Neutral Citation Number: [2008] EWCA Civ 1445

Case No: C1/2008/1531; C1/2008/1532

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT
MR JUSTICE BENNETT
CO/2130/2007 and CO/2334/2008

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18th December 2008

Before :

THE RT HON. LORD JUSTICE WARD
THE RT HON LORD JUSTICE MAURICE KAY
and
THE RT HON SIR JOHN CHADWICK

- -

BETWEEN:

The Queen on the application of A
- and -
London Borough of Croydon

AND BETWEEN: **-and -**

The Queen on the application of M
-and-
London Borough of Lambeth

- -
- -

Mr Ian Wise (instructed by Harter & Loveless) for the appellant A
Mr Timothy Straker Q.C and Mr Christopher Buttler (instructed by Bennett Wilkins) for the appellant M
Mr Charles Béar Q.C. and Mr Jon Holbrook (instructed by Sternberg Reed) for the London Borough of Lambeth
Mr Bryan McGuire and Ms Peggy Etiebet (instructed by Croydon Legal) for London Borough of Croydon
Mr Daniel Stilitz and Ms Deok Joo Rhee (instructed by the Treasury Solicitor) Secretary of State for the Home Department
Mr John Howell Q.C. (instructed by Anna Fairclough) for Liberty

Hearing dates: 17, 18 and 19 September 2008

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Approved Judgment

Lord Justice Ward:

Introduction

1. Man or boy? That is the question, easy to ask but not so easy to answer, that is with increasing frequency confronting the social workers of some local authorities because, pursuant to the Age Assessment Joint Working Protocol between the UK Border Agency and the Association of Directors of Social Services, disputes as to age of young asylum seekers are to be resolved by the Social Services Department in order to settle who has to provide accommodation for them. The National Asylum Support Service (NASS) must provide for an adult but the responsibility for a child, i.e. one who is under 18 years, lies with the local authority by virtue of Part III of the Children Act 1989.

2. In the cases before us, the London Boroughs of Lambeth and Croydon ("Lambeth" and "Croydon") decided respectively that the appellants M and A were adults and so they refused to provide accommodation for them. As it happened, in the course of M's asylum claims, the AIT came to a different conclusion and decided that M was still a child. M and A sought the judicial review of the respective decisions and three preliminary issues were ordered to be tried:

> "i) Were the age determinations of each claimant by the respective local authorities contrary to section 6 of the Human Rights Act 1998 in that they were contrary to the procedural protections of Article 6 and/or Article 8 of the European Convention on Human Rights?
>
> ii) Is the question whether an individual is a child for the purposes of section 17 and 20 of the Children Act 1989 one of precedent fact, which the court may review on the balance of probabilities?
>
> iii) Was the departure of the London Borough of Lambeth from the decision of the AIT and the Secretary of State on M's age lawful?"

On 20th June 2007 Bennett J held in answer to the first question that the age determinations by the respective local authorities were not contrary to Article 6(1) and that, in respect of Article 8, which A alone sought to invoke, his age determination was not a "private right" and thus Article 8 was not engaged. He answered "No" to the second question and "Yes" to the third. He gave permission to appeal on the first two issues. There is no appeal in respect of the third.

A little more detail

M's case

3. He arrived in the United Kingdom from Libya on 1st December 2006 and claimed asylum. He said he was born on 15th December 1989 but his age was disputed by the immigration officers and the matter was referred to Lambeth. On 14th December 2006 two social workers carried out an assessment and concluded on the basis of their

visual assessment that M was over 18 years old. On 17th January 2007 the SSHD refused M asylum. On 2nd February 2007 Dr Michie, a consultant paediatrician, assessed his age as more likely than not to be 17. Lambeth considered the report but was not persuaded to change its mind. On 13th March M began judicial review proceedings. In response, Lambeth produced a "supplementary" report which provided further reasons for its original conclusions and stated that it considered M to be over 20 years old. By consent the parties agreed to conduct a further age assessment and Dr Michie responded to questions put to him by Lambeth. Having considered his response, Lambeth on 12 July again assessed M as over 18. Meanwhile the asylum application was progressing through the A.I.T. and, as I have said, there it was held that M was a child. M asked Lambeth to reconsider his age in the light of that decision but on 12th December Lambeth maintained their view that M was over 18. On 7 May 2008 a second consultant paediatrician, Dr Birch, concluded that statistically there was an 86% probability that M was under 18.3 years on the material date, 14 December 2006.

A's case

4. He arrived in the United Kingdom on the back of a lorry from Afghanistan on 13th November 2007. He maintained that his date of birth was 8th April 1992 which would have meant he was only 15 years old on entry. On 14th November 2007 he applied for asylum at Croydon and was interviewed by the Home Office who assessed him to be over 18. He was accordingly referred to Croydon's Social Services Department. On 22nd November 2007 he was interviewed by two social workers. He spoke no English. No one was present to assist him. Croydon assessed him to be an adult and he was accordingly referred to the Home Office for NASS support. On 7th December the Home Office confirmed his being over 18 years old and that they would provide NASS support until his asylum claim was determined. A week later A's solicitors wrote to Croydon making three points: first that A's older brother was supported as a child by Westminster City Council, secondly that A's birth certificate showed him to be 16 and thirdly the age determination was contrary to Article 6. On 16th January 2008 Dr Birch assessed him to be between 15 and 17 years old, calculating him to be 15 years 10 months which was consistent with his stated age of 15 years 9 months. That opinion was served on Croydon. Judicial review proceedings were issued on 7th March 2008. On 12th March 2008 Croydon responded at length to Dr Birch's report concluding that he did not provide any significant evidence to support A's claim. They therefore maintained their view that he was an adult. On 26th March 2008 Dr Birch confirmed her opinion but Croydon were unmoved.

Age assessments

5. There is no statutory or procedural guidance issued to local authorities as to how to conduct an assessment of the age of a person claiming to be under 18 for the purpose of deciding on the applicability of Part III of the Children Act 1989. The Guidelines for Paediatricians published in November 1999 by the Royal College of Paediatrics and Child Health state:

> "In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15-18, it is even less possible

> to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as five years either side. … Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical, family and social history."

The difficulties will be compounded when the young person in question is of an ethnicity, culture, education, background and dietary regime that are foreign and unfamiliar to the decision maker. In *R (on the application of B) v Merton London Borough Council* [2003] EWHC 1689 (Admin), [2003] 4 All E.R. 280, Stanley Burnton J. held when dismissing a claim for the judicial review of an age assessment:

> "36. The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and the judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.
>
> …
>
> 50. In my judgment, the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. Judicialisation of what are relatively straightforward decisions is to be avoided. As I have stated, in such cases the subject matter of decision is not complex, although in marginal cases the decision may be a difficult one. Cases will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The Court should not be predisposed to assume that the decision maker has acted unreasonably or carelessly or unfairly: to the contrary, it is for a claimant to establish that the decision maker has so acted."

6. Concerns are, however, still raised about the procedure that is adopted. In March 2007 the Home Office published proposals for the fundamental reform of the way it supported and managed unaccompanied asylum seeking children and there was a wide ranging consultation. In January 2008 the UK Border and Immigration Agency published *Better Outcomes: the Way Forward*. Key reform 4 – putting in place better procedures to assess age in order to ensure children and adults are not accommodated together – proposes:

> "5.1 We will improve the system for assessing the age of those claiming to be unaccompanied asylum seeking children. Failing to detect those who lie about their age has serious

> consequences. As well as representing a serious abuse of the asylum system, it leads to adults being inappropriately accommodated with children and vice versa, with all the associated child protection risks that we are determined to minimise.
>
> 5.2 We agree with many respondents to the consultation exercise that the process of assessing age should take place in regional centres set up for that purpose. The location of these centres will be negotiated with local authorities and other stakeholders, though it seems sensible to place the majority near to our main ports and asylum screening units where the young people first come to attention – building on the arrangements we have already put in place to fund social worker teams in these areas. In that way issues about a person's age can be settled before transfer to a specialist local authority that will provide longer term care. …
>
> 5.3. By ensuring age assessments are carried out in specialist regional centres there will be a more consistent approach. Consistency will be further enhanced by ensuring that the social workers in these centres undertake assessments according to clear written guidance. We will consult further with the key stakeholders about what this updated guidance should contain. It will need to cover matters such as the weight that should be attached to reports from Paediatricians and other medical reports commissioned by solicitors acting for the young people. There is presently a lack of consensus among stakeholders about the merits of x-rays as a means of accurately assessing age. There is a need to consider this further. We will, therefore, set up a working group with key stakeholders, including medical practitioners, to carry out a thorough review of all age assessment procedures with a view to establishing best practice."

7. Sir Albert Ainsley-Green, the Children's Commissioner for England, has his concerns which he set out in a witness statement filed in these proceedings. He said:

> "21. I have endorsed the proposal for separate specialist age assessment centres so that there is some measure of independence between the decision maker determining age of the unaccompanied child and the Authority with the ongoing duty to care for the child and their needs. This independence plainly does not exist now."

He added:

> "32. Age assessment is a process that concerns far more than a scheme for administering welfare benefits. It is a determination that has profound effects for the individual and their relationship with the state and the community. It impacts upon

> them in a fundamental and far-reaching way. It cannot be sensibly and fairly characterised simply as a determination about whether the applicant is entitled to support and assistance under the Children Act if assessed as a child or other support if assessed as an adult. The assessment provides for applicants assessed as children to be accorded a particular status, for their rights and interests to be safeguarded, for those under 16 to be entitled to education and for those over 16 to have access to education as well as to be provided with accommodation and economic and social support."

He analysed the consequences of being treated as a child by a local authority and concluded:

> "38. I trust this recitation makes clear that age determinations by Local Authorities involve important status and rights issues going significantly beyond matters relating to welfare benefits. The assessment impacts upon all aspects of the asylum process beyond the arrangements made for care, support and accommodation and directly affects and determines the nature of the procedure for the substantive determination of the claim for protection and in particular whether the individual will be subject to detention, fast tracking or removal during their minority. In the light of these matters I would certainly endorse the comments of the ILPA report that "the risks of wrongly treating children as adults are considerably higher than the other way round. This is because the children's system has in-built support and supervision to prevent children from being harmed. No such safeguards exist in the adult system"."

Finally he said:

> "46. I am strongly of the view that the present processes do not meet the necessary and appropriate standards of fairness to give effect to the best interest principle."

8. This is a powerful voice of criticism which merits due consideration. Our task is, however, more narrow for we are concerned in this appeal with determining whether Bennett J. erred in his approach to the questions of law which arise in the preliminary issues he decided.

Bennett J's judgment

9. Whilst a summary will not do justice to a long and careful judgment it is sufficient for present purposes to attempt a précis. He held that:

> (1) The duty to "provide accommodation" under section 20(1) of the Children Act 1989 arises when, and only when, the local authority arrives at a decision that the young person is (i) a child in need, (ii) in the area, (iii) who requires accommodation, (iv) as a result of one of the triggers in (a), (b) or (c) of subsection 1 and,

(v) having considered the matters set out in subsections (6), (7), (8) and (9). See the judgment at [50], [57] and [58].

(2) Once these matters are satisfied, an absolute duty to provide accommodation arises: ([59]).

(3) Section 20 does not create a civil right within the meaning of Article 6 because there are a considerable number of evaluative judgments vested in the local authority: ([86]).

(4) The determination about age is not a determination of civil right because the civil right must encompass all the matters in section 20. The age determination was but a staging post. It would be absurd if one part of section 20(1) was subject to Article 6(1) and the other parts not. Over-judicialisation and what the judge termed "oppressive legalism" should be avoided. Consequently he did not think Article 6(1) was engaged: ([87], [88] and [89]).

(5) A local authority's social workers are not independent but they are impartial in respect of the question of entitlement to section 20 accommodation ([117]).

(6) If Article 6 were engaged, the availability of ordinary judicial review grounds would render the process Article 6 compliant: ([117]).

(7) The age dispute assessment cannot by itself be said to engage a right to private life under Article 8. If Article 8 is to be engaged it has to be engaged looking at section 20 as a whole and not just at one part of the process: ([128]).

(8) Parliament intended that local authorities should evaluate an individual's age, so that the question is not precedent to the local authority's jurisdiction arising: ([130], [148]).

The Children Act 1989 ("the Act")

10. The Act was the product of a magnificent collaboration between the Law Commission and the Department of Health and Social Security with Professor Brenda Hoggett, as she then was, playing a prominent and invaluable part in undertaking the comprehensive review of the law affecting children and proposing its reform. As the Department of Health and Social Security's *Review of Child Care Law* found in 1985, the law was "complicated, confusing and unclear". The White Paper, *The Law on Child Care and Family Services*, presented to Parliament by the Secretary of State for Social Services in January 1987 (Cm 62) acknowledged that:

> "8. An essential part of clarification is to rationalise and where possible simplify existing legislation. The powers and duties of local authorities to support families with children come from two main streams of law, health and welfare legislation and

> child care legislation. These were not integrated when local authority social services departments were formed in 1970 from the former welfare and children's departments."

The Act was, therefore, as the long title proudly proclaims, "an Act to reform the law relating to children; to provide for local authority services for children in need and others; …". Since, as I shall later show, questions of construction arise both in respect of the consideration of the child's civil rights, if any, as well as questions of precedent fact, I must set out the material parts of the Act at some length.

11. The Act is in twelve parts. Part 1 is introductory. Section 1 requires that the child's welfare shall be the court's paramount consideration and although this strictly only applies when the court is determining any question with respect to the upbringing of the child, there is no doubt that the welfare of a child is the dominant theme, the golden thread linking all parts of the Act together. Section 1(3) sets out the checklist of factors to which the court is to have regard including the child's wishes and feelings, his needs, the effect of any change in his circumstance and any harm which he is at risk of suffering.

12. Part 2 deals with the orders that can be made in private law family proceedings – residence orders, contact orders and so forth. Part 4 deals with care and supervision and Part 5 with protection of children. It should be remembered that the philosophy of the Act was to promote and protect the independence of the family and ensure that there was no intervention by the state unless the court had found that the child concerned had suffered or was at risk of suffering significant harm. Another key concept of the Act was the encouragement of families and the local authorities working in partnership together aiming wherever possible to keep children within the family. Many families needed help to attain that objective and so we find Part 3 nestling appropriately between Parts 2 and 4, providing the bridge between the private law and public law interventions by the court.

13. The scope of that assistance is given in Part 3 which deals with "Local Authority Support for Children and Families". I must now set out how that was to be achieved.

> "**17. Provision of services for children in need, their families and others.**
>
> (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) so far as is consistent with that duty, to promote the upbringing of such children by their families,
>
> by providing a range and level of services appropriate to those children's needs.
>
> (2) For the purpose principally of facilitating the discharge of their general duty under this section, every local authority shall have the specific duties and powers set out in Part 1 of Schedule 2.

(3) Any service provided by an authority in the exercise of functions conferred on them by this section may be provided for the family of a particular child in need or for any member of his family, if it is provided with a view to safeguarding or promoting the child's welfare.

…

(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 exceptional circumstances, in cash.

…

(10) For the purposes of this Part, a child shall be taken to be in need if —

(a) he is unlikely to achieve or maintain, or to have the opportunity of achieving or maintaining, a reasonable standard of health or development without the provision for him of services by a local authority under this Part;

(b) his health or development is likely to be significantly impaired, or further impaired, without the provision for him of such services; or

(c) he is disabled,

and "family", in relation to such a child, includes any person who has parental responsibility for the child and any other person with whom he has been living.

(11) For the purposes of this Part, a child is disabled if he is blind, deaf or dumb or suffers from mental disorder of any kind or is substantially and permanently handicapped by illness, injury or congenital deformity or such other disability as may be prescribed; and in this Part—

"development" means physical, intellectual, emotional, social or behavioural development; and

"health" means physical or mental health.

…

18. Day care for pre-school and other children -

(1) Every local authority shall provide such day care for children in need within their area who are—

(a) aged five or under; and

(b) not yet attending schools,

as is appropriate.

…

20 Provision of Accommodation for Children: general -

(1) Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of—

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(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.

(4) A local authority may provide accommodation for any child within their area (even though a person who has parental responsibility for him is able to provide him with accommodation) if they consider that to do so would safeguard or promote the child's welfare.

(5) A local authority may provide accommodation for any person who has reached the age of sixteen but is under twenty-one in any community home which takes children who have reached the age of sixteen if they consider that to do so would safeguard or promote his welfare.

(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.

(7) A local authority may not provide accommodation under this section for any child if any person who—

(a) has parental responsibility for him; and

(b) is willing and able to—

(i) provide accommodation for him; or

(ii) arrange for accommodation to be provided for him,

objects.

(8) Any person who has parental responsibility for a child may at any time remove the child from accommodation provided by or on behalf of the local authority under this section.

(9) Subsections (7) and (8) do not apply while any person—

(a) in whose favour a residence order is in force with respect to the child;

(aa) who is a special guardian of the child; or

(b) who has care of the child by virtue of an order made in the exercise of the High Court's inherent jurisdiction with respect to children,

agrees to the child being looked after in accommodation provided by or on behalf of the local authority.

(10) Where there is more than one such person as is mentioned in subsection (9), all of them must agree.

(11) Subsections (7) and (8) do not apply where a child who has reached the age of sixteen agrees to being provided with accommodation under this section.

…

21 Provision of accommodation for children in police protection or detention or on remand, etc -

(1) Every local authority shall make provision for the reception and accommodation of children who are removed or kept away from home under Part V.

(2) Every local authority shall receive, and provide accommodation for, children –

(a) in police protection whom they are requested to receive under section 46(3)(f) …

22 General duty of local authority in relation to children looked after by them -

(1) In this Act, any reference to a child who is looked after by a local authority is a reference to a child who is —

(a) in their care; or

(b) provided with accommodation by the authority in the exercise of any functions (in particular those under this Act) which are social services functions within the meaning of the Local Authority Social Services Act 1970, apart from functions under sections 17, 23B and 24B.

…

(3) It shall be the duty of a local authority looking after any child —

(a) to safeguard and promote his welfare; and

(b) to make such use of services available for children cared for by their own parents as appears to the authority reasonable in his case. …

23 Provision of accommodation and maintenance by local authority for children whom they are looking after -

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

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

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

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

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

(i) a family;

(ii) a relative of his; or

(iii) any other suitable person,

on such terms as to payment by the authority and otherwise as the authority may determine (subject to section 49 of the Children Act 2004);

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

(f) making such other arrangements as—

(i) seem appropriate to them; and

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

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

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

(a) a parent of the child;

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

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

(6) … any local authority looking after a child shall make arrangements to enable him to live with –

(a) a person falling within subsection (4)

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

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

14. The services to be provided for families under Part 1 of Schedule 2 include:

"**Identification of children in need and provision of information**

1(1) Every local authority shall take reasonable steps to identify the extent to which there are children in need within their area.

…

Children's services plans

1A (1) Every local authority shall …

(a) review their provision of services under sections 17, 20…

Provision for disabled children

> 6. Every local authority shall provide services designed – (a) to minimise the effect on disabled children … of their disabilities …
>
> **Provision to reduce need for care proceedings etc.**
>
> 7. Every local authority shall take reasonable steps designed – (a) to reduce the need to bring –
>
> (i) proceedings for care … orders …
>
> …
>
> **Family centres**
>
> 9. Every local authority shall provide such family centres as they consider appropriate in relation to children within their area.
>
> **Maintenance of the family home**
>
> 10. Every local authority shall take such steps as are reasonably practicable …
>
> (a) to enable him to live with his family …"

15. One will have noted in section 17(3) and 22(1)(b) the references to the provision of any service or of accommodation by the authority as being in the exercise of functions conferred on them which are social services functions within the meaning of the Local Authority Social Services Act 1970. That Act provides by section 1A that:

> "For the purposes of this Act the social services functions of a local authority are –
>
> (a) their functions under the enactments specified in the first column of Schedule 1 to this Act (being the functions which are described in general terms in the second column of that Act) …"

Included among those functions are the functions under the whole of the Children Act 1989 in so far as it confers functions on the local authority within the meaning of that Act and in particular the "Functions under Part 3 of the Act (local authority support for children and families)."

16. During the course of the argument reference was also made to sections 37 and 46 of the Act. Section 37 provides as follows:

> "**Powers of court in certain family proceedings -**
>
> (1) In any family proceedings in which a question arises with respect to the welfare of any child, it appears to the court that it may be appropriate for a care or supervision order to be made with respect to him, the court may direct the appropriate authority to undertake an investigation of the child's circumstances. …"

17. Section 46 provides

> "**Removal and accommodation of children by police in cases of emergency -**

> (1) Where a constable has reasonable cause to believe that a child would otherwise be likely to suffer significant harm, he may—
>
> > (a) remove the child to suitable accommodation and keep him there; ...
>
> (2) For the purposes of this Act, a child with respect to whom a constable has exercised his powers under this section is referred to as having been taken into police protection.
>
> (3) As soon as is reasonably practicable after taking a child into police protection, the constable concerned shall—
>
> > (a) …
> >
> > (f) where the child was taken into police protection by being removed to accommodation which is not provided—
> >
> > > (i) by or on behalf of a local authority; or
> > >
> > > (ii) as a refuge, in compliance with the requirements of section 51,
>
> secure that he is moved to accommodation which is so provided. …

The issues arising in this appeal

18. As the arguments became refined in this Court, three issues emerged in this order:

(1) *The precedent fact issue*:

Do the questions (i) whether the applicant for accommodation under section 20 of the Act is or is not a child, and (ii) whether he is or is not within the local authority's area, involve establishing jurisdictional facts or, to use another phrase, facts precedent to the exercise of the local authority's powers in which case the local authority's decision cannot be conclusive because the local authority cannot be allowed to be the judge of the extent of its own powers. If so, the court must retain the power to investigate and decide those facts for itself.

(2) *The Article 6 ECHR issue*

This requires answers to these questions:

(i) Does section 20 provide a right to accommodation?

(ii) If so, is it a "civil right"?

(iii) If so, has there been a determination of that civil right?

(iv) Were the social workers who decided the questions of the appellants' ages independent and impartial?

(v) If not and Article 6 is engaged, does the availability of judicial review constitute sufficient compliance with Article 6?

(3) *The Article 8 ECHR issue*

Are A's rights to respect for his private life engaged in the assessment of his age?

The precedent fact issue

19. This doctrine has an ancient and respectable pedigree. The rule was stated by Coleridge J. in *Bunbury v Fuller* (1853) 9 Ex 111, 140, a case where the assistant tithe commissioner's jurisdiction was dependent on the fact that the land was not previously discharged from tithe:

> "Now it is a general rule, that no Court of limited jurisdiction can give itself jurisdiction by a wrong decision on a point collateral to the merits of the case on which the limit to its jurisdiction depends; and however its decision may be final on all particulars, making up together that subject-matter which, if true, is within its jurisdiction, and, however necessary in many cases it may be for it to make a preliminary inquiry, whether some collateral matter be or be not within the limits, yet, upon this preliminary question, its decision must always be open to inquiry in the superior Court."

20. In a more modern explanation of the rule, Lord Goddard C.J. stated in a Rent Act case, *R v Fulham etc. Rent Tribunal ex p. Zerek* [1951] 2 KB 1, 6:

> "… if a certain state of facts has to exist before an inferior tribunal have jurisdiction, they can inquire into the facts in order to decide whether or not they have jurisdiction, but cannot give themselves jurisdiction by a wrong decision upon them; and this court may, by means of proceedings for certiorari, inquire into the corrects of the decision. The decision as to these facts is regarded as collateral because, though the existence of jurisdiction depends on it, it is not the main question which the tribunal have to decide."

21. The doctrine has been approved by their Lordships in *Reg. v Home Secretary ex p. Khawaja* [1984] 1 A.C. 74. Lord Fraser of Tullybelton said at p. 97:

> "The second general issue relates to the function of the courts and of this House in its judicial capacity when dealing with applications for judicial review in cases of this sort; is their function limited to deciding whether there was evidence on which the immigration officer or other appropriate official in the Home Office could reasonably come to his decision (provided he acted fairly and not in breach of the rules of

> natural justice), or does it extend to deciding whether the decision was justified and in accordance with the evidence? On this question I agree with my noble and learned friends, Lord Bridge and Lord Scarman, that an immigration officer is only entitled to order the detention and removal of a person who has entered the country by virtue of an ex facie valid permission if the person *is* an illegal entrant. That is a 'precedent fact' which has to be established. It is not enough that the immigration officer reasonably believes him to be an illegal entrant if the evidence does not justify his belief. Accordingly, the duty of the court must go beyond inquiring only whether he had reasonable grounds for his belief."

Lord Scarman's concise statement of the rule was this at p. 110:

> "… where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied."

22. Mr Timothy Straker Q.C. has on M's behalf placed before us an array of authority which, *pace* the doubts expressed by Butler-Sloss L.J. in *R v Dyfed County Council ex parte S (Minors)* [1995] 1 FCR 113, totally satisfy me that the doctrine has its proper place in the jurisprudence and, whilst it may not be the most used weapon in the administrative lawyer's arsenal, it is there to be deployed when the relevant statute primes it. The determining factor is the supposed intention of Parliament. That is common ground. Thus the crucial question is this: did Parliament trust to the local authority the decision of whether or not the applicant for accommodation under section 20 is a child within the area or did Parliament intend those facts to be jurisdictional thresholds for the court to decide in cases of dispute about them. Put another way, the question is not only what powers has Parliament conferred on the local authorities but also what limits are placed upon the exercise of those powers.

23. Mr Straker bore the brunt of the arguments for the appellants, ably supported by Mr Ian Wise for A and Mr John Howell Q.C. intervening for Liberty. Mr Straker's central submission, drawing on the 9th edition of *Administrative Law*, by Sir William Wade and Christopher Forsyth, is that all discretionary powers have objective limits of some kind, though he acknowledges that the problem lies in identifying them. At p. 257 the learned authors suggest:

> "As a general rule, limiting conditions stated in objective terms will be treated as jurisdictional, so that the court will consider any admissible evidence of their non-fulfilment."

So Mr Straker asks, does the statutory language set out the fact in objective or subjective terms, in other words, does the statute require the very existence of the fact to be established or does it require that the decision maker be of the opinion that the fact exists? Another way of testing it is to ask when the fact is in issue whether there is only one answer to it, right or wrong, in which case the factual matter is objective, or whether there are a range of reasonable conclusions about the fact, in which case it is subjective.

24. It cannot be gainsaid that age is a matter of fact in the sense that we were all born at a certain time on a certain day. That may be best established by direct evidence of the event, or a reliable birth certificate, but that evidence is not always available as these cases demonstrate. As the medical evidence shows, and as Stanley Burnton J. found in the *Merton* case (see [5] above), it is very difficult to be certain of age when the evidence of it derives from the history given by and the physical appearance of the young person himself. Judgment is then a matter of art not science. But age does remain a fact and so far I agree with Mr Straker.

25. His difficulty, however, is that he chooses to confine the fact precedent to "child" and he eschews any suggestion that the jurisdictional threshold would be "child in need". He has to limit the question in this way for he accepts that the decision about whether the person is "in need" as defined in section 17(10) is one involving the kind of evaluative judgments which render it more subjective than objective. In my judgment the language of section 20 does not admit of this limitation. Accommodation must be provided "for any child in need within their area who appear to them to require accommodation". "Child in need" is a composite phrase. Section 17(1) requires the local authority to safeguard and promote the welfare of "children within their area who are in need". Section 17(10) defines "for the purposes of this Part" "when a child shall be taken to be in need". It is plainly not enough for the operation of section 20 just to be a child: the threshold to cross is constituted by there being a child in need. A child in need is not a limiting condition stated in wholly objective terms so as to satisfy *Wade and Forsyth's* test.

26. Mr Straker submits that the word "child" must bear the same meaning wherever it appears in the Act. That is obviously correct but it does not assist in answering the question who has to decide the age of the person involved. In some statutes it is clear. For example, section 94(7) of the Immigration and Asylum Act 1999 provides that for the purpose of defining eligibility for asylum support, which is only available to adults, the Secretary of State "may enquire into and decide, the age of any person". By contrast, for the purposes of sentencing children and young offenders, a person's age "shall be deemed to be that which it appears to the court or (as the case may be) the Secretary of State to be after considering any available evidence": section 164(1) of the Powers of Criminal Courts (Sentencing) Act 2000. More pertinently, the repealed section 1(1) of the Children Act 1940 provided:

> "Where it appears to a local authority with respect to a child in their area appearing to them to be under the age of 17 …"

Examples of this kind show that where Parliament wishes to emphasise who can take the decision about age, Parliament is clearly able so to provide but did not choose to do so in section 20. Mr Wise submits that far from it being implicit that it is for the local authority to determine age, a true reading of the Act shows that it is simply assumed that the young person is a child and so age must be a precedent fact for the court to determine.

27. Mr Straker submits that since "child" bears the same meaning throughout the Act, Parliament must have intended that all parts of the Act would work in harmony and so, to produce that consistency, there has to be one final arbiter of the child or adult question. I cannot agree. Take this example. In exceptional circumstances the court makes a residence order in favour of the grandparents of a child who has reached the

age of 16. The court decides age. The child runs away and presents himself to the social services department urgently seeking accommodation. The social workers decide he is a child and offer him that accommodation. When his grandparents remove him under section 20(8) he runs away again and sleeps rough where he comes to the attention of a constable. It is the constable who has to have reasonable cause to believe that he is a child likely to suffer harm in order to remove him to suitable accommodation under section 46(1). If the constable then requests the local authority to receive and provide accommodation for that child, which the authority is obliged to do under section 21(2), then the local authority will not be able to refuse because they believe the child had celebrated his eighteenth birthday the previous day. If the NSPCC get involved and apply for a care order which cannot be made with respect to a child who has reached the age of 17 (section 31(3)), then age is a matter for the court.

28. I see the force of the argument that there is the possibility that different decision makers may come to different views about the age of the person before them. Consistency is, of course, a proper aspiration for the legal and administrative systems. Mr Charles Béar Q.C. for Lambeth and Mr Bryan McGuire, for Croydon, respond, tellingly in my view, that if it is correct, as the appellants contend, that in case of every dispute, the courts have to determine age, then the consequences would be adverse to good administration. The cost of processing such claims will be considerable; there will be significant delay, urgent decisions will have to be taken in the interim and all of this uncertainty and delay will be inimical to the welfare of young people thereby undermining a crucial cornerstone of the Children Act's philosophy. Croydon have added flesh to this submission by giving evidence that in 2007/08 there were 415 approaches for Children Act support for unaccompanied asylum seeking minors. In 217 or 52% of those age was disputed. Croydon assessed 89 of those 217 to be over 18 and 128 to be under 18. The potential for litigation is obvious. Thus Mr Béar and Mr McGuire submit that Parliament must have intended that all necessary decisions were to be made quickly and with a minimum of formality by those operating the service on the ground and they draw support from Lord Griffiths' speech in *R v Oldham Metropolitan Borough Council ex parte Garlick* [1993] A.C. 509, 520, a case under the Housing Act 1985:

> "But if, on the true construction of the Act, Parliament only imposes the duty in respect of applicants of sufficient mental capacity to act upon the offer of accommodation then it seems to me it must have intended the local housing authority to evaluate the capacity of the applicant. In this field of social welfare all those concerned with the welfare of the victims must necessarily work closely together. When an application is made by or on behalf of a homeless person an immediate investigation must be started and if it is decided that the homeless person is so disabled as to be incapable of looking after himself and there is no one to care for him then the social services must be alerted immediately so that they may look after him. *All these very immediate investigations and decisions are necessary to make the system work and they can only be carried out by the authorities concerned*." (Emphasis added by me).

The same considerations apply here.

29. Mr Straker seeks support for his argument by reference to *Lambeth LBC v TK and KK* [2008] EWCA Civ 103, [2008] 1 F.L.R. 1229 where the court had directed the local authority under section 37 of the Act to undertake an investigation of the child's circumstances for the purpose of the court's deciding whether it would be appropriate to make a care order. Lambeth concluded that the girl concerned was over 18 and so did not report on her circumstances. Faced with that impasse, the court directed a fact finding hearing to determine whether the girl was under 18 and if so what her age might be. The local authority appealed, arguing that the issue of the child's age had already been determined by them. Wilson L.J. held:

> "[28] Apart from the need for it to appear to the court to be appropriate for a care order to be made, the terms of s.37 set three threshold requirements for the exercise of the power which it confers, namely that:
>
> (a) there is a 'child';
>
> (b) there are family proceedings; and
>
> (c) a question arises therein with respect to her welfare.
>
> A local authority are entitled to submit to the court that there is no 'child'; or that there are no 'family proceedings'; or even, I suppose, that no question arises therein with respect to the child's welfare; and thus that, by reason of any of such three alleged circumstances, there is no power to make - or on a presumptive basis to have made - the direction. But I am unable to subscribe to any such construction of the section as confers upon a local authority the right to determine whether such circumstances exist. The reference in the section is to a 'child', not to any person whom the local authority consider to be a child. Unless its terms make clear to the contrary, it is for the court to determine whether the threshold requirements set by statute for the exercise of a judicial power are satisfied."

Wilson L.J. also held that there was no need to draw upon the doctrine of precedent fact:

> "[31] … For, where a direction has been made under s.37, the fact, if it be the case, that the applicant is a child is precedent not just to a local authority's discharge of functions under the Act but, more relevantly, to their performance of a duty to the court, namely to respond substantively to the direction."

30. Mr Straker submits that because it was there held that it was for the court, not the authority, to decide the question of age in respect of a direction under s.37, and because the court held that the question of whether there is a child is a "threshold requirement" then the same should apply to section 20. I cannot accept that argument. It misses the point. It confuses the meaning of the statutory term, "child", namely

someone under 18, with the question of who is to apply that meaning. Is it for the court or for the social workers to decide? In that case, it was clearly for the court to decide for, as Wilson L.J. held:

> "[34] The bottom line, however, is that local authorities cannot be the arbiters of whether courts have jurisdiction to make directions to them."

By contrast, for section 20 to operate effectively, it is the social workers who decide the age of the applicant. The nature and process of the decision requires the implication of words into section 20 so that it reads: "Every local authority shall provide accommodation for any *person whom the local authority have reasonable grounds for believing to be a* child in need …" as was held to be inevitable in *Reg. v Secretary of State for the Home Department Ex parte Zamir* [1980] A.C. 930.

31. Even though I am satisfied that those words must be implied for section 20 to operate effectively, I acknowledge that the draughtsman could have made the position clearer. To remind us of it, section 20(1) reads:

> "Every local authority shall provide accommodation for any child … who *appears to them* to require accommodation …"

So the section could easily have read:

> "… shall provide accommodation for anyone who appears to them to be a child in need … and to require accommodation".

Despite the failure to spell out the obvious, I am satisfied that the scheme of the Act compels that conclusion. In contrast with Parts 2 and 4 which involve decisions being made by the court, Part 3 is concerned with administrative functions of the local authority. In section 22 a child who is looked after by a local authority is defined as a child who is "provided with accommodation by the authority in the exercise of any functions which are social services functions within the meaning of the Local Authority Social Services Act 1970". As set out in paragraph 15 above**,** all local authority support for children is such a function. As Sir Stephen Brown P. said in *Hazell v Hammersmith and Fulham LBC* [1990] 2 Q.B. 697, and approved by the House of Lords in the same case, [1992] 2 A.C. 1, 29 F:

> "The word 'functions' … is used in a broad sense and is apt to embrace all the duties and powers of a local authority: the sum total of the activities Parliament has entrusted to it. Those activities are its functions."

The only person able to carry out local authority functions is the local authority. Parliament must have intended the local authority to take all the relevant decisions. Parliament has given them the power to take the decisions and has not circumscribed the exercise of those powers. There is no limit to the exercise of the power other than, obviously, the inability to decide any other questions than those which are given to them to decide. That, in my judgment, is conclusive of this precedent fact issue.

32. If, however, I need to draw further support for that conclusion, I can find it in *Lambeth LBC v TK and KK*. Wilson L.J. cited with respectful agreement the President's observations in *E v London Borough of X* [2005] EWHC 2811 (Fam), [2006] Fam 187, where Sir Mark Potter said:

> "[32] … While the 1989 Act does not expressly so provide, it is inherent in its structure and content that a local authority, in any case where doubts are raised in respect of the age of a putative child in need of care and protection, should make an age assessment and, according to its results, decide whether to take measures in respect of the 'child' under the provisions of the 1989 Act. It is thus an area in which … the court must be careful to avoid assuming a supervisory role or reviewing power over the merits of the local authority's decision."

33. If more is needed, note Baroness Hale of Richmond in *In Re B (Children)* (Fc) [2008] UKHL 35 saying:

> "57. It is also important to keep separate the roles of the courts and the local authorities in the protection of children from harm. Where a local authority have reasonable cause to suspect that a child in their area is suffering or likely to suffer significant harm, they must make the inquiries necessary to enable them to decide whether they should take any action to protect the child and if so what (1989 Act, s 47(1))."

The remark was obviously obiter but it confirms that Part 3 is for the local authority and Part 4 for the court. Since Baroness Hale had, as I have already described, a modest part to play in the passage of the Children Act 1989, what she says about the way the Children Act operates can hardly be taken with a pinch of salt.

34. Consequently I am satisfied that the judge came to the correct conclusion and I would not allow the appeal on this ground.

The Article 6 issues

35. I hardly need remind one that Article 6(1) provides:

> "In the determination of his civil rights and obligations …, everyone is entitled to a fair hearing within a reasonable time by an independent and impartial tribunal established by law."

In the way the argument has been presented to us, the questions arising in this appeal are (1) is there a right to accommodation; (2) is it a civil right; (3) has there been a determination of it; (4) were the social workers independent and impartial; and (5) does judicial review constitute sufficient compliance? Although (1) and (2) have been argued as discrete issues (and I shall deal with them as such), they are very closely linked and I may have been better to have treated it as a composite matter.

36. Some of these questions arose in *Runa Begum v Tower Hamlets LBC* [2003] UKHL 5, [2003] 2 A.C. 430. In that case the local authority accepted that the appellant was

homeless and that it had a duty to secure accommodation for her. She was offered permanent accommodation which she rejected and after an internal review the housing officer concluded that the accommodation was indeed suitable for her and that it would have been reasonable for her to accept it. Although the Court of Appeal had been satisfied that her civil rights were engaged, their lordships preferred simply to assume they were civil rights and concentrated on whether the county court's appellate jurisdiction under section 204 of the Housing Act 1996 was sufficient to satisfy the requirements of Article 6(1). Since I have reached the conclusion for reasons I will spell out shortly that judicial review does constitute sufficient compliance in this case too, it is tempting not to rush into tricky territory when the angels have feared to tread there. Nonetheless, in deference to the well-researched and cogent submissions advanced to us by this bevy of good counsel I feel obliged to be foolhardy and deal with the first three questions, happy in the knowledge that my meanderings can be treated as obiter if it is thought that I have gone wrong.

Do the appellants have any right under section 20?

37. Let me for the sake of convenience repeat section 20(1):

> "(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; or
>
> (c) the person who has been caring for him being prevented … from providing him with suitable accommodation or care."

38. The first question must be this: does this impose a duty on the local authority or does it empower them to exercise their discretion whether or not to provide accommodation? It will be seen at once that the terms are peremptory: "*shall* provide accommodation". If the qualifying conditions are met, the local authority are under a duty to the child to provide accommodation and the child has a correlative right to receive it. It is not a discretionary award which the local authority may give or refuse as it wishes. That distinction is well drawn in *Masson and Von Zon v Netherlands* [1996] 22 E.H.R.R. 491 where the court held:

> "… In this connection, in deciding whether a 'right', civil or otherwise, could arguably be said to be recognised by Netherlands law, the Court must have regard to the wording of the relevant legal provisions and to the way in which these provisions are interpreted by the domestic courts.
>
> 50. Sections 591(1) and 591a(1) CCP provide that in given circumstances various specified expenses 'shall' be refunded to a former suspect. A duty is thereby imposed on the State to reimburse the sums involved if the applicable conditions are met, and consequently the former suspect is granted a right. …

> 51. On the other hand, sections 89(1) and 591a(2) lay down that the competent court 'may' award the former suspect compensation for certain damage not covered by sections 591(1) and 591a(1). In contrast to these latter provisions, sections 89(1) and 591a(2) do not require the competent court to hold the State liable to pay even if the conditions set out therein are met. Moreover, section 90(1) CCP makes the award of compensation contingent on the competent court being of the opinion 'that reasons in equity' exist therefore … The grant to a public authority of such a measure of discretion indicates that no actual right is recognised in law."

39. I could add, perhaps in parenthesis, that, strictly speaking, there is a proper distinction to be made between an evaluative judgment and an exercise of discretion. A decision maker may have a finely balanced and difficult judgment to make when deciding whether a certain fact or criterion (e.g. child in need) exists but if that judgment is to be properly made, then there is only one answer: either he is or he is not a child in need. A discretion, on the other hand, gives the decision maker a choice of options where he may do one thing or the other and where, provided he does not stray outside the generous ambit within which there is reasonable room for disagreement, he can never categorically be said to be right or wrong. This broad range of what is mandatory and what is permissive, or what is a matter of judgment and what is a matter of discretion, is easily demonstrated in Part 3 of the Act. For example in section 20(1) every local authority *shall* provide accommodation whereas in section 20(4) and (5) the local authority *may* provide accommodation. In carrying out their function under section 20, the social workers are making evaluative judgments but they do not exercise a pure discretion.

40. To answer the first question I can agree with Dyson L.J. in *Regina (M) v Gateshead MBC* [2006] EWCA Civ 221, [2006] Q.B. 650 when he said:

> "33 It is common ground that this [section 20(1)] imposes on every local authority an absolute duty to provide accommodation for any child in need where one of the specified circumstances exists. It is a precise and specific duty. There is no scope for discretion as to whether or not to provide accommodation at all."

41. Indeed, Bennett J. held in this case:

> "59. Once all of these [skilled, evaluative assessments or judgments] are completed and the requirements of section 20(1) and other relevant subsections are fulfilled then an absolute duty does indeed arise."

42. The respondents accept that conclusion and even though there is some argument about the relevance of the other subsections, the appellants likewise have no serious quarrel with it. As set out in his skeleton argument, Mr Straker accepts:

> "45. … Where the [subjective evaluative] criteria are satisfied, there is an absolute right to accommodation."

43. The matter is surely put beyond doubt by Baroness Hale of Richmond's views on section 20 set out in paragraph 16 of her speech in *R (M) v Hammersmith and Fulham LBC* [2008] UKHL 14, [2008] 1 WLR 535 that: "This duty [under section 20] is now owed to children up to the age of 18". If there is a duty there is plainly a correlative right.

44. The debate in this case has, however, centred upon what right, if any, the appellants have if the criteria (whatever they are) are *not* satisfied and the claim for accommodation is rejected. The respondent's case is that they have no more than "a right to due consideration by the relevant authority": see paragraph 2.2 of Mr Béar's skeleton argument, and the submission is that that is not enough to engage Article 6. I do not accept that submission. I agree with Mr Howell Q.C. for Liberty that, as he puts it in paragraph 3 of his skeleton argument:

> "The relevant right under section 20 is the right to accommodation. There are a number of conditions which have to be satisfied before the duty to provide it arises. But any dispute about whether one or more of those conditions is satisfied is one directly determinative of whether the relevant right exists."

45. I find support for that from an established line of authority, for example, in *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] UKHL 23, [2003] A.C. 295 where Lord Hoffmann said:

> "74. … Apart from authority, I would have said that a decision as to what the public interest requires is not a 'determination' of civil rights and obligations. It may affect civil rights and obligations but it is not, and ought not to be, a judicial act such as article 6 has in contemplation. The reason is not simply that it involves the exercise of a discretion, taking many factors into account, which does not give any person affected by the decision the right to any particular outcome. There are many such decisions made by courts (especially in family law) of which the same can be said. Such decisions may nevertheless be determinations of an individual's civil rights (such as access to his child: compare *W v United Kingdom* (1987) 10 EHRR 29) and should be made by independent and impartial tribunals", with the emphasis added by me.

46. In *W v United Kingdom* the European Court of Human Rights held:

> "The Court thus concludes that, it can be said, at least on arguable grounds, that even after the adoption of the parental rights resolution affecting him the applicant could claim a right in regard to his access to S."

He had that right even though it had not been determined whether access would indeed be afforded to him: indeed on the facts of the case he was denied access.

47. There are other examples. In *Case of Capital Bank AD v Bulgaria* [2007] 44 E.H.R.R. 48 the court held:

> "87. In the instant case, subject to the possibility of its being revoked, the licence conferred a 'right' on the applicant bank in the form of an authorisation to enter certain categories of banking transactions in accordance with the conditions set out in the licence and the relevant provisions of domestic law. On the other hand, under the applicable law, the BNB was required to revoke the licence in the event of insolvency, which then results in a winding-up order. It has no discretion in this respect … Bearing the circumstances in mind, the Court considers that the applicant bank could maintain on arguable grounds that it was allowed to continue to operate as a going concern unless it was indeed insolvent. Its principal contention was that it was solvent, so that there was *a genuine and serious dispute over the existence of that right* …" (Emphasis added by me.)

48. Finally, in the admissibility decision in *Wos v Poland* (2005) March 1st App. No. 22860/02, upheld by the court as reported at [2007] 44 E.H.R.R. 28:

> "83. With regard to the issue of whether the right to compensation from the Foundation on account of Nazi persecution was recognised, at least on arguable grounds, under domestic law, the Court notes that the relevant Foundation's regulations define the conditions and procedures with which a claimant had to comply before compensation can be awarded by the Foundation. Those regulations, regardless of their characterisation under domestic law, could be considered to create a right for a victim of Nazi persecution to claim compensation from the Foundation. Accordingly, *if a claimant complied with the eligibility conditions stipulated in those regulations, he had a right* to be awarded compensation by the Foundation … Thus, it cannot be said that the relevant Foundation's regulations gave rise to an *ex gratia* compensation claim.
>
> 84. The Court considers that the applicant could claim, at least on arguable grounds, the right to receive compensation from the Foundation in respect of the overall period of his forced labour", [again my emphasis].

49. I am satisfied that the child has more than a mere right to apply for accommodation. As is common ground, he certainly has a right to accommodation when the conditions for granting it are met and so it seems to me that, at the time he makes his application and seeks the determination of his claim, it can then fairly be said that he has the right, at least on arguable grounds, to be provided with accommodation. Assuming for a moment that it is a civil right, it is *in the determination* of that civil right that he is entitled to the guarantees of fairness afforded by Art. 6. He has the right to a fair hearing whether the determination is favourable or unfavourable to him. Indeed, it is difficult to see what use article 6 would be if it could only be invoked when the determination found that the conditions for the accrual or crystallisation of the right had been established. Article 6 is there to protect the victim of a determination made by a tribunal lacking independence and impartiality which has unfairly decided the

relevant facts and matters against him and so refused to admit that he has the right he was seeking to assert.

Do the appellants have a civil right to accommodation?

50. The analysis so far has been concerned to answer the narrow question: does section 20 confer a right to accommodation? Now I have to ask another question, the more important question: does that right amount to a civil right as that autonomous term must be understood? This requires us to look at the scheme of the Act to discover exactly what accommodation the child becomes entitled to under section 20. Section 23 provides the answer. Section 23(2) requires that the local authority provide accommodation and maintenance for any child whom they are looking after by doing any one of many things. A huge spread of accommodation is envisaged. It ranges from placing him with a family, a relative of his or a foster parent. The local authority can maintain him in an appropriate children's home or even, and this is important,

> "(f) Making such other arrangements as –
>
> (i) seem appropriate to them."

That could include arranging for some independent living by finding and paying for his occupation of a flat or by arranging hostel accommodation or a bed and breakfast hotel.

51. In the light of such a range of choice, is the right to accommodation one which is properly classified as a civil right? That calls for an analysis of two aspects. The nature of the decision-making and the character of the accommodation to be provided.

52. When considering the former, one goes back over the ground already covered above. I found the judgment of Stanley Burnton J. in *R (Hussain) v Asylum Support Adjudicator* [2001] EWHC Admin 852 to be instructive:

> "26. However, Article 6 does not apply to the exercise by public authorities of their discretion, as distinguished from their compliance with their obligations owed to citizens. Obligations give rise to rights; discretionary payments and discretionary support do not. …
>
> 27. … A right by definition is something to which the citizen is entitled, to which he has an enforceable claim. A discretionary benefit, one that a government may give or refuse as it wishes, cannot be the subject of a right.
>
> 28. The line between a discretionary benefit and one to which the citizen may be entitled may not be an easy one. In England, court orders for costs, equitable relief and remedies on judicial review are all said to be discretionary, but the decisions relating to them are made by courts of law on well-established principles, and are unquestionably judicial decisions. A successful litigant in civil proceedings against an unassisted

> opponent may claim to have a 'right' to an award of his legal costs, notwithstanding the discretionary nature of the court's power."

He held that the provision of support for asylum seekers was a civil right.

53. Whilst, therefore, it can be said that the child may have a right to *some* accommodation under section 20, he has no right, or enforceable claim to any particular type of accommodation. A wide discretion is vested in the local authority to decide exactly what accommodation is appropriate in the circumstances of the case. Consequently, looking at the process as a whole, beginning with the assessment under section 20 but ending with the allocation under section 23, the decision-making process has the character of exercising a discretionary power which destroys the notion that a right is involved.

54. Turning to the second aspect, the character of the accommodation which is to be provided, the best guidance (I hesitate to say "test") for classification of the right at issue is that provided by *Salesi v Italy* 26 E.H.R.R. 187, 199, where the relevant domestic law provided that "all citizens who are unfit for work shall be entitled to means of subsistence and welfare assistance". The court held:

> "… despite the public law features pointed out by the Government, Mrs Salesi was not affected in her relations with the administrative authorities as such, acting in the exercise of discretionary powers; she suffered an interference with her means of subsistence and was claiming an individual, economic right flowing from specific rules laid down in a statute giving effect to the Constitution."

55. This case demonstrates how the court has shifted and advanced its views. As Lord Hoffmann has pointed out in *Alconbury* and *Runa Begum*, what started as rights created by private rather than public law have extended, as he explained in *Runa Begum* at [30]:

> "to cover a wide range of administrative decision-making on the ground that the decision determines or decisively affects rights or obligations in private law. … More recently the scope of article 6 has also been extended to public law rights, such as entitlement to social security or welfare benefits under publicly funded statutory schemes, on the ground that they closely resemble rights in private law: *Salesi v Italy* …"

56. So the question is whether a "right" to some accommodation has features of a personal and economic nature. It is by now well settled that "disputes over entitlement to social security and welfare benefits generally fall within the scope of Article 6.1": see *Tsfayo v United Kingdom* [2007] H.L.R. 19 at [39]. In a series of cases from Russia, for example *Teteriny v Russia* (2005) June 30th app no 113931, certain citizens were granted the right to possession of a flat owned by the State. Disputes over the State's failure to provide that accommodation engaged Article 6.1.

57. In *Secretary of State for Health v Beeson* [2002] EWCA Civ 1812, [2004] LGR 92 the claimant was assessed by the local authority as needing residential care under section 21 of the National Assistance Act 1948. Laws L.J. giving the judgment of the Court said at [28]

> "Upon the question whether Art. 6 applies at all, in our judgment this case and others like it systematically engage the civil rights of the affected individual. They do so on a very simple basis: they are concerned with the question, what premises he will occupy as his home and upon what terms; and although for all we know a person in Mr Beeson's position may well stand to be granted no more than a bare licence of premises which may be offered him, still the issue whether or not he may get such an entitlement affects his rights in private law."

58. It follows that the provision of accommodation can be characterised as an entitlement affecting the person's rights in private law. But for my part I cannot accept that the provision of accommodation in the family home or with foster parents is of that character.

59. I conclude, therefore, that the right of accommodation given by section 20 read with section 23 cannot be classified as a civil right because:

(1) too much discretion is given to the local authority to decide what kind of accommodation is to be provided, and

(2) the accommodation can range from, at one extreme, a flat which the child is licensed to occupy – which does have the character of a private law right – to at the other end of the spectrum, the family home which smacks entirely of a social services public law provision.

Assuming there were a civil right, was there a determination of it?

60. Under section 20 the child will only become entitled to accommodation if a number of facts and matters are established: (1) that he is a child, (2) that he is in need, (3) that he is within the local authority area, (4) that he appears to the local authority to require accommodation and (5) that the reason why he requires accommodation is the result of (a) there being no-one who has parental responsibility for him or (b) his being lost or having been abandoned or (c) the person who had been caring for him being prevented from providing him with suitable accommodation. In this case the social workers only determined the first question, child or not. Ordinarily that first decision is but "a staging-post" requiring the social workers to go on to consider the other factors. But here the determination is conclusive of the question. Once it has been decided that he is not a child, there is no need to consider those other matters. Thus the decision that he is not a child is a determination of his right to accommodation.

The fourth issue: were the social workers independent and impartial?

61. Article 6(1) requires the determination of the person's civil rights to be made by "an independent *and* impartial" tribunal. I add the emphasis. Here it is common ground that the social workers employed as they were by the local authorities upon whom the cost of providing accommodation might fall were not independent. There is, therefore, a breach of Article 6(1).

62. It has also been urged upon us, especially by Mr Howell, that the legitimate doubts about the organisational impartiality of the social workers also arise. I shall deal with that next.

The fifth issue: assuming Article 6(1) to be engaged, does the availability of judicial review constitute sufficient compliance with its requirements?

63. The issue is whether the Administrative Court as the second-tier tribunal has "full jurisdiction", jurisdiction that is "to deal with the case as the nature of the decision requires", per Lord Hoffmann in *Alconbury* at para 87. The nature of the decision upon which the appellants concentrate is the finding of fact that the appellants are adults not children and the question is whether judicial review provides an adequate remedy to challenge that finding of fact and whether or not the want of independence and impartiality on the part of the social workers can be cured.

64. I begin with what Lord Hoffmann described at [51] in *Runa Begum* as "the great principle which *Bryan* decided", (*Bryan v UK* 21 EHRR 342, 360, para 45) namely:

> "in assessing the sufficiency of the review ... it is necessary to have regard to matters such as the subject matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal."

I will begin with the manner in which the decision was arrived at.

The degree of a lack of independence and impartiality

65. Dyson L.J. approached that question in *Regina (Wright) v Secretary of State for Health* [2007] EWCA Civ 999, [2008] 2 W.L.R. 56, saying at [105]:

> "… in deciding whether the court has full jurisdiction on a judicial review, it is relevant to have regard to the nature of the breach in the first stage of the process. The more serious the failure to accord a hearing by an independent and impartial tribunal, the more likely it is that a breach in the first stage of the process cannot be cured at the second stage. … Thus, where the lack of impartiality at the first stage was of a somewhat formal and technical nature the breach of article 6 was taken to be cured by the availability of judicial review. But if the lack of impartiality at the first stage had real practical content, then it infected the whole process and could not be cured by judicial review."

66. Considerable reliance is placed by the appellants on *The Queen on the application of Bewry v Norwich City Council* [2001] EWHC Admin 657 and *Tsfayo v United Kingdom* [2007] H.L.R. 19. In *Bewry* the decision over housing benefit to be paid by the Council to the applicant was taken by the Housing Benefit Review Board whose members were Norwich City councillors. Moses J. held:

> "62. In my judgment, the connection of the councillors to the party resisting entitlement to housing benefit does constitute a real distinction between the position of an inspector [the planning inspector in *Alconbury*] and a Review Board. The lack of independence [of the councillors] may infect the independence of judgment in relation to the finding of primary fact in a manner which cannot be adequately scrutinised or rectified by this court. One of the essential problems which flows from the connection between a tribunal determining facts and a party to the dispute, is that the extent to which a judgment of fact may be infected cannot easily be, if at all, discerned. The influence of the connection may not be apparent from the terms of the decision which sets out the primary fact and the inferences drawn from those facts. …
>
> 64. Thus it is no answer to a charge of bias to look at the terms of a decision and to say that no actual bias is demonstrated or that the reasoning is clear, cogent and supported by the evidence. This court cannot cure the often imperceptible effects of the influence of the connection between the fact-finding body and a party to the dispute since it has no jurisdiction to reach its own conclusion on the primary facts; still less any power to weigh the evidence."

67. *Tsfayo* was another housing benefit case. The appellant had been in receipt of housing benefit but failed to submit her application for renewal in time. Her application for backdating the benefit was rejected because she failed to show good cause why she had not claimed the benefits earlier. The decision was taken by the Housing Benefit Review Board consisting of councillors of the Hammersmith and Fulham London Borough Council. The court in Strasbourg held at [46]:

> "… in contrast to the previous domestic and Strasbourg cases referred to above, the HBRB was not merely lacking in independence from the executive, but was directly connected to one of the parties to the dispute, since it included five councillors from the local authority which would be required to pay the benefit if awarded. As Mr Justice Moses observed in *Bewry* (para [32]) above), this connection of the councillors to the party resisting entitlement to housing benefit might infect the independence of judgment in relation to the finding of primary fact in a manner which could not be adequately scrutinised or rectified by judicial review."

68. In my judgment, our case is clearly to be distinguished from those. There the tribunals in each case were to all intents and purposes the council itself and the

analogy with being a judge in one's own cause was close. Here the social workers were merely employees of the local authority. They were, moreover, professional people, fully qualified and subject to the code of practice issued by the General Social Care Council which provided, inter alia, as follows:

> "1. As a social care worker you must protect the rights and promote the interests of service users and carers.
>
> 2. As a social care worker, you must strive to establish and maintain the trust and confidence of service users and carers.
>
> This includes:
>
> 2.1 being honest and trustworthy;
>
> …
>
> 2.4 being reliable and dependable;
>
> …
>
> 2.6 declaring issues which might create conflicts of interest and making sure that they do not influence your judgment or practice;
>
> …
>
> 5. As a social worker you must uphold public trust and confidence in social care services.
>
> In particular you must not:
>
> 5.8 behave in a way, in work or outside work, which would call into question your suitability to work in social care services.
>
> 6. As a social care worker you must be accountable for the quality of your work and take responsibility for maintaining and improving your knowledge and skills."

69. Against that background I doubt whether there is a "public perception of the possibility of unconscious bias" which is the key, as Lord Steyn held in *Lawal v Northern Spirit Ltd* [2003] UKHL 35, [2003] I.C.R. 856, at [14].

70. I have heard nothing in this appeal to cause me to recant the views I expressed in *Feld v Barnet LBC* [2005] H.L.R. 9 where the appellant asserted bias on the part of the head of the housing needs and resources of the local authority in conducting the review of the suitability of the accommodation offered to her as a homeless person. There I said at [44]:

> "Trained decision-makers should not be treated as inferior beings intellectually unable to approach the task with an open

> mind. The fair-minded and informed observer would have that in mind."

71. In my judgment, the reasonable member of the public taking a balanced view of this case is unlikely to be unduly perturbed by the close connections between the social workers and their employers, the local authorities, who have to find the appropriate accommodation. It cannot realistically be said that a lack of independence and impartiality arising from no more than the organisational structure of the employment can so infect the social workers decisions as to be incapable of cure by judicial review. I reject Mr Howell's submission that the very essence of the right conferred by Article 6 has been impaired so that the concept of "full jurisdiction" accordingly requires the court to take the decision afresh or remit it to some other body which is fully independent of the local authority and manifestly impartial. There is, at the moment, no such body to take the decision and the suggestion was floated that the Department would have to contract it out to independent social workers. If the local authority pay for this service, as presumably they will have to do, can it be said that that alternative body is fully independent? But I need not trouble to answer that rhetorical question.

72. I agree with Laws L.J. and apply to this case what he said in *R (on the application of Beeson) v Dorset County Council* [2002] EWCA Civ 1812, [2004] L.G.R. 92 at [30]:

> "In this present case we have seen no evidence that the panel could not or would not arrive at a fair and reasonable recommendation. It is by no means to be assumed that the two Council members would have entertained, even subconsciously, a disposition towards the protection of Council funds. … If there is no reason of substance to question the objective integrity of the first-instance process (whatever may be said about its *appearance*), it seems to us that the added safeguard of judicial review will very likely satisfy the Art. 6 standard unless there is some special feature of the case to show the contrary. Here there is not."

The nature of the decision to be taken

73. The appellants argue that the Administrative Court's powers on judicial review do not give it "full jurisdiction", i.e., per Lord Hoffmann in *Alconbury* at para 87, "jurisdiction to deal with the case as the nature of the decision requires", which here is a decision in the nature of a finding of a material, indeed the appellants would say, crucial fact, namely the age of the appellants.

74. A similar argument was deployed in *Runa Begum*. For Lord Bingham the essential features were:

> "9. (1) Part VII of the 1996 Act is only part of a far-reaching statutory scheme regulating the important social field of housing. The administration of that scheme is very largely entrusted to local housing authorities. …

> (2) Although, as in the present case, an authority may have to resolve disputed factual issues, its factual findings will only be staging posts on the way to the much broader judgments which the authority has to make.
>
> …
>
> 11. … None of these cases [including *Bryan v United Kingdom* and *Kingsley v United Kingdom* (2000) 33 E.H.R.R. 288] is indistinguishable from the present, but taken together they provide compelling support for the conclusion that, in a context such as this, the absence of a full fact-finding jurisdiction in the tribunal to which appeal lies from an administrative decision-making body does not disqualify that tribunal for purposes of article 6(1)."

Lord Hoffmann's approach can be shown from these few extracts from his speech.

> "43. But utilitarian considerations [that it would be cheaper or more efficient to have these matters decided by administrators] have their place when it comes to setting up, for example, schemes of regulation or social welfare. I said earlier that in determining the appropriate scope of judicial review of administrative action, regard must be had to democratic accountability, efficient administration and the sovereignty of Parliament.
>
> …
>
> 52. In this case the subject matter of the decision was the suitability of accommodation for occupation by Runa Begum; the kind of decision which the Strasbourg court has on several occasions called a 'classic exercise of an administrative discretion'. …
>
> …
>
> 56. The key phrases in the judgments of the Strasbourg court which describe the cases in which a limited review of the facts is sufficient are 'specialised areas of the law' (*Bryan's* case 21 EHRR 342, 361, para 47) and 'classic exercise of administrative discretion' (*Kingsley's* case 33 EHRR 288, 302, para 53). … It seems to me that what the court had in mind was those areas of the law such as regulatory and welfare schemes in which decision-making is customarily entrusted to administrators. And when the court in *Kingsley* spoke of the classic exercise of administrative discretion, it was referring to the ultimate decision as to whether Kingsley was a fit and proper person and not to the particular findings of fact which had to be made on the way to arriving at that decision. In the same way, the decision as to whether the accommodation was

> suitable for Runa Begum was a classic exercise of administrative discretion, even though it involved preliminary findings of fact.
>
> …
>
> 59. … In my opinion the question is whether, consistently with the rule of law and constitutional propriety, the relevant decision-making powers may be entrusted to administrators. If so, it does not matter that there are many or few occasions on which they need to make findings of fact. … Finally, I entirely endorse what Laws LJ said in *Beeson's* case, at paras 21-23, about the courts being slow to conclude that Parliament has produced an administrative scheme which does not comply with constitutional principles."

75. To answer the question whether decisions under section 20 of the Children Act should be entrusted to social workers, one must consider the legislative scheme as a whole. Confining myself for a moment to section 20 alone, it is immediately obvious that the decision involves a judgment being formed about a range of facts and matters such as:

(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?

(5) Is that need the result of:

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented from providing him with suitable accommodation or care?

(6) What are the child's wishes regarding the provision of accommodation for him?

(7) What consideration (having regard to his age and understanding) is duly to be given to those wishes?

(8) Does any person with parental responsibility who is willing to provide accommodation for him object to the local authority's intervention?

(9) If there is objection, does the person in whose favour a residence order is in force agree to the child being looked after by the local authority?

76. It is apparent at once that in addition to several matters which might be characterised as pure matters of fact, there are substantial and important areas where social working judgments have to be made, e.g. "in need", "require accommodation". Looking at the

section itself the preponderant elements are those which require answers from persons experienced in the area with expertise borne of specialist qualifications and experience. Even limiting myself to section 20, the task involved is "a classic exercise of administrative discretion" involving the provision of a valuable, but often limited, local authority resource, some form of accommodation.

77. In my judgment it is not enough to look at section 20 alone. The whole of Part III of the Act is relevant. At the end of the process is the decision as to what sort of accommodation within the wide range of section 23 is appropriate. As I have already pointed out, the functions of Part III are social service functions within the meaning of the Local Authority Social Services Act 1970 and they are, therefore, to be performed by the social service department. Parliament has, therefore, expressly entrusted this raft of responsibility to administrators.

78. Even if one confines oneself (wrongly, as I think) to the narrow question of the age determination, the experience gained from the many cases with which these local authorities have had to deal puts the assigned social workers in a position where they are as expert as, or even more expert than, a judge would be. The task involved was well summarised by Stanley Burnton J. in *R (B) v Merton London BC*:

> "[36] The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, …
>
> [37] It is apparent from the foregoing that, except in clear cases, the decision-maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision-maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision-maker will have to make an assessment of his credibility, and will have to ask questions designed to test his credibility."

There is no reason why these delicate assessments cannot be made by social workers.

79. *Beeson* was applied in *Runa Begum*. All that Laws L.J. said at [33] seems to me to be equally pertinent here:

> "In our judgment the scheme here is exactly the kind where the first decisions are properly confined within the public body having responsibility for the scheme's administration. Difficult issues of judgment will arise; and difficult balances will have to be struck. We acknowledge that in this particular case issues of credibility arose for decision, and were important to the decision. It is plain however that that circumstance will not of itself require, as the price of compliance with the Article 6

> standard, the addition of a strictly independent adjudicative process empowered to re-decide the facts. Mr Giffin cites *Kingsley v UK* … and *X v UK* (1988) 25 E.H.R.R. CD88, which generally support that position. Once it is accepted that the operation of the statutory scheme has to be looked at as a whole, the fact that this or that particular instance may be specially burdened with factual dispute cannot affect the general legality of the arrangements in place for deciding issues of entitlement."

80. *Tsfayo* does not in my judgment assist the appellant. There the European Court of Human Rights considered *Runa Begum*. It did not disapprove of that decision but sought to distinguish it on the basis that:

> "45. The Court considers that the decision-making process in the present case was significantly different. In *Bryan*, *Runa Begum* and the other cases cited in para.[43] above, the issues to be determined required a measure of professional knowledge or experience and the exercise of administrative discretion pursuant to wider policy aims. In contrast, in the instant case, the HBRB was deciding a simple question of fact, namely whether there was 'good cause' for the applicant's delay in making a claim. On this question, the applicant had given evidence to the HBRB that the first that she knew that anything was amiss with her claim for housing benefit was the receipt of a notice from her landlord – the housing association – seeking to repossess her flat because her rent was in arrears. The HBRB found her explanation to be unconvincing and rejected her claim for back-payment of benefit essentially on the basis of their assessment of her credibility. No specialist expertise was required to determine this issue, which is, under the new system, determined by a non-specialist tribunal (see para. [21] above). Nor, unlike the cases referred to, can the factual findings in the present case be said to be merely incidental to the reaching of broader judgments of policy or expediency which it was for the democratically accountable authority to take."

81. The case before us is a case indistinguishable in kind from *Runa Begum* and easily distinguishable from *Tsfayo*. Age determination is not "a simple question of fact". It is not infrequently a very difficult question of fact. It does require "a measure of professional knowledge or experience". Moreover it was "incidental" to the reaching of "broader judgments of policy or expediency" about the provision of accommodation which "it was for the democratically accountable authority to take". Age may have been the determining factor in the cases before us and there may not have been any dispute about, and therefore no need to make express findings about the other factors to be considered if accommodation was to be provided, but, nevertheless, age was but "a staging post" (per Lord Bingham) or "a preliminary finding of fact" (per Lord Hoffmann) on the way to what would have been the broader judgements which the authority had to make.

82. To accede to the appellants' submission that the local authority have to contract out to independent experts all age determinations or to have the court decide the issue would be a recipe for administrative chaos. "Efficient administration" is, per Lord Hoffmann, a relevant consideration. How to accommodate these asylum seekers calls for an urgent, often very urgent decision about where a person is to lay his head that night. It cannot be delayed while the case is assembled before some other body – not that there is such a body in place at the moment – still less before the court. The cost in so doing would prove prohibitive. And, as I have asked already, if the local authority have to pay the independent body, will the pedantic still complain that it is not truly independent?

83. Moreover, further confusion would be caused if the age determination had to be hived off for some special treatment whereas the "need questions", admitted to be questions fit for administrative decision, were to be left for traditional judicial review. Such a division of decision-making would not work.

84. My conclusion is that age determinations, being part of broader questions relating to the provision of accommodation, and being but one of the many responsibilities for local authorities to provide support for children and families under Part III, are decisions which fall squarely within the social field of child care and are, therefore, customarily and properly entrusted to the social workers to decide. It follows that judicial review does comply with the standard set by Article 6.

85. I have reached that conclusion without any doubt but I am comforted to read since first drafting this judgment that this Court has arrived at very similar conclusions in *Fazia Ali v Birmingham City Council* [2008] EWCA Civ 1228, another appeal under the Housing Act 1996 where the issue was whether the appeal to the county court (which is akin to judicial review) was sufficient compliance with our Article 6 obligations in circumstances where the challenge to the decision made by the reviewing officer was that he or she had been wrong to find as a fact that the appellants had received a letter containing the statutory notice under section 193 of the Act. The Court reviewed *Runa Begum* and *Tsfayo* and Thomas L.J. with whom Hughes and Rimer LJ.J. agreed concluded that:

> "[34] In my view, however, the Strasbourg Court did not decide the issue in this case in a manner that would require a different answer to the issue on these appeals which I have reached on the basis of the decision in *Runa Begum*. In the first place the Strasbourg Court relied on the decision in *Runa Begum* in reaching its conclusion and said nothing that cast doubt on the correctness of the decision. Secondly, the decisions in *Runa Begum* and *Tsfayo* each turned on a careful examination of the whole of the statutory scheme relevant to the particular case. Thirdly, it is apparent from the details of the scheme considered in *Tsfayo* that … the HBRB was not independent of the parties …"

So the Court held that it was bound by the decision of the House of Lords in *Runa Begum* and that even if the Strasbourg court had decided the issue differently from the way in which the House of Lords decided *Runa Begum*, this Court was bound by the

decision of the House of Lords: see *Kay v Lambeth LBC* [2006] UKHL 10, [2006] 2 A.C. 465 at paragraphs 42-45.

Finally, the Article 8 issue: are A's rights to respect for his private life engaged in the assessment of his age?

86. Only A advances this argument. Mr Wise on his behalf contends that Article 8 is engaged because the determination of A's status as an adult is a decision affecting his private life. He relies on the observations of the Children's Commissioner. He submits that the age determination will inevitably impact upon his "right to participate in the life of the community and to have access to the appropriate range of social, recreational and cultural activities" per Munby J. in *R (A, B, X and Y) v East Sussex County Council* [2003] EWHC 167 (Admin), [2003] 6 C.C.L.R. 194. He also draws support from the decision of the Strasbourg court in *Pretty v United Kingdom* (Application No. 2346/02) where the court held on the applicability of Article 8(1) of the Convention:

> "61. As the court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the *physical* and *psychological integrity* of a person … It can sometimes embrace aspects of *an individual's physical and social identity* … Elements such as, for example, gender identification, name and sexual orientation and sexual life all fall within the personal sphere protected by Article 8 … Article 8 also protects a right to *personal development*, and the right to establish and develop relationships with other human beings in the outside world … Although no previous case has established as such any right to self-determination as being contained in Article 8 of the Convention, the court considers that the notion of *personal autonomy* is an important principle underlying the interpretation of its guarantees." (The emphasis is added by Mr Wise).

87. Mr Wise seeks to engage Article 8 in order to claim the procedural protections for this right implicit in Article 8(2).

88. Although as Munby J. accepted in *A, B, X and Y* at paragraph [105], "Not every act or measure which may be said to affect adversely the physical or moral integrity of a person necessarily gives rise to an interference with private life," I daresay a finding relating to a person's status as an adult or a child could come within the aegis of Article 8. Where, however, I depart from Mr Wise's analysis is in his assertion that the age determination by itself engages Article 8. It does not. It is not a judgment *in rem* declaring to the world at large that these appellants are adults. It was, as I have already pointed out, a staging post or a preliminary finding on the way to the consideration of the broader question of whether the applicants are entitled to be accommodated by the local authority or whether they must look to the Secretary of State to find them shelter. The assessment of age by itself does not engage Article 8(1) because it does not affect A's physical or psychological integrity or personal development or personal autonomy.

89. In any event, as Mr Stilitz for the Secretary of State submits, whilst it may be accepted that there is a procedural aspect to Article 8, that procedural element cannot assist A in circumstances where Article 6 is not breached since it is Article 6 that is the primary Article in the Convention providing procedural safeguards. That correlation between Article 6 and Article 8 was recognised by this Court in *R (Gilboy) v Liverpool City Council* [2008] EWCA Civ 751, [2008] L.G.R. 521 where, dealing with the converse of the case we have here, Waller L.J. held:

> "[45] … it seems to me that it must be unlikely that a scheme which is held to have the requisite procedural aspects so as to comply with the requirements of Art. 8(2) will still be held to violate Art. 6."

90. The claim to engage Article 8 adds nothing in this case: it is in my judgment misconceived and I would reject Mr Wise's submissions.

Conclusion

91. For the reasons set out above, these appeals must be dismissed. Nevertheless, I add this footnote for I am not without sympathy for the plight of young asylum seekers whether they be under 18 or just over 18 years of age. To arrive in this country often in a state of confusion, often traumatised by the events that have caused them to flee their own land, bewildered by what is happening to them, unable to speak the language and often without help must be a daunting ordeal, one which the Children's Commissioner has highlighted and one which in the paper *Better Outcomes: the Way Forward*, the Border and Immigration Agency acknowledge as I describe in [6] above. It does seem to me that although I have been satisfied that the present procedures comply with Article 6, nonetheless a better system could and in my judgment urgently should be provided and I hope this judgment will add impetus to the need for reform.

Lord Justice Maurice Kay:

92. I am in substantial agreement with the judgment of Ward LJ. The only issue upon which I might have reached a different conclusion is the one he considers at paragraph 37-49. I am hesitant on the question whether section 20 can be said to provide a right to accommodation before the local authority has reached a favourable decision. However, that is but one issue in this case and, in the interest of enabling the case to be finalised before the end of Term, I shall forebear from going into further detail. For all the other reasons given by Ward LJ, I too would dismiss these appeals. I would also associate myself with the views expressed by Ward LJ in paragraph 91.

Sir John Chadwick:

93. I share the hesitation expressed by Lord Justice Maurice Kay on the question whether section 20 of the Children's Act 1989 confers a right to be provided with accommodation. But it is unnecessary to decide that question in order to determine these appeals; and I prefer not to do so. I agree that the appeals must be dismissed for the other reasons set out in the judgment of Lord Justice Ward.