion of their age assessments. The local authority contends that it treated the Claimants as children and therefore complied with the statutory guidance, and that there were exceptional circumstances not to provide s.20 accommodation, and therefore the ADCS guidance was properly followed. In oral submissions Mr Paget said that the exceptional circumstances were that these Claimants had accommodation at the Holiday Inn and it was intended that their age assessments would be short-form assessments that would soon be completed.

31. The Defendant maintains that in making its decisions under s.20 of the Children Act 1989 it was exercising an "evaluative judgment" which can only be successfully challenged if it can be shown to have been irrational. In that context it submits that it did not act irrationally or unreasonably because:

    i) The Claimants were being provided with appropriate accommodation.

    ii) Their physical appearance and demeanour were strongly suggestive of an adult male of at least 25 years old.

    iii) They had no medical complaints.

iv) The Defendant was only undertaking a "short-form assessment which would be completed far quicker than a full age assessment."

v) It is appropriate to depart from the "default" position of providing accommodation for a short period when a short-form assessment is proposed.

vi) The mere assertion by an applicant that they are a child does not trigger a duty on the Defendant to provide accommodation.

Conclusions

32. The Claimants have not alleged that mere assertion by an applicant that they are a child triggers a duty on the Defendant to provide accommodation. The Defendant is not bound to accept mere assertion and it is legitimate for a local authority to assess age based on an abbreviated assessment of physical appearance and demeanour in an obvious case – *R(B) v Merton LBC* (above). The Defendant's obligations under s.20 of the Children Act apply to children, not to adults. If it is obvious that an individual is an adult then an immediate assessment can be made within a very short time. That was not the case for these Claimants. The differing outcomes of the age assessments for the three Claimants demonstrate how difficult the process of assessing age can be when age is not obvious and in the absence of documentary proof. The Home Office must have regarded each claimant as being clearly over 25, whereas only one of them has now been assessed as being within that age range, and one has now been assessed as having been 16 years old at the relevant time. At the time when the decisions under challenge were made, the local authority had doubts as to the Claimants' ages, had decided to carry out age assessments, and so had not accepted the Home Office's view as to the Claimants' ages. In those circumstances, as the statutory guidance makes clear, in accordance with Lavender J's judgment in *R(S) v Croydon* (above), and as the Defendant accepts, each Claimant had to be treated as a child unless or until a case-law compliant age assessment concluded that they were an adult.

33. Accordingly, the Defendant cannot reasonably contend that the appearance and demeanour of each of these three Claimants was "strongly suggestive" of their being over 25 years old. That submission is in conflict with the local authority's acceptance upon referral that the Home Office's view to that effect could not be relied upon and that *Merton* compliant age assessments were needed. The local authority clearly took the view that the age of each Claimant was in doubt.

34. In all of the present cases an age assessment process was ongoing at the time of the challenged decisions and at the time when the claims were issued.

i) In the case of AB, the local authority had been put on notice that he claimed to be a child and sought support and services as a child on 30 October 2020. The age assessment process had not been concluded by the time of the letter of response of 10 December 2020 or when proceedings were issued on 21 December 2020. Thus, there had been 41 days between referral and the letter of response, and 52 days between referral and issue. The conclusion of the age assessment process was not envisaged to be completed at least two weeks after the planned interview on 17 December 2020, and even later because of the

Christmas break. On the evidence I conclude that the local authority knew that the age assessment was unlikely to be concluded until about 7 January 2021 at the earliest, which would have been approximately 69 days after referral. As it happens the age assessment was completed on 6 May 2021, over six months after referral.

ii) In the case of NLK, referral was on 16 November 2020, the letter of response was written only three days later, and the application for Judicial Review was issued 17 days after referral. At that time no timetable had been given by the local authority for completion of the age assessment and in fact the initial interview took place on 11 January 2021 and the assessment was concluded on 9 April 2021, over 20 weeks after referral.

iii) In the case of AD, referral was on 24 September 2020, the letter of response was dated 19 October 2020, 25 days later, proceedings were issued on 22 December 2020, 91 days after referral. There is no evidence that the age assessment was under way. No timetable was given for the conclusion of the age assessment and in fact it was not concluded until 8 October 2021, over a year after referral.

35. In none of the three cases can I find any reference by the local authority to a "short-form" age assessment or to the intention to perform an abbreviated age assessment prior to the challenged decisions or the issue of proceedings. Indeed, in the cases of NLK and AD, no timetable was set out at all. In the case of AB, a timetable was set out but, even if it had been complied with, it would still have resulted in a completed assessment over 28 days from the Defendant's letter of response stating that it would carry out an age assessment. The ADCS guidance suggests that most assessments should be performed within 28 days. The Defendant local authority did state in each letter of response that the Claimant would remain in the Holiday Inn "for a short period whilst the Local Authority make arrangements to carry out a Merton Complaint age assessment." However, on the evidence provided I conclude that at the time of each letter of response, which I take to contain the decisions under challenge in these cases, the local authority envisaged that each age assessment would be likely to take at least 28 days to complete.

36. For the Defendant, Mr Paget submitted that it was the granting of interim relief in each of these cases that resulted in decisions to carry out "full" *Merton* compliant age assessments. That is supported to some extent by witness evidence. However, I do not accept that the granting of relief made a significant difference to the time taken to complete age assessments in these three cases. It might be that having placed AB and AD with foster carers, it would have been necessary to obtain evidence from the foster carers, but the age assessments contain only relatively brief references to such information. The information could have been obtained quite easily from the foster carers without the need for significant delay. As it is, considerable delay was caused in AD's case by the need to involve an Education Psychologist. In NLK's case, his rare language caused delay.

37. Mr Paget presented a schedule purporting to show four categories of assessment: immediate (1-2 days), short-form (up to two weeks), short-form but delayed (intended to be 2 weeks but undeliverable in that time), and long-form (ideally up to 28 days but in practice several months). For the Claimants, Mr Rule and Mr Nabi submitted that there are no neat categories of "short-form" or "long-form" or "full" age assessments because there is a single requirement, namely that the assessment complies with

necessary, minimum standards. The assessor(s) cannot know in advance of the process how many interviews will be required or what investigations may be necessary.

38. The courts have recognised that immediate assessments based on physical appearance and demeanour may be conducted in obvious cases. None of the three Claimants fell within that category. At the time when a decision is made to undertake a more substantial age assessment, it cannot be predicted with certainty when it will be completed. However, in these cases the evidence does not begin to demonstrate that the local authority anticipated, or could reasonably have anticipated, that the age assessment processes would be completed within two weeks and certainly not two weeks from the decision to undertake an age assessment. In each case there had been more than two weeks between the decision to assess age and the granting of interim relief, which the Defendant relies upon as triggering a change to a long-form assessment. Even the most straightforward assessment, other than an immediate assessment, would involve interviewing the individual concerned with an interpreter if required, preparing a written assessment, having that assessment approved, and then communicating it to the individual. The local authority's email to AB's solicitors on 10 December 2020 states that it can be expected to take up to two weeks even after the interviews have taken place simply for the report to be written up and to be approved.

39. I do not discount the possibility that there may be cases where there is a reasonable expectation that the age assessment will be completed within an exceptionally short time, but that cannot be said of these three cases.

40. I turn now to the relevance to the local authority's obligations under s.20 of the Children Act 1989 of the nature of the accommodation in which the Claimants were placed by the Home Office – the Holiday Inn, Empire Way, Wembley. The following points appear to me to be salient:

    i) The Home Office could only place the Claimants at the Holiday Inn under NASS and in accordance with the Immigration and Asylum Act 1999, if they were adults (over 18).

    ii) The Defendant local authority accepts that if it did have a duty to accommodate any of the Claimants as children under s.20 of the Children Act 1989, then the Holiday Inn would not have been "suitable" accommodation. I am satisfied that had the local authority placed the children at the Holiday Inn under s.20, it would have been in breach of the Care Planning, Placement and Case Review (England) Regulations 2010, and would have been acting contrary to the ADCS guidance.

    iii) The asylum seekers placed at the Holiday Inn were placed there by the Home Office on a temporary basis (under s.98 of the 1999 Act) and were liable to be dispersed, including into detention, at any time and without notice. This happened to NLK and to AD whilst they were awaiting age assessment. Had they been accommodated as children under s.20 of the Children Act they would not have been dispersed in that manner.

    iv) In fact, the Holiday Inn was used to house adult asylum seekers and the overwhelming majority of occupants, whilst these three Claimants were there, were adults. The Home Office had put in place a manager, security, three

support staff, and medical assistance (according to the letters of response from the Defendant in this case) but I have received no evidence of any services being provided to the Claimants, or others, as children. Thus, there was no education provision, no child health provision (physical or mental), no assistance with food, hygiene, or finances, and no allocated social worker or other support workers from children's services.

v) Whilst the Home Office provided security, there is no evidence that putative children at the Holiday Inn were safeguarded against risk from adult strangers with whom they were living in close proximity.

vi) There is no evidence of any separation of putative children from adults at the Holiday Inn – no separate area for their rooms, for eating, or for activities.

vii) There is no evidence that any account was taken of safeguarding the Claimants as children, or of promoting their welfare as children whilst they were placed at the Holiday Inn.

41. I accept the Defendant's submission that s.20(1) of the Children Act involves evaluative judgements by the local authority and that, as such, the evaluative questions are to be determined by the local authority subject to the control of the courts on the ordinary principles of judicial review – Baroness Hale in *R(A) v Croydon LBC* (above) at [26]. Section 20(1) does not give the local authority a discretion: if the matters set out by Baroness Hale in *R(G) v Southwark LBC* (above) at [28] are satisfied, then accommodation must be provided to the child concerned. However, some of the individual matters involve a judgement to be exercised by the local authority. In these three cases the only matter listed by Baroness Hale which is in dispute is whether each Claimant appeared to the local authority to require accommodation. That element does involve the exercise of judgement by the local authority.

42. I turn to the conditions under s.20(1)(a) to (c). The evaluation or judgement in dispute was whether the child in question required accommodation as a result of one or more of those conditions. None of the Claimants contends that the condition at s.20(1)(b) was met in this case. I have heard no submissions on that point and so I proceed on the basis that s.20(1)(b) was not met. In his written submissions, Mr Rule, for AB and NLK, relied on s.20(1)(a) being met: there was no person with parental responsibility. Mr Nabi, for AD, agreed but added that s.20(1)(c) was also met in that the person who had been caring for AD was prevented from providing him with suitable accommodation or care. Mr Paget, for the Defendant, treated all the Claimants in the same way. He accepted that in each case at least one of the conditions at s.20(1)(a) to (c) was met. He did not argue that either (a) or (c) was not met.

43. In relation to s.20(1)(a) none of the Claimants had anyone with parental responsibility in the jurisdiction and it was evident that they would not be reunited with a living parent in the foreseeable future. The condition at s.20(1)(a) is that there is no person with parental responsibility, not that there is no person with parental responsibility within the jurisdiction. Nevertheless, I take the condition to be met when there is no person with parental responsibility in the jurisdiction and no immediate prospect of any such person being reunited with, and caring for, the child – see *R(Berhe) v LB of Hillingdon* [2003] EWHC 2075 (Admin), per Sullivan J at [35]. There was no-one who could exercise parental responsibility in relation to these Claimants. The Defendant knew that.

As noted, the Defendant does not dispute that the condition at s.20(1)(a) was met in the cases before the court.

44. I am also satisfied that the condition at s.20(1)(c) was met and that the local authority knew that it was met at the material time in each case. The local authority knew that each Claimant was an unaccompanied asylum seeking child. It must be taken to have known that any child who has survived childhood to puberty must have been cared for by someone during their lives. It knew that there was no foreseeable prospect that they would soon be reunited with those who had cared for them before they left their home countries and travelled to the UK unaccompanied. It therefore knew that any person who had been caring for these Claimants was now overseas and thereby prevented from providing them with suitable accommodation or care. Again, as noted, the Defendant has not disputed that the condition at s.20(1)(c) was met in these three cases.

45. If s.20(1)(a) is met in any particular case, it does not necessarily follow that a local authority would be bound to find that a child in need in its area required accommodation. For example, a child may be very well looked after and accommodated by a relative who does not have parental responsibility. The question of "requirement" is a distinct one. However, if the condition at s.20(1)(c) is met, and the local authority is aware that it has been met, as I have found to be the case in respect of these three Claimants, then the local authority knows that anyone who has cared for the child, whether or not they have parental responsibility, is now prevented from providing them with suitable accommodation or care. In the present cases the local authority accepts that the accommodation provided by the Home Office was not suitable accommodation within the meaning of the Children Act 1989. It has produced no evidence that the nature of the accommodation and care at the Holiday Inn was likely to change. Any accommodation provided by the local authority under s.20 of the Children Act 1989 must be "suitable" under the Act and the 2010 Regulations. Hence, the Defendant local authority was aware that unless it provided accommodation, these "children in need" would continue to live in unsuitable accommodation. Even so, it contends that it appeared to it that the Claimants did not require accommodation.

46. In considering whether the Defendant's evaluation or judgement that these Claimants did not require accommodation was *Wednesbury* reasonable, the following matters are relevant. Some are specific to these cases; some are of more general application:

    i) The judgement involved under s.20(1) is not whether the local authority is satisfied that the child requires accommodation, but only whether the child "appears" to the local authority to require accommodation as a result of one or more of the conditions at s.20(1)(a) to (c). That is not a particularly high threshold.

    ii) The duty under s.20 of the Children Act 1989 should be read in the light of the general duty under s.11 of the Children Act 2004 which requires local authorities to make arrangements to ensure that that their functions, which include their functions under s.20 of the 1989 Act,

        "(a) … are discharged having regard to the need to safeguard and promote the welfare of children…"

iii) The Defendant local authority accepts that each claimant was to be treated as a child, and as a child in need. By s.17(10) of the Children Act 1989 a child shall be taken to be in need if, for example, without the provision of services under Part III of the Act, which include the provision of accommodation, he is unlikely to achieve a reasonable standard of health or development, or his health or development is likely to be significantly impaired. The question of whether accommodation is required must be considered in the light of the fact that the child in question is a child in need and the consequences for the child's health and development if accommodation is not provided.

iv) In taking a view as to whether an unaccompanied asylum seeking child, who is a child in need, requires accommodation, the local authority should have regard to the vulnerability of such children as emphasised in the statutory and non-statutory guidance. Given the vulnerability of unaccompanied asylum seeking children and children in need, and given the duty of the local authority to safeguard the welfare of children, the court will scrutinise the Defendant's decision that such children did not require accommodation under s.20 of the Children Act with considerable care.

v) The provision of accommodation under s.20 of the Children Act 1989 is closely connected with other support and services to the child in need. Baroness Hale set out the implications for older children of being a looked after child in *R(M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 at [2]-[23]. By dint of a child being a "child in need", the local authority knows that the child is unlikely to achieve a reasonable standard of health or development without the provision of services by a local authority, and/or that other, similar criteria under s.17(10) of the 1989 Act are met. In exercising its function under s.20, a local authority must assess not only what services and support are being provided to the child in need but also what services and support are likely to be provided if the local authority does not provide accommodation thereby making the child a looked after child. The need for accommodation is not simply about securing a building for the child to occupy. No local authority could reasonably hold the view that vulnerable children, who are children in need, do not require accommodation on the sole ground that they have use of a bed, a toilet, a shower, and a roof over their head.

vi) The ADCS guidance states that putative children will be looked after under s.20 of the Children Act 1989 "other than in exceptional circumstances". I have already found that the projected times for completion of age assessments were not exceptional in these cases. I am satisfied that in each case the local authority knew when it decided not to accommodate the putative child, that the age assessment was likely to take at least about 28 days. That is the expectation for most age assessments within the ADCS guidance, therefore the anticipated time to complete the age assessments in the present cases cannot have constituted "exceptional circumstances" within the terms of that guidance. For the reasons already given I also reject the suggestion that the physical appearance and demeanour of any of the Claimants constituted "exceptional circumstances".

vii) The other matter on which the Defendant local authority relies as constituting "exceptional circumstances" is the nature of the accommodation already provided to the Claimants by the Home Office at the Holiday Inn. In *R(G) v*

Southwark LBC (above) Baroness Hale said at [28(3)] that it was "quite obvious that a sofa surfing child requires accommodation." The ADCS guidance states that, "Bed and breakfast accommodation is not suitable for any child under the age of 18, even on an emergency basis." The placement of these three Claimants at the Holiday Inn was a temporary and unstable placement. As happened to NLK and AD, they could be moved elsewhere with no notice. Accommodation is more than a room with a bed, and access to a toilet and shower. A child in need may have a roof over their head but still obviously require the provision of accommodation by the local authority. These were unaccompanied putative children placed by the Home Office as adults alongside many other adults at the Holiday Inn. There was no child-focused support or provision at the hotel, no s.17 Children Act provision of services, and no access to education. There is no evidence of any adaptations to the hotel to make it suitable for unaccompanied children. On the evidence provided to this court, I conclude that the accommodation at the Holiday Inn was materially equivalent to bed and breakfast accommodation. It was accommodation that was wholly unsuitable for unaccompanied asylum seeking children. It was not accommodation that would safeguard children or promote their welfare: instead, it jeopardised their safety and was likely to be detrimental to their welfare.

viii) I have received no evidence that other services under Part III of the Children Act 1989 were being provided by the local authority to these Claimants or were likely to be provided to them whilst they remained placed by the Home Office at the Holiday Inn. In contrast, the provision of accommodation under s.20 would be associated with the provision of child-centred support services designed to safeguard children and promote their welfare.

ix) The Defendant accepts that had it provided accommodation under s.20 of the Children Act 1989 to any of these Claimants, it would not have accommodated them at the Holiday Inn because it was not "suitable" accommodation. I am satisfied that the Holiday Inn would not have been considered suitable under the Care Planning, Placement and Case Review (England) Regulations 2010. In each case the grant of interim relief requiring the local authority to accommodate the Claimant under s.20 resulted in their immediate transfer – in two cases placing the Claimant in a foster family, and in the third case, into semi-independent living accommodation. It is an uncomfortable position for the Defendant to assert that children in need did not appear to it to require accommodation on the ground that they were living in accommodation that the local authority considered to be unsuitable for children in need.

47. I acknowledge the difficulties faced by the Defendant who suddenly had responsibility to deal with a number of asylum seekers who claimed to be children. I have no evidence as to resources to take into account, even if such evidence were considered relevant, but I note that each claimant was swiftly found suitable accommodation once interim relief was granted. There may well be circumstances in which a local authority can reasonably decide that it does not appear to it that an unaccompanied asylum seeking child who is a child in need, requires accommodation. Perhaps their current accommodation, provided by a person or body other than the local authority, is suitable and/or there can be confidence that the age assessment will be concluded within a very short time. However, I do not have to speculate about such circumstances because they do not arise

in these three cases. Taking into account all the circumstances, in my judgement the local authority cannot reasonably have concluded that these three Claimants, as children in need, who had been placed as adults in accommodation unsuitable for children, and who were awaiting age assessments that were expected to take four weeks or more to conclude, did not appear to the local authority to require accommodation. There was no justification for that view being taken. There were no grounds to depart from the non-statutory guidance - the fact that these Claimants were placed by the Home Office at the Holiday Inn and were awaiting age assessments that the Defendant local authority knew would be likely to take at least as long to complete as the expected 28 days within that guidance, could not constitute "exceptional circumstances" justifying a departure from the usual expectation that, treated as children in need as they were, these claimants should become looked after children under s.20 of the Children Act. It was *Wednesbury* unreasonable for the Defendant local authority to determine that it did not appear to it that these three Claimants required accommodation, and the local authority was in breach of its duty under s.20 of the Children Act 1989 by declining to provide accommodation to these three Claimants pending the outcome of their age assessments. The Defendant's decisions in these three cases not to accommodate the Claimants under s.20 of the Children Act 1989 were unlawful.

48. I reach that conclusion whether either or both of the conditions at s.20(1)(a) and (c) of the 1989 Act were met.

49. I have determined the applications in favour of the Claimants without the need to consider the additional grounds put forward by Mr Rule, namely contravention of the best interests principle and breach of the Human Rights Act. There is no need for me to determine those issues. I am not persuaded that consideration of the "best interests" principle or the Human Rights Act would add anything to the claims. The matters which the local authority had to consider under s.20 of the Children Act included consideration of s.11 of the Children Act 2004 and therefore promotion of the welfare of children. Even if the Claimants' Art 8 rights are engaged, those rights are fully respected through the lawful application of the principles of Part III of the Children Act 1989.

Relief

50. In each case the Claimant has now been age assessed and appropriate accommodation provided depending on their age. I shall receive submissions on what declarations or other relief, and costs orders, are appropriate in the light of this judgment.