

# Surely not! Procedurally lawful age assessments in the UK

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Every day young people arrive in Europe who cannot prove their age.<sup>1</sup> Their birth may never have been registered in their country of origin.<sup>2</sup> It may also be that at some stage documentation existed which indicated their age, but it has been lost, or the authorities do not believe it is genuine. This creates a problem for the authorities who must now decide how to treat the person in front of them. If this person is a child,<sup>3</sup> they are entitled to more rights and must be given far greater protection than if they are adults. The younger they are, the more support they must be offered.

J, as he is referred to by the High Court in a judgment of November 2011, arrived in the UK in October 2009.<sup>4</sup> He said he was 14 ½ years old but the authorities did not believe him. An age assessment procedure was performed by a social worker, the very day of his arrival. She felt J looked older than the age he claimed to be. Her notes record that he was ‘gently spoken’ and ‘presented as very considered in his responses’. The form she completed concluded: ‘Based on the assessment, the client’s age is: 18’. The Home Office subsequently relied upon this for refusing J asylum. So did the (then called) Asylum and Immigration Tribunal (AIT)<sup>5</sup> for dismissing the appeal against the asylum refusal. Having been found to be an adult and being considered a failed asylum seeker, J was detained on 1 March 2010, with his removal planned for eight days later.

The removal did not happen. From the time J had arrived in the UK, he had said and repeated he had an older brother called Zaky (who, unlike J, is named in the judgment). Indeed, the social worker’s assessment mentions Zaky, adding in his respect ‘whereabouts unknown’. At some undefined stage Zaky had made it to the UK too, and the two brothers were reunited. When this happened, the authorities had already accepted Zaky was 16 and had granted him the status of Unaccompanied Asylum Seeking Child (UASC). Throughout the proceedings Zaky had gone through, he had consistently mentioned having become separated from his younger brother J.

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<sup>1</sup> My thanks go to Jo Wilding for sharing her knowledge and insights, the experts and young people Jo interviewed in 2015 as part of the MinAs research project, as well as two lawyers and three appropriate adults I interviewed in June-July 2016. People directly involved in age assessment proceedings kindly commented on a draft of this chapter in September and October 2016. They prefer to remain anonymous.

<sup>2</sup> Lack of birth registration affects one in three children worldwide. This situation is especially prevalent in South Asia and Sub-Saharan Africa (UNICEF, 2013).

<sup>3</sup> Under the Convention on the Rights of the Child, a child is any person under 18; this is how this chapter will use this word, even though this usage is not unproblematic.

<sup>4</sup> *J, R (on the application of) v Secretary of State for the Home Department* [2011] EWHC 3073 (Admin) (24 November 2011), referred to simply as J below.

<sup>5</sup> This is now the First Tier Tribunal (Immigration Asylum Chamber).

This provided J's solicitor with a basis for making a fresh claim for asylum. The UK Border Agency rejected the claim one week later, with the refusal letter, dated 1 March 2010, stating:

Despite the outcome to Zaky's case this has no bearing on that of your client who has been through the appeal system and has been found to be someone who is over 18 years of age and who is not in need of international protection. He has never been dependant on his brother's claim or vice versa. (para 24 of the judgment)

J's lawyer did not give up and made an emergency application for judicial review before the High Court. J was immediately released as the High Court judge accepted J had been about 14 ½ at the time of the initial age assessment.

In light of national law and policy, J's initial age assessment was seriously flawed. To use the legal expression, which will be explained below, it failed to be 'Merton-compliant'. As such, it should never have been given the weight it was given by the Home Office and by the AIT, as another High Court judge subsequently pointed out in proceedings that took place in 2011 for damages for unlawful detention.

J should have been believed, or at least given the benefit of the doubt, when he said he was 14 ½. Due to age going to the heart of an individual's identity, being age disputed is an extremely distressing experience, with potentially serious mental health implications. (Crawley 2007: 102 and 181). Other drastically negative consequences ensue. As is immediately clear, J failed to receive the support and education to which he was entitled as a 14-year-old. Furthermore, he was treated in a way that was completely inappropriate for his age. He spent four days in a building constructed on the model of a Category B prison, surrounded by adults, some of whom hostile, not yet recovered from the physical exhaustion and psychological distress of a perilous journey, and full of angst about his future. This is a deleterious experience for anybody, however mature they are (Smith 2016; Nethery and Silverman 2015; Stevens 2013). A young teenager is not supposed to go through it at all.

From a child rights perspective, there is no excuse for the way J was treated. Under international and national law, J's 'best interests' (the international law's vocabulary) or 'safeguarding' and 'welfare' (the UK law's vocabulary) should have been the primary concern for the British authorities from the time they entered in contact with him. Clearly these considerations did not dominate the way J was treated. The following questions arise: is J an isolated case or is it common for an unaccompanied minor to have their age inflated by the authorities? What are the factors which fail to prevent and perhaps positively encourage incorrect age assessments? When age assessments are procedurally flawed or factually wrong, what are the chances of these mistakes being corrected?

In the absence of documentation such as a birth certificate, passport or school attendance record, it is *impossible* for scientists, doctors or any other expert to determine age from any corporal measurement, scan or X-ray, with certainty, as will be explained below. Defenders of children and refugee rights believe this produces a context where age is overestimated on a regular basis. Those at the opposite end of the spectrum fear that migrants are prone to tell stories that are not true, including about their age, in order to access benefits to which they are not entitled, or simply feel their country has no moral obligation to open up its doors to refugees. Local authorities, which are the bodies tasked under UK law with age assessing, find themselves between a rock and a hard place.

This chapter has two aims. The first is to show that it seems incontrovertible that age is frequently overestimated. This is despite a legal framework that insists on giving the young person the benefit of the doubt as to their claimed age. The second aim is to open up a window onto how an age assessment is actually conducted and to identify various ways in which the process can fail to respect guidance and best practice. Five elements are identified. First, the age assessing interviews too often take place in forbidding venues (police stations or immigration detention centres). Second, youngsters may be inappropriately accompanied. Third, the interview is far from always prevented from turning into an adversarial process, for example because of intimidating lines of questioning. Fourth, the proceedings are dominated by an absurd quest to prove that which cannot be proven. Fifth, the focus on this quest has for effect to discourage the application of the supposedly central principle of the benefit of the doubt. This article reviews each of these factors in turn. First, however, it briefly presents the legal framework, some statistics, the concept of Merton compliance, and gives an account of an age assessment procedure as told by an 'accompanied adult'.

## **1. The UK legal framework: the centrality of the principle of the benefit of the doubt**

In 1989, the United Nations adopted the Convention on the Rights of the Child (CRC). Described as 'the most complete statement of children's rights ever produced'<sup>6</sup>, the CRC proved popular with states, and quickly achieved the distinction of being the most widely ratified international human rights treaty. The UK ratified it in 2001, but not without making a reservation which would allow the government to avoid bestowing foreign children all the rights provided in the 54 articles of the convention.<sup>7</sup> Seven years later, under pressure from different quarters, the UK government retracted this reservation, thus theoretically putting on an equal footing the rights of national and foreign children. In national law, this translated in Section 55 of the Borders, Citizenship and Immigration Act 2009, which makes it a statutory duty for authorities, when carrying out immigration, asylum and nationality functions, to 'safeguard' and 'promote the welfare' of children who are in the United Kingdom. 'Every child matters', even if they are subject to immigration controls, proclaims the guidance issued in pursuance of Section 55.<sup>8</sup>

When a child arrives in the UK and claims asylum, if they do not have documents proving their age, an initial age assessment is to be conducted by a screening officer. At this stage, the young person can only be treated as an adult 'if their physical appearance/demeanour very strongly suggest that they are *significantly* over 18 years of age', with the policy issued by the government emphasising the word 'significantly'. Two officers, one of whom fairly highly graded, must reach this assessment independently from each other.<sup>9</sup> Official guidance is clear that everyone else should be afforded the benefit of the doubt and treated as a child until a

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<sup>6</sup> Unicef, <http://www.unicef.org.uk/UNICEFs-Work/UN-Convention/>

<sup>7</sup> As had long been predicted. See Newell 1991, which also records the practice of age assessment of unaccompanied minors at the time.

<sup>8</sup> 'Every child matters' policy presented to Parliament in September 2003, bearing reference Cm 5860.

<sup>9</sup> This had not happened in the age assessment at the heart of *AA v. Secretary of State for the Home Department and Wolverhampton City Council* [2016] EWHC 1453 (Admin), judgment of 20 June 2016. AA's detention as an adult was therefore found unlawful.

careful assessment of their age has been completed. Even though the guidance uses the conditional tense, lawyers agree that this amounts to a legal obligation. The persons concerned, the guidance continues, should be referred to the local authority (i.e. the body to whom the law gives the responsibility of supporting any child who requires support, whether British or foreign). Local authorities should come and collect the unaccompanied child, with the most pressing duty usually being to arrange accommodation. The local authority is then responsible to make an assessment of their age, so as to be able to assess their needs. On completion of the age assessment, they communicate their finding to the relevant department of the Home Office, at which time a final decision about age is made.<sup>10</sup>

The reason why an unaccompanied asylum seeking child is referred to the local authority is to ensure that this child's needs, including regarding support, accommodation and education, are met. Which provision should be granted in order to meet these needs in great part depends on the child's age. For example, a 14-year-old will be placed in foster care, whilst a 16-year-old will usually live semi-independently. Similarly, the type of education the local authority offers the unaccompanied child typically depends upon the age the child is assessed to be. In the local authority's perspective, the paramount reason for performing an age assessment should be to help determining the child's needs.

Age assessing is obviously not necessary when the person's age is reliably known. Such certainty, however, depends on the existence of documentation which is accepted to be conclusive. Barring such documentation, the 'Guidance to assist social workers and their managers in undertaking age assessments in England', issued by the Association of Directors of Children's Services (ADCS) in October 2015, is clear that the young persons must be given the benefit of the doubt as to their claimed age. To quote:

Age assessments cannot be concluded with absolute certainty as there is not any current method that can determine age with 100% accuracy. The only exception to that is if there is definitive documentary evidence, such as a clear history of birth, school records, or other documentation which you [social workers] accept as valid and authentic. Where definitive evidence is not available, the benefit of the doubt should be granted to children and young people presenting as such. (ADCS 2015: 23)

This message is repeated throughout the 33 pages of the ADCS guidance, whose closing words read:

In many cases it will not be possible to know definitively the age of the child or young person with whom you are working. Where there is doubt about whether or not the young person is a child, the dangers inherent in treating a child as an adult are in almost all cases far greater than the dangers of taking a young adult into your care. (Ibid: 33)

## **2. The practice in number: what the available statistics suggest**

It is difficult to ascertain exactly how far this guidance is respected or violated. However, in a report recently published by its European Union Committee, the House of Lords (2016) cited a variety of evidence to conclude that the guidance, which dates from 2015, is not uniformly

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<sup>10</sup> For more details, see ADCS 2015.

followed. One need not go further than the government's own documentation to be convinced of this. The latest national statistics devoted to age disputes read:

Some asylum applicants claim to be children but there may be doubts as to whether this is in fact the case. In the year ending June 2016, 1,060 asylum applicants had their age disputed and 933 were recorded as having an age assessment. Of those who completed age assessments in the year ending March 2016, 68% were assessed to be over 18, despite claiming to be a child when the age dispute was raised.<sup>11</sup>

The tone in which this statement is phrased is hardly one which seems to accept that giving the benefit of the doubt is important and the proper response whenever doubts arise and subsist.

National statistics have used the exact terms quoted in the above paragraph since 2013, allowing a table to be drawn. Before discussing Table 1, it is worth clarifying that an age disputed case is defined as one where the person claims to be a child and neither do their physical appearance/demeanour strongly suggest they are *significantly* over 18 (taken to mean 25 by some local authorities) nor have they been the subject of a Merton compliant age assessment which has found them to be over 18. Age can be disputed by the Home Office or by a local authority. In reply to a freedom of information request (FoI), the Council of the County of Croydon reported that their age disputed cases were always initiated by the Home Office. This appears to be an exceptional situation, which must be linked to the fact that the asylum screening unit, where adult asylum seekers are accommodated prior to dispersal, is based in Croydon. The other contacted local authorities were generally the ones who were disputing the claimed age.<sup>12</sup>

Table 1 demonstrates that giving youngsters who claim to be under 18 the benefit of the doubt can hardly be described as a thoroughly general practice. From July 2015 to June 2016, although over two-thirds of youngsters were believed by the authorities when they said they were under 18, almost one third had their age disputed. Of these, only a third managed to convince the authorities they were actually under 18 (without necessarily having been found to be as young as the age they claimed to be). Ultimately, more than one in five youngsters<sup>13</sup> ended up neither being believed nor given the benefit of the doubt. This was a proportion broadly similar to 2013 but higher than in 2015 and especially 2014.

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<sup>11</sup> National statistics concerning asylum, available at:  
<https://www.gov.uk/government/publications/immigration-statistics-april-to-june-2016/asylum#age-disputes>

<sup>12</sup> The exception was Hillington, where Heathrow airport is based. There the local authority had disputed age in five cases and the Home Office in 7 cases in the last 12 months. For the same period, the age claimed was accepted in 33 cases. FoI reply dated 16 September 2016. All the FoIs mentioned in this section were sent by me.

<sup>13</sup> 634 out of 3,472, to which must be added an unknown number of youngsters accepted to be under 18 but not their claimed age.

Year	UASC applications	Age disputed cases	Proportion	Age assessed	Assessed to be over 18	Assessed to be under 18 (not necessarily claimed age)
15-16 (July-June)	3,472	1,060	30%	933	68% [634]	32% [299]
2015	3,043	766	25%	700	68%	32%
2014	1,861	310	16%	449	54%	46%
2013	1,174	324	27%	404	65%	35%

**Table 1: National statistics related to age disputes**

Source: Statistics available at [gov.uk/government/publications](http://gov.uk/government/publications), national statistics, asylum chapter, published 25 August 2016 and accessed 1 October 2016; the proportions appearing in the fourth and last columns are my own calculations .

FoI replies indicate variations in local practice (as well as in recording data as they all replied in different ways, with many saying they did not hold some or most of the information requested). Table 2 presents the information provided by Croydon Council, the local authority with the second highest intake of unaccompanied minors in the country. With its steadily increasing proportion of disputed cases since 2013 and 2014, the Croydon figures can be said to be closely aligned with the national trend captured in Table 1. It should nonetheless be noted that the number of new UASC cases in Croydon over the last three years has intriguingly remained similar, despite the near doubling, from 2014 to 2015, of the number of unaccompanied young people nationally (as recorded in Table 1). Croydon did not provide information about the outcome of the disputed cases.

Year	New UASC cases in Croydon	Age disputed cases	Proportion of disputed cases	Proportion of accepted cases
2015-16	212	72	34%	66%
2014-15	195	58	30%	70%
2013-14	218	32	15%	85%

**Table 2: UASC cases dealt by Croydon Council**

Source: FoI F/CRT/10006208 dated 10 August 2016; the proportions appearing in columns 4 and 5 are my own calculations.

The situation in Kent, where the port of Dover is located and where the majority of refugees not travelling by air are arriving, is worth reviewing next, as the council with the highest number of UASC in the country. Kent County Council (KCC) provided age assessment figures for 2015 and the first six months of 2016, as outlined in Table 3. In 2015, KCC reported having accepted the age claimed in 217 cases. Over the same period, it completed an age assessment procedure in 246 cases. As was explained to me by an independent expert in the field, prior to 2015, KCC conducted age assessments in every UASC case. As the number of arrivals increased, this produced an important backlog, which led KCC to employ two social workers specifically to deal with it. In the first six months of 2016, the number of age accepted cases climbed to 305, whilst the number of performed age assessments declined to 120. KCC did not provide any further figures or explanations. Assuming it might make sense to add the figures provided (which it may not if the backlog continued in 2016), the proportion of age assessed cases - between a quarter and a third - would be broadly in line with national trends as captured in Table 1. Still, subjecting more than a fourth of youngsters to an age assessment procedure hardly seems in keeping with the ADCS advice to give the benefit of the doubt.

Year	Age accepted cases	Age assessments performed	[Total]
January-June 2016	305	120	[425]
2015	217	246	[463]

**Table 3: UASC cases dealt by Kent County Council**

Source: FoI/16/1183 dated 19 August 2016 - the totals indicated in the last column are my own calculations. The brackets indicate the possibility that there may have been additional age disputed cases in the period considered.

For the purpose of this paper, information was collected from nine local authorities.<sup>14</sup> Table 4 computes the information received from Cambridgeshire County Council (CCC). From July

<sup>14</sup> There seemed little point of doing this in relation to the authorities which Jo Wilding's previous research had indicated had no UASC in their care (n authorities) or very few (n authorities). Wilding had moreover warned me that the information I would obtain from different councils was unlikely to be directly comparable, each council having their own way to record UASC related data. I decided to direct my FoIs to the local authorities with the largest UASC intakes, namely, Kent, Croydon, Hillingdon, Surrey, Essex and Northamptonshire. I was also interested in getting information from the two local authorities which had been involved in the case of J with which I opened this article, namely Wiltshire in

2013 to July 2016, CCC accepted the age claimed by the youngsters in 18 cases. My FoI was asking whether the local authority had performed age assessment due to youngsters not knowing their age. CCC is the only local authority to have responded positively to this question (24 cases in the last three years). Astoundingly in view of the replies received from the other contacted local authorities, CCC had age disputed and performed an assessment in five times more cases than they had accepted (96 cases). The young person was determined to have been over 18 in a somewhat paltry 16 cases, suggesting 104 cases found the youngster to be a minor - though not necessarily the age they claimed to be.<sup>15</sup>

Period	Cases where claimed age is accepted	Age assessments performed because youngsters say they don't know their age	Age assessments performed because claimed age is disputed by local authority	Total of age assessments performed	Age assessments concluding youngster is over 18	Age assessment concluding youngster is under 18
July 2013- July 2016	18	24	96	120	16	104
July 2011- July 2013	0	0	20	20	10	10

**Table 4: UASC cases dealt by Cambridgeshire County Council**

Source: FoI 6837 dated 23 August 2016 - under 18 determination appearing in last column are my own calculations.

The question arises as to why CCC performs so many assessments. The explanation seems to emerge from their reply to another question included in the FoI, about how the local authority finds 'appropriate adults'.<sup>16</sup> CCC's reply indicates that their point of departure is not the benefit of the doubt. To quote,

Appropriate adults are always used during full Merton compliant age assessments. Appropriate adults are not used during initial visual assessments due to time constraints. If at initial visual, there are concerns that the young person *could* be over 18 years of age, they are accommodated without prejudice

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England and Cardiff in Wales. I finally contacted Cambridgeshire as they had intriguingly referred to visual assessments in reply to Wilding's earlier FoI. Neither Wilding nor I had come across this phrasing.

<sup>15</sup> In the previous two years, CCC had had fewer dealings with UASC, but these indicated an even lower rate of acceptance. The figures for July 2011-July 2013 are as follows: nil case of age readily accepted, 20 disputed cases, 10 over-18 assessments. The 18-25 Service had performed the assessments in the 2011-2013 period. Thereafter they were being done by FREDt.

<sup>16</sup> The notion of the 'appropriate adult' is borrowed from Criminal Law. It is used in contexts where it is recognised that a vulnerable person should not face some difficult proceedings alone but must be accompanied by an 'appropriate adult'.

until such time as a full Merton compliant age assessment can be undertaken.  
[my emphasis]

Assessing a youngster simply because they might be over their claimed age is a recipe for over assessing. The practice is unfortunate in that it involves a resource-hungry process (two social workers, an appropriate adult and often an interpreter), which moreover rarely produces an unequivocal result, as the evidence it is able to gather tends by nature to be inconclusive, as will be explained below. Needless to say, the process is also stressful for the youngster who would greatly benefit from having the benefit of the doubt directly applied to them.

### 3. Merton compliance

How are social workers supposed to determine the age of the person in front of them? Given the difficulty, indeed impossibility, of fulfilling this task with accuracy, it may come as no surprise that local authorities have not been prescribed any specific way in which they must carry out age assessments. Courts have nonetheless provided guidance as to the minimal standards that should be respected. The leading case in this respect was handed down by the High Court in 2003, in a case involving the London Borough of Merton,<sup>17</sup> hence the expression ‘Merton-compliant’ age assessments. Further judicial guidance followed, elaborating on these criteria.<sup>18</sup>

It is now accepted that an age assessment should be conducted, some case law adds ‘if practicable’, by two social workers with appropriate training and experience for this task and in the presence of an ‘appropriate adult’. The assessors should pay attention to the level of tiredness, trauma, bewilderment and anxiety of the child. Their assessment should be ‘holistic’, meaning it cannot be limited to physical appearance and behaviour. The assessors must take a history from the child, including regarding family composition and education. Ethnicity, culture and customs should be a key focus. The interpreter’s skills in both the child’s language and dialect and interpreting experience in the kind of situation created by the age assessment process should be checked before proceeding. The purpose of the process must be explained to the child. The interview should be conducted in a structured, fair, non-adversarial, non-stressful and informal manner. Before a conclusive finding is reached, the child must be given an opportunity to answer any potentially adverse findings, including regarding inconsistencies in answers that they have given.<sup>19</sup>

Some age assessments are so lacking in Merton compliance that they are plainly unlawful. This was the case of J’s assessment recounted in the introduction of this chapter. The High Court judge found it to have been marred by such ‘obvious deficiencies’ that these made J’s detention, which would not have taken place if he had not been found to be over 18, unlawful. The judgment identifies four major deficiencies: (1) the assessment had been carried out just by one social worker; (2) J had been given no opportunity of having an appropriate adult present during the process; (3) the social worker had not explained why she thought J was 3 ½ years older than he claimed to be; (4) her assessment seemed to have been based solely on his appearance.<sup>20</sup>

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<sup>17</sup> *B v London Borough of Merton* [2003] EWHC 1689 (Admin), judgment of 14 July 2003.

<sup>18</sup> See e.g. *FZ v Croydon*; *R(AS) v LB of Croydon* [2011] EWHC 2091 (Admin).

<sup>19</sup> The above paragraph is adapted from: *IG v LB of Croydon* [2015] EWHC 649 (Admin), judgment of 13 March 2015, para 7.

<sup>20</sup> J paras 13-16.

The judge concluded: ‘It is difficult not to agree with J’s legal representative that this ‘was, in many ways, a vivid illustration of how *not* to conduct an age assessment’.<sup>21</sup>

Other age assessments do not so plainly fail to comply with *Merton*, even though they fall short of exhibiting the features highlighted by the ADCS guidance of 2015. It is the purpose of the rest of this article to explain how this comes to pass.

#### **4. Stefanie’s account of an age assessment procedure**

Before doing this, it may be useful to give a concrete example of how age assessments take place. This may be the most important since age assessments conducted by social workers leave very little public trace, the more so since data protection issues are involved. In order to form a better idea of the practice, I asked three persons who had acted as appropriate adults to recount in specific details an assessment in which they had participated. This section summarises the account ‘Stefanie’ (not her real name) gave of the assessment interview of ‘Mustapha’ (not his real name either).<sup>22</sup>

Stefanie has been a regular visitor for detainees at an immigration centre in England. When the group through which she does this asked her whether she would be willing to undertake the role of appropriate adult in age assessing proceedings, she accepted. By the time she was asked in early 2015 to participate in Mustapha’s age assessment, she had received about five hours of training.

She arrived at the immigration centre at the prescribed time in the given morning. However, there was a long wait before the process properly began. During this time she chatted with the interpreter. By the time the interview started, perhaps one hour and a half beyond schedule, she could not help being a bit worried that Mustapha might not be in the best possible condition to undertake the process – was he not hungry, for example?

Stephanie was given a chair to sit on, back from the desk where everybody else, namely the two social workers, Mustapha and the interpreter, were sitting. Except for her chair, the seats were bolted to the floor. The room was entirely bare. It was located in the area reserved for legal matters, behind the immigration center’s visiting area with which Stefanie was familiar. She asked that Mustapha be told through the interpreter that she was there to support him, which was done. Despite his downcast eyes, she felt he understood this.

The social workers started to go through a set of pre-set questions designed to make him talk about his early life and schooling, his arrival in the UK, his background and home life. They did this professionally and in a friendly way. The interpreter proved excellent. Originally from Mustapha’s country, he was able to ask appropriate questions and to relay answers that made sense, for example, of the schooling system in his country of origin – which would otherwise have been confusing to English ears.

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<sup>21</sup> J para 18, emphasis in the original.

<sup>22</sup> Whenever I put a name in inverted commas below, this indicates that I have changed the name of my interlocutor. I do this only at first usage, so as not to overburden the text.

Mustapha explained how he had got involved in protest and participated in demonstrations at home, how his family became increasingly concerned for his safety and decided he needed to be removed from the country. It was clear he came from a well-to-do family. They told him he must go to England and paid smugglers to organise and take him through his journey, which turned out to be difficult. As Mustapha was travelling, he often did not know where he was. However, when he heard he was in London, he recognised the name and decided to come out, having made the last leg of his journey hidden under the axel of a lorry.

He was taken to a café owned by a couple originating from his country. The police were called. As the social workers were now assessing his age, they were keen to probe what Mustapha had said then, and why. Following the conversation developing in the detention centre, Stefanie formed the impression that Mustapha had been poorly treated by the police. In her view, he must have been disorientated and have given them confusing answers, not to mention that the conversation had been taking place through an interpreter who was on the phone rather than present. Now, however, four days later, Mustapha spoke confidently and his answers were straightforward.

The social workers moved the interview to questions about his family. There, in this emotional territory, Mustapha was getting really upset. Stefanie was wondering whether to intervene. As she was about to do this, the social workers themselves interrupted the interview. They left the room with the interpreter. Stefanie saw Mustapha put his head down on the table in a manner which struck her as very child-like.

She could only communicate with him through body language. Although she had only just encountered him, she could not help feeling for him, looking so young, fragile and distressed in this bare room. She was also thinking of Mustapha's parents who had believed they were sending him to safety, instead of which, there he was, in hostile surroundings, interrogated and deprived of his liberty.

After a while, the social workers came back, in an atmosphere that was completely changed. They had talked over the phone with a relative of Mustapha's (through the interpreter). They were now persuaded to believe that what Mustapha had told them was true. They were accepting he was 16. Arrangements were being made to get him out of the immigration centre as soon as possible. Even though it was already early evening, he would not spend the night there.

Stefanie gave me this account from memory. She had understood from the training she had received that she was not allowed to take any note during the proceedings. On the positive side, Stefanie had noted the professionalism of the social workers. Most importantly, the outcome was a good one for Mustapha in that his age was accepted. Nonetheless the proceedings cannot be said to have been unproblematic. The next five sections of this article review ways in which actual age assessment proceedings can fall short of respecting official guidance.

## 5. Forbidding venues that are not strictly forbidden

Detention Services Order 14/2012, issued by the Home Office in 2012, states:

An individual who is defined as an age dispute case will not remain in detention pending a Merton compliant age assessment. He/she will be released and the Merton compliant age assessment will be conducted in the community. He/she must be released into the care of the local authority because of the possibility that he/she is under 18 years of age.<sup>23</sup>

Follow instructions as to what should happen. Admittedly, the section ends with what might be taken to be a window for rendering an age assessment conducted in a detention centre lawful if the local authority does not provide suitable accommodation for the youngster.<sup>24</sup> This, however, is surely meant as a last resort rather than a circumstance which can generally be relied upon.

The ADCS guidance stresses the importance of finding an appropriate venue for the age assessment interview – or interviews if more than one is necessary:

The venue [...] needs to be conducive to helping the child or young person feel safe, comfortable and able to participate to the best of their ability in their interview(s). [...] Facilities such as police stations would not be considered appropriate for conducting age assessments, and every effort should be made to take a child or young person out of a police station in order to conduct a lawful assessment. (ADCS 2015: 18)

The ADCS guidance does not say anything about (not) holding the interview(s) in a detention centre. It nonetheless warns about the deleterious effects immigration detention has, especially on children. (Ibid.: 51)

Anecdotal evidence suggests that age assessing in police stations (as happened to J) or detention centers (as happened to Mustapha) is a fairly general practice. Such an intimidating environment should not be considered acceptable. It obviously goes unreprimed in quite a large number of cases.

## 6. Inappropriate appropriate adults?

The legal concept of the appropriate adult was introduced in England and Wales in 1984 through the Police and Criminal Evidence Act. This was in order to ensure that a vulnerable person, including any juvenile, would not be alone when facing criminal proceedings. The law makes the presence of an appropriate adult mandatory in a number of circumstances, including police questioning of a vulnerable person. In the criminal justice context, the appropriate adult's role is not just to support, but also to advise and assist, the vulnerable person.

In the age assessment context the role of the appropriate adult is more limited. Once the

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<sup>23</sup> The order's original implementation date was 28 September 2012. It was last reviewed in March 2015, with a so-called 'rebranded' outcome, and its next review is due in March 2017.

<sup>24</sup> 'In the event that the local authority placement is delayed by the local authority, the removal centre will make immediate arrangements to safeguard the individual within the centre whilst awaiting the local authority response'.

appropriate adult has ensured that the young person understands the purpose of the interview (age assessing) and their own role (supporting them), the appropriate adult is not supposed to intervene again as the social workers proceed with the interview. Exceptions to this rule are if the appropriate adult feels the social workers are acting improperly, for example because their line of questioning is repetitive and harassing or unsuitable to help determining age, or it appears that the young person is tired or hungry and needs a break. However, if things are proceeding in a manner that is not inappropriate, the role of the appropriate adult is 'just' to offer emotional support, through being present (which may be why some actors have renamed the role 'accompanying adult'<sup>25</sup>). To this, must be added that the appropriate adult can take notes of the questions asked and answers given. Some organisations which train appropriate adults advise this, so as to put the young person in a better position to mount a legal challenge, if necessary. Other organisations prefer for the appropriate adults not to be distracted from their support role by note taking. It is to be regretted that the authorities do not take verbatim notes of the interviews, let alone record them.

For the purpose of writing this chapter, I have interviewed three persons who have acted as appropriate adults (each time in a detention centre). What struck me at the end of these interviews was how downcast my interlocutors seemed to be after having shared their experience with me.

Like Stefanie, 'Mat' was an immigration detainees' visitor. He accompanied 'Ashraf' in March 2014. Ashraf was facing removal on the basis of a previous age assessment, undertaken in another locality about 18 months before, which deemed him now to have turned 18. Recently put in detention with a view to removal, Ashraf was now contesting the age he had been determined to be. In order to do this, he had presented a document which acts as an identity card in his country of origin. The assessing social workers had to decide whether this new evidence could be accepted. Proceedings started in the morning. Unlike what Stefanie reported for Mustapha, Mat thought it took a while before Ashraf understood he was there to support him.

Mat described the social workers as nice people, who came across as compassionate, competent and professional. At the same time, he also said he would have wished to intervene all the time to stop their questioning. Ashraf was asked for an hour about the exact circumstances in which he and his father had gone to a town to obtain the document. He could not recall exactly how that morning had unfolded. He nonetheless kept being asked about this, which made him increasingly frustrated and agitated. The social workers then started to ask him about his 14<sup>th</sup> birthday, which would have happened shortly after this. Again, he said he could not remember what his family had done that day. He explained birthdays were not important occasions in his country. The social workers said they could not believe he would not remember this event, which could not but have stood out. (As I write this, I do not manage to remember how I celebrated my birthday last year, even though I know I did and I am sitting peacefully in my study). Ashraf's answers, or lack of answer, to other questions put to him continued to increase the suspicion of the social workers. At one stage, he was led to explain that the document had been sitting in the deserted family house for a few years. The social workers said they could not believe that then it would not have been stolen. Ashraf retorted that people in his country were not interested in identity documents and that his cousin had gone to fetch it when Ashraf

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<sup>25</sup> FoI reply of Kent County Council. See also Young Lives Foundation website: <http://ylyf.org.uk/wordpress/wp-content/uploads/Volunteer-AccAdult-Info-Pack.pdf>, accessed 21 August 2016.

had recently contacted him from England. This again was found unconvincing. Eventually, furious at not being believed, Ashraf slammed down pen and paper and stormed out of the room. This was a horrifying moment, Mat tells me. From then on, Ashraf's credibility had completely gone. At some point in the afternoon, the two social workers left the room to phone their colleagues who had age assessed Ashraf upon his arrival in the UK. During this interval, Ashraf was full of agonizing questions to Mat and the interpreter about what was going to happen to him. They had to explain to him that if he was not believed he would be kept in detention and then removed. When the social workers returned, they said they saw no reason to change their colleagues' original assessment. Mat reflected to me: '[Ashraf] could have been 19, he could have been 17. There was no way of knowing'.

Mat expressed regrets at not having received more training before he accompanied Ashraf and not having had the confidence to intervene. It is possible, however, that no other appropriate adult, however well trained, would have been able to persuade the social workers to change their final determination, even if they had been invited and had accepted to modify their questioning. I doubt that, in this case, Mat did not appropriately fulfill the role policy assigns appropriate adults, the more so since he had complemented the basic training he had received with his own online research. It must nonetheless be a concern that so-called appropriate adults may be entirely inappropriate.

Anybody over 18 can fulfil the function. 'Claire' is a solicitor who specializes in immigration and asylum and who has trained social workers in age assessment proceedings. As I interviewed her, she explained that she has been asked to act as appropriate adult for social services who could not find anybody else. She refuses to do this out of principle, feeling this would prevent her to be in a position to legally represent the child in judicial review proceedings, were such proceedings considered later. Claire regrets that interpreters, accommodation provider staff and foster carers, are asked to act as appropriate adults. In her view, they lack the required independence from the situation.

The question arises as to where local authorities turn to find appropriate adults available at short notice and ready to devote a whole day at a time to proceedings they are likely to find emotionally difficult. One response is that some non governmental organisations make it a service of theirs to provide trained volunteers to act as appropriate adults in age assessment proceedings.<sup>26</sup> One council said in their FoI replies that they were 'spot purchasing' from a range of organisations.<sup>27</sup> The local authority with by far the highest number of unaccompanied children's arrivals in the country, Kent County Council, has formal contractual arrangements in place.<sup>28</sup>

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<sup>26</sup> CORAM is an example. See <http://www.coramvoice.org.uk/professional-zone/appropriate-adults-age-assessments>, accessed 21 August 2016.

<sup>27</sup> FoI reply FR6639 by Northamptonshire County Council dated 12 August 2016. Northamptonshire spot purchases from a range of organisations including the National Youth Advocacy Service, Leicester Inter Faith Forum and Northamptonshire Children's Rights Service.

<sup>28</sup> Whilst KCC used to rely on Barnardos and the Refugee Council, it has now commissioned the Young Lives Foundation to provide an accompanying adult service for all UASC who require an age assessment. My FoI request to see the contract was refused on the grounds that disclosure would be an advantage to competitors. It would certainly be worthwhile to study the history of these public authority-voluntary sector relationships.

While these arrangements seem promising, it would be important to research the training and performance of those who act as appropriate adults. In the criminal justice context, it has been noted that some problems arise that need attention and solving (Pierpoint 2006; 2011; Hollingsworth 2014). This is bound to be so in the age assessment context too, where the circumstances of the 'unaccompanied' young person are particularly isolating and dramatic. Another concern is that contracts for specific organisations to provide appropriate adults are rumoured to encompass informal gagging clauses, to the effect that appropriate adults cannot talk about their experience to journalists or academic researchers. If this is the case, this is a worrying development, the more so since there exists no public record concerning the way age assessments are performed in practice.

In J's case, the High Court considered the absence of an appropriate adult a 'substantive failing', finding it 'axiomatic' that J, who was just 14 ½, should have been offered such assistance.<sup>29</sup> This perspective must be approved. However, the three research interviews I have conducted suggest that acting as an appropriate adult in the asylum process is not an easy or straightforward process. Quotes included in the ADCS guidance also indicate that youngsters often do not understand what is going on, with one young person for example having observed that 'Refugee Council' was a new word for him and he had no idea that the person from this organisation was participating in the proceedings in order to support him (ADCS 2015: 20).

Most importantly, it must be born in mind that the assistance offered by an appropriate adult will always be inappropriate if the very logic of the proceedings in which they are asked to participate is defective. Could any appropriate adult have pointed out to the social workers who were assessing Ashraf that it was unreasonable for them to expect Ashraf to recollect the details of the morning when he and his father went to obtain his identity document and what they did for his 14th birthday? Would it be their role to remind them of their obligation to give him the benefit of the doubt? Perhaps some appropriate adults would have the necessary skills and diplomacy to be able to do this. However, fulfilling an advocacy role is not deemed a requirement for the role.

## **8. The purpose of the interview in the midst of a refugee culture of disbelief**

Where memory is concerned, we make mistakes all the time. This is because memory constantly reconstructs the past rather than storing it intact in our brains. In turn, this is because the biological function of memory is to help us live in the present – not in the past. Psychologists have long been aware of this and warned against thinking that memory's purpose is to deliver an objectively accurate record of past events (Hunter 1961). Most often, when we remember things wrongly, it does not matter. Either we are not aware of this as we do not stand corrected and just carry on with our lives, or there is external evidence available which puts the record right.

Youngsters who are subjected to an age assessment procedure are being asked a multitude of questions about their family, their education, their journey, their life. They often produce an account which immediately appears chronologically impossible to the assessors. This is not helped by differences in language and cultural conceptualisation, which may confuse further the account received by the assessors. Resulting inconsistencies may create the impression that the person who is being age assessed is fabricating their account rather than sticking to the

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<sup>29</sup> J, para 14.

truth. The impression of being told a lie can be further exacerbated by a reluctance on the part of the youngster to talk about sensitive issues, not to mention memory gaps and slips due to the way the brain deals with trauma. The obstacles the youngster faces in delivering a convincing account and appearing credible can be overwhelming.

The excellent ADCS guidance recognizes this difficulty. It states:

While forming your decision, you should [...] talk to the child or young person in an inquisitorial, not adversarial, manner.

You need to bear in mind developmental stages, the memory process, as well as the impact of trauma. Gaps, inconsistencies or lack of information do not always mean that a child or young person is not being truthful, and this should not be the starting point. Inquisitiveness about finding the right age is better for the child or young person than trying to catch someone in a “lie”. (ADCS 2015: 25)<sup>30</sup>

Unfortunately, the very pitfalls the guidance recommends to avoid are described by those who work in the asylum field, including lawyers and civil society organisations, as common practice. As Mat told me, 'everything in Ashraf's line of questioning was set up to try to trick him. All that he said was being weighted not towards assessing his age but towards seeing whether he could be tripped up.'

Almost inevitably, this attitude produces adversarial proceedings, whether this is the atmosphere the social workers wish to create or not. This was Stefanie's experience, who saw a striking change of atmosphere once the social workers were convinced that Mustapha was telling the truth. It is also indirectly recognised by the ADCS guidance, which acknowledges that: 'Children and young people have often said that even when they have been assessed to be a child, at their claimed age or at a different age, they found the process very difficult and upsetting and it had left them with feelings of distrust' (ADCS 2015: 30).

In theory, the aim of the procedure is to assess age. However, the reality does not always conform to this ideal (Cemlyn and Nye 2012). The feedback Claire receives from the social workers she trains is that they do not consider age assessment to be a need procedure, performed in order to help them assess a young person's needs for accommodation or education. Claire tells me she reminds them that 'they are not there to do the job of the Home Office'.

Claire concurs with other practitioners in the field to say that age assessment too often becomes wrapped up in asylum (see also Crawley 2015). In this context, there is nothing to stop the regrettable culture of disbelief that notoriously pervades asylum determination (Souter 2011; Jubany 2011) from spilling over to age assessment.<sup>31</sup> This may be the more so since doing this plays in local authorities' interests. The finding by a local authority that someone is an

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<sup>30</sup> The guidance continues: 'Consider also that many children and young people have been told by their families, smugglers or traffickers to tell particular stories about their life in order to protect others, which are not necessarily reliable indicators of their age. Children and young people being age assessed will also often not know yet who to trust, so may not reveal their entire situation at the assessment stage. Note that this is not dissimilar to other young people who are coming into care and may not be clear who to trust'.

<sup>31</sup> It is worth adding that in fact, as Farbey (2014) notes, the benefit of the doubt should also be central to asylum determination.

unaccompanied child has direct financial implications for the said local authority. If the person is found to be a child, services will have to be provided. This will not arise if the person is found to be an adult as they will then be the responsibility of the Home Office. The younger the child, the more costly to the local authority. Greater services will have to be provided, with no adequate funding from central government.<sup>32</sup> There is therefore a financial incentive to find someone who for example claims to be 14 to be 16, or someone who claims to be 16 to be 17.<sup>33</sup>

Pressure to overestimate age can be pretty direct. A former social worker told Jo Wilding that managers would come in just before an age assessment interview was due to take place and say ‘Oh that kid’s definitely over 17’ (House of Lords 2016). Not giving the young person the benefit of the doubt regarding their age in the absence of compelling evidence that they are older is against guidance. This does not mean it does not happen.

## **9. Evidence-based exercise or pure guesswork?**

Given social workers are tasked with assessing age, what reliable tools are available to assist them in this task? The short answer is: hardly any.

Non-scientists are often under the impression that resort could be had to scientific methods, such as x-rays, for determining age. This is a mistaken view: age cannot be specifically determined by physical examination. The reason for this is simple: people do not physically develop at the same rate within one population, let alone across ethnic groups. A multitude of factors, such as genetic inheritance, nutritional intake, environment, health and illnesses, influence individual development. Neither skeletal X-rays of the hand and wrist, nor dental X-rays, nor bone development imaging, nor height or testicular volume for men, or measurement of any other part of the body, can specifically answer the question ‘how old is this person?’. Teenagers grow, acquire bone and tooth maturity, and develop sexually, at hugely different rates. What can be known is the range of ages compatible with a given measurement – but not the age of a person who presents certain measures. Within a given population, 5 per cent of normal boys aged 14 have heights above the average adult height. Some 15 year olds have wisdom teeth showing, even though these generally appear later. Once it is determined that an individual is physically mature because four (for boys) or five (for girls) indicators are all satisfied, this still need not mean the individual is over 18; they might be as young as 15 (Aynsley-Green et al. 2012). Examples such as these could be multiplied that demonstrate physical examinations, however precise, are not a dependable age indicator (Noll, 2016; Crawley 2015: 28-36).

In the UK, Sir Al Aynsley-Green, former Children’s Commissioner and President of the British Medical Association, has ceaselessly highlighted the danger of wishing to ascribe adult age to individuals on the basis of their developmental maturity. Medical professional bodies in the UK are in agreement that it is not possible to determine age with certainty on the basis of body measurements. Unlike what is happening in many other countries (Sedmak et al. 2015), their vocal opposition has successfully thwarted government proposals in 2009 and 2012 to

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<sup>32</sup> For exact figures, see Wilding and Dembour (2015).

<sup>33</sup> Due to the resulting conflict of interests, a key recommendation of Heaven Crawley’s comprehensive study on the process of age assessment in the UK (2007) was the establishment of regional age assessment, funded independently of the local authorities taking responsibility for children. Unfortunately, this central recommendation has not been acted upon.

introduce X-rays for age determination process. This opposition was based not only on medical and statistical grounds, but also on ethical considerations. Medical ethics give prominence to the principles of respect for autonomy and beneficence. In this case, not only is it difficult to think the young person would be in a position to give informed consent to the procedure, but X-rays would be used purely for government's administrative convenience, without therapeutic benefit and indeed with potential harm such as an increased risk of brain tumour (Aynsley-Green et al. 2012).

For many years now, it has been accepted in the UK that it would be wrong to assess age solely on the basis of physical appearance.<sup>34</sup> The result is that social workers are told they must perform a 'holistic' assessment, which combines observations of physical appearance and social development with the taking of a family and educational history, and whatever else might be considered relevant. However, even a so-described holistic assessment is bound to remain a hit-and-miss process, since none of its constitutive elements, taken alone, can generally be considered fit to produce solid evidence. It is a serious fault of logic to expect that the sum of these undependable elements could secure a reliable outcome.

In order to substantiate this statement, it is necessary to discuss each of the elements regularly considered in a holistic assessment in turn. The first is physical appearance. The wide margin of error inherent in this method of assessment has already been noted. Physical appearance is a factor which should not be relied upon, except in very stark cases: a man over 25 is not a child; an infant is not a teenager. The question arises as to why physical appearance has not been altogether left out from the conceptualisation of Merton-compliance. Presumably this is because it appears unfeasible not to rely on it, even though we know it is unreliable.

When we wish to guess how old a person is, appearance is generally our first port of call. This works well in order to recognise that a young child is not a mature adult. The problem with the visual assessment method – to borrow the vocabulary used in Cambridgeshire - is that it is not helpful in reliably distinguishing a 14-year-old from a 15-year-old from a 16-year-old from a 17-year-old and even from an adult (as J's case demonstrates). A feeling that the young person does not look the age they say they are is nonetheless what presumably triggers the age assessment process in the first place.<sup>35</sup> So, in the absence of data indicating age with certainty, how could visual assessments, on which we rely all the time even if we know from experience they are not reliable for precisely determining age, not be part of the age assessing process? This, I think, must be why physical appearance is not ruled out, even though science tells us that logically it gives us no clue as to what we are seeking to determine.

Admittedly, UK law requires visual assessments to be integrated in a holistic assessment. To achieve this holism, social workers are advised, or possibly simply allowed, to take into consideration the demeanour of the young person - either during the assessing interview(s) or through observations conducted in the place where they are accommodated. This is another

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<sup>34</sup> This is only acceptable if the individual is *significantly* over 18 and there is absolutely no doubt they are an adult. For this to be the case, they would have to have wrinkles, a lawyer jokingly told me. More seriously, in Kent, this has been taken to mean that the person must distinctly look to be over 25.

<sup>35</sup> I have heard it said that in one place, age assessments sometimes appeared to be used as punishment for perceived bad behaviour on the part of the youngster. This allegation was strongly disputed by the local authority which was implicated. It is nonetheless concerning that this was reported by more than one person, independently from each other.

wild card, however. What conclusion regarding their exact age can be derived from someone who has just crossed the world alone and encountered scary situations appearing more mature than home teenagers - or on the contrary timid and withdrawn? I was told of an age assessment where the young person was assessed to be over 18 on the grounds that he was seen befriending people who were over 18. The logic of this reasoning is not unassailable, far from that.<sup>36</sup>

The young person's history will generally form a crucial element in the holistic assessment. This may work well when the young person is able to produce a consistent account, moreover somewhat independently confirmed (as in Mustapha's case, when the social workers phoned a relative in his country of origin). It can be useless when the young person cannot answer specific questions put to them because they don't know or they are not believed when they provide an answer, as in Ashraf's case. Moreover, as noted in the previous section, expecting someone to deliver an accurately dated account of their past, solely based on their memory, and therefore becoming convinced that they are lying if their account contains inconsistencies, is highly problematic.

Admittedly, social workers are in a difficult position. They are not detectives and they do not have the resources to examine and resolve any possible discrepancy that arises in an interview. They are moreover expected to come to their conclusion reasonably fast. Even if their assessment can be extended over the course of a series of interviews and even if they can include observations of the young person in daily life, their investigations cannot take months, let alone years. They simply are not in a position to retrace exactly how the life of the young person in front of them has chronologically unfolded. The result, however, is that in the majority of cases, age assessment cannot be anything but guesswork.

When social workers come to the conclusion, which they genuinely hold, that a person is older than their claimed age, there is a risk they do so on the basis of a misplaced confidence in their own judgment. One might hope that this risk would be alleviated by the legal requirement that their assessment must be motivated. However, the least one can say is that justifications do not always stand to scrutiny. Worst examples include: coming from a country where everybody is friendly but not displaying the same friendliness (sexual abuse notwithstanding); making intense eye contact (despite the applicant having specifically warned the assessors he had a squint which made it difficult for him to see); wearing a Gucci shiny watch (for young children apparently do not like shiny watches); having been observed selecting the most expansive brand of hair gel during a shop.

## **10. Age upgrading, or a shrinking place for the benefit of the doubt**

Let us return to asking why was Ashraf was not given the benefit of the doubt, for the question is important. The assessing social workers may have genuinely believed he surely could not be under 19, however much evidence to this effect appeared to Mat to be lacking. Perhaps they did not want to go against the opinion of the social workers who had performed the initial assessment eighteen months before. They may also have integrated an unspoken but real

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<sup>36</sup> I was also told by another person of a case in which two young children (eventually determined to be 10 and 11) had actually said they were 16 in order to avoid separation from the teenagers whom they had befriended. Yet again showing the limits of the records kept by local authorities or their willingness to be open on the subject of age assessment, my FoI question asking whether the local authority had come across cases of age assessment due to the claimed age appearing too high attracted no positive response.

political pressure not to believe and accept everyone who claims to be a refugee. Whatever the case, in view of ADCS guidance (which admittedly postdates Ashraf's assessment), it is troubling that Ashraf was found to be 19. To quote the guidance again:

Everyone involved in this process would like children assessed to be children and adults assessed to be adults. However, there will be times when, even after assessment, you have some doubt about the age of the person you are assessing; you cannot be expected to know the age of everyone you assess. In these circumstances you are advised to give the benefit of the doubt, and this is partly because of the different implications for children and adults in getting the decision wrong. Children in the UK are afforded extra levels of protection compared to adults both in terms of how they are cared for and in terms of how they are treated in the immigration system, and it is vitally important that children are able to access this protection. (ADCS 2015: 32)

From July 2015 to June 2016, 634 young people claiming to be children were assessed to be over 18, as per Table 1. How does one reconcile this number with the guidance which makes giving the benefit of the doubt a central, if not *the* central, principle of age assessment in the UK? This is not necessarily difficult, for the guidance does not say 'you must give the benefit of the doubt'. Instead it advocates less categorically: 'you are advised to give the benefit of the doubt'. This phrasing leaves the door open for an age determination which rests on weak evidence to be lawful. In other words, the governing framework suffers from double speak.

Table 1 indicates that the proportion of young people who are being age assessed has been increasing over the years, from a sixth in 2014, to a quarter in 2015, to almost a third in 2016.<sup>37</sup> As for the number of young people who are assessed to be under 18, but determined to be one or two years older than they claim, it is not known. However, experts comment that this is a common situation. Age upgrading, if we can call the phenomenon so, acts in blatant disregard for the principle of the benefit of the doubt which is supposed to be the central piece of the legal framework. How can the assessing social workers be sure of their conclusion that, for example, the teenager in front of them is really 17 rather than 16 as they claim?

One should not need to repeat that any additional year wrongly attributed to a young person will have enormous consequences for the care they will - or rather will not - receive. Needless to say too, it will also serve to slightly relieve pressure on local authorities. This is especially so for those whose geographical position puts them on the frontline of the responsibility to support unaccompanied minors.

Let us imagine for a moment that one could magically find the real age of all the young people who are age assessed just after their assessment has concluded. Let us further imagine that the social workers were systematically sanctioned every time they had got it wrong by overestimating age. By contrast they would attract absolutely no opprobrium, however slight, if they simply gave the benefit of the doubt, as they are supposed to. In such a scenario, it is difficult not to believe that the statistics presented above would not look rather different. The high number of age assessments performed and young people found to be over 18, not to mention those found to be under 18 but over their claimed age, might be expected to drastically drop.

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<sup>37</sup> In 2013, the proportion was over a quarter, making it possible that 2014 represented a dip. In the absence of figures prior to 2013, this is impossible to tell whether it is 2013 or 2014 which appears out of line

## 11. How supposedly 'Merton-compliant' age assessments that are actually not Merton compliant are allowed to stand

A number of guarantees are in place in order to ensure the fairness of the age determination process. In a context where a determination detrimental to the young person made on the basis of guesswork is not ruled out, they nonetheless lose much of their effectiveness. For example, the two social workers must be trained and experienced. However, a long practice as a social worker in the children services or asylum unit of a local authority is in itself no guarantee that the philosophy of the ADCS guidance is understood and will be applied. Some staff may even have learnt over their professional career that determining a young person to be one or two years over their claimed age, because this makes sense to them even though their feeling is not backed by robust evidence, is what is expected of them.

Similarly, the case law is very clear that a Merton compliant assessment must give the young person the opportunity to elucidate discrepancies and contest negative findings which the assessors are contemplating. This is important, and no doubt this proviso can be instrumental in dissipating misunderstandings and convincing assessors of the truthfulness of the young person's claim.<sup>38</sup> However, there will also be many cases where assessors will have formed the impression that the person in front of them is not credible (which the very fact that they are being age assessed may in itself be taken to suggest), making it virtually impossible to dislodge this view.<sup>39</sup> In J's case, even the appearance of his older brother did not convince the authorities to proceed swiftly to accept his age.

Although five years old, the case of J remains instructive. Particularly significant for the argument developed in this paper is that J's age assessment was described and treated as Merton compliant throughout all the stages of the asylum and judicial proceedings, up to the moment when the High Court judge agreed with J's legal representatives that the assessment had been an excellent illustration of how *not* to age assess. J's asylum refusal letter noted that a Merton-compliant aged assessment had been completed by Wiltshire Social Services. In the damages for unlawful detention proceedings, the High Court judge noted that after the Wiltshire age assessment was described as Merton compliant in the asylum refusal letter, this assertion had been 'picked up and repeated, mantra-like, in all of the later documents'.<sup>40</sup> In other words, though the deficiencies may well have been 'obvious',<sup>41</sup> they nonetheless went unnoticed until the proceedings before the High Court. Had it not been for the rather unlikely event of J's

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<sup>38</sup> As a result, best practice is now understood to consist in at least two interviews, one for the assessing social workers to come to (preliminary) conclusions, and another for the young person to explain why these conclusions are mistaken.

<sup>39</sup> One person who had participated in many age assessments as an appropriate adult told me that they had been 'surprised and pleased' when social workers had changed their mind at the second interview, after having put their findings to the young person who then challenged them. I asked how often this would happen. Pushed in giving me a number, the appropriate adult eventually responded: 'Perhaps one in twenty'. On the lack of standards to assess credibility in the asylum determination field, see Byrne 2007. On the negative impact a finding of non-credibility regarding the age claimed then has on the asylum determination procedure, see Warren and York 2013.

<sup>40</sup> J para 30.

<sup>41</sup> *Idem*.

reunion with his older brother, the Wiltshire age assessment would have continued to be treated as Merton compliant and reliable rather than fundamentally flawed.

Any asylum lawyer will tell you that few age assessments are successfully contested in the UK. Figures are not readily available about the number of judicial review proceedings concerning age assessment (but see Thomas 2015), but it is clear they are few and far between, as born out by one of the responses of Kent County Council to my FoI. It stated that in the two years since August 2014, KCC had had 26 judicial review proceedings issued against it about age assessment. Of these only three were due to go through the full judicial process; the 23 others had either been refused permission to proceed or had been withdrawn, settled or struck out.<sup>42</sup> To recall, in the 18 months between January 2015 and June 2016, KCC performed 366 age assessments.

The statistics of three judicial review proceedings (which may or may not ultimately find the KCC's assessment in need of revision) is the most startling since KCC is not only the local authority which age assesses the most but also the local authority which takes care of the largest number of unaccompanied minors in the country. In 2015, it started to run out of foster families and school places. Understandably it called for a system which would see the responsibility for unaccompanied minors in the UK shared between local councils to be instituted (Wilding 2016). If there is one authority which one might expect to be inclined to sometimes overestimate age, it must be it. In this country, the paltry number of three judicial reviews confirms, if need be, that the gap that so easily emerges between theory and practice, as highlighted in this article, is rarely identified, denounced and corrected in judicial proceedings. A number of factors contribute to explain this absence of reaction.

First, a legal representative contracted to do public law would need to take up the case. That the young person could find such a lawyer is not certain. Legal aid cuts have had the effect of reducing the number of lawyers willing to provide judicial review services in general, including on age assessment. In some parts of the UK, what has been termed 'advice deserts' have emerged: there is not one legal aid lawyer available to challenge some issues. Due to the most recent changes to funding for judicial review, lawyers must now put in many hours of work before having it confirmed they will be paid for this, as no payment will ensue if permission to proceed to full court proceedings (?) is not ultimately granted. Unsurprisingly given this context, it is anecdotally reported that lawyers have become more reluctant to start judicial review claims.

Second, even if the young person has access to a lawyer willing to pursue the case, the case is no longer proceeding from a blank slate once an age assessment has been performed which is described as Merton compliant. New evidence now needs to be submitted that demonstrates either that the initial age assessment was unlawfully conducted (which is difficult to prove in the absence of a verbatim record of interviews and given the interpretative leeway the assessing social workers enjoy in practice) or that there is new evidence proving the first determination is factually wrong.

Third, even if evidence to this effect exists, the young person's legal representative still needs to weigh the pros and cons of starting judicial proceedings. Lawyers may make the judgment

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<sup>42</sup> To give another statistic, Northampton replied to my FoI that they had received 12 letters before action in respect of applications seeking to judicially review age assessment in the last year. Of these, nine cases were withdrawn and three had yet to be resolved.

call that it would be uncaring for them to pursue the case of their client, even if they think they would be in a strong position to win it. This is because the proceedings may prove psychologically damaging for the young person, whilst bringing them only a relatively small gain. As Claire told me, if High Court proceedings go all the way through, the youngster will have to face hostile cross-examination by a barrister acting for the local authority or the Home Office. Even if the judge eventually determines the young person is the age they claim to be, months will have passed by the time this happens. There is also the problem that during the protracted age dispute, the young person may find themselves in additional turmoil, without any service provider and local authority clearly taking responsibility for them (Crawley 2007: 127).

Fourth, if a lawyer decides the case is worth pursuing and takes the first step towards this by sending a letter before action, the authorities may decide to withdraw the initial age assessment and get another one effected. In this case, the young person may benefit. However, there is no guarantee that the local authority will be persuaded to draw general lessons and transform its practice - or even change the eventual conclusion in that case.

Fifth, and perhaps most disappointingly, if the proceedings go through, the young person may face a judge who displays a baffling disregard for the law and its underlying premises and logic. This is no better exemplified than by a recent judgment of the Court of Appeal, which sided with the London Borough of Croydon in insisting that dental examination form part of a new age assessment to be conducted in view of the legal challenge to a previously performed age assessment, which had been based exclusively on physical appearance.<sup>43</sup> More generally, there is a conspicuous tendency in the case law to have the judiciary discounting the potential value of a pediatrician report submitted to support an age assessment's challenge (a position which appears to me logical), but then proceeding to elevate the social workers' assessment as a reliable piece of documentation as there is no evidence proving it is not (which makes no sense).<sup>44</sup>

This discussion would be worth taking further, but this cannot be done in the context of this paper. For our present purposes, the point is that the legal system allows age assessments which should never be conceptualised as Merton compliant to stand.

## **12. Recommendations and conclusion**

The aim of this paper was not so much to think about the opportunities (or lack of) for challenging age assessments that are not Merton compliant, as to reflect upon what makes an age assessment Merton compliant in the first place, thereby averting the need for legal challenge. In this respect, official guidance insists on the centrality of the principle of the benefit of the doubt, recognising that the damage done to a child who is not believed and as a result is treated as an adult or substantially older than they are is too great to be acceptable. Indeed, the only position from a human rights and child rights perspective is to recognise the obligation to treat the youngster as a person of the age they claim to be – bar incontrovertible evidence showing they are a different age. From it, the following recommendations emerge:

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<sup>43</sup> *London Borough of Croydon v. Y* [2016] EWCA Civ 398, [2016] WLR(D) 211.

<sup>44</sup> *A v London Borough of Croydon & SSHD; WK v SSHD & Kent County Council* [2009] EWHC 939; *R v London Borough of Croydon* [2011] EWHC 1473, cited approvingly in section 6.5 of the Home Office Guidance about 'Assessing age', updated in June 2015.

- 1) Performing age assessment procedures should be avoided altogether. The default reaction of the authorities should be to accept the age a young person say they are (except if they are excellent reasons not to believe them).
- 2) Assessing social workers should constantly bear in mind that the procedure is there to determine needs. Age assessment interviews should be conducted in congenial venues and in a child-friendly manner. Ideally, regional age assessment centres should be created, which would be funded independently of the local authorities that take responsibility for children.
- 3) There should be further thinking about the role which the appropriate adult should fulfil and guidelines produced and followed as to how they should be recruited and trained.

This paper has made use of the available national statistics and information collected directly from local authorities in reply to FoIs in order to show that many unaccompanied minors in the UK are not believed as to the age they say they are, with disastrous consequences for them. However, we should not forget that these statistics also demonstrate that the majority of young people, currently two-thirds, are believed outright or given the benefit of the doubt. There has never been any talk of age assessing them. This, for example, happened to 'Hussein', interviewed by Jo Wilding in the course of the MinAs research conducted for writing the UK report. When Jo asked Hussein about the reaction of the authorities when he told them he was 13, his response was: 'It was my age so they had to accept it'. It had never even occurred to him that he could have been doubted. This is how things should be.

However, despite the benefit of the doubt being given theoretical prominence, it is far from always applied in practice. In a context where a limited number of local authorities must care for the majority of young refugees, this is not surprising; it is crucial that an effective and positive responsibility-sharing scheme be put in place (Wilding 2016). However, it is important also to recognise that the development of a gap between theory and practice is also encouraged by punctual practices, such as interviewing the young person in a forbidding place like an immigration detention center; not taking the time of introducing them to the appropriate adult who is there to support them and ensuring the appropriate adult is trained and encouraged to play an effective role; not bothering to record the interviews, thus making it impossible to check the exact sequence of questions and answers; failing to insist that the benefit of the doubt must stand in the absence of incontrovertible evidence proving the young person is older than they say they are; leaving unsanctioned social workers and local authorities who do not abide by this rule.<sup>45</sup>

Ultimately the real reason why the benefit of the doubt is not always given the upper hand is that a fundamental contradiction mars law and policy in the UK as elsewhere (Hastie and Crépeau 2014; Goodwin-Gill 2012). On the one hand stands the legal principle that children must be protected, which is difficult for anyone to oppose directly. On the other hand, the British government has made very clear its policy goal of keeping the number of refugees down. The result is an age determination procedure which looks excellent on paper, but does not consistently live up to its ideals in practice. It is incumbent to all of us to try to get this practice improved.

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<sup>45</sup> A more comprehensive research project would need to look at further elements, including for example the role played by interpreters.

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