Case No: CO/640/2017 & CO/1323/17

Neutral Citation Number: [2017] EWHC 1723 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 07/07/2017

Before :

MRS JUSTICE ELISABETH LAING DBE

- -

Between :

(1) KA	**Claimants**
(2) NBV	
- and -	
London Borough of Croydon	**Defendant**

- -
- -

Azeem Suterwalla and Jane Elliott-Kelly (instructed by **Bhatia Best**) for the **Claimants**
Joshua Swirsky (instructed by **LB Croydon**) for the **Defendant**

Hearing dates: 21 June 2017

- -

Judgment

Mrs Justice Elisabeth Laing DBE :

Background

1. This is my decision after a 'rolled-up' hearing of the Claimants' ('Cs') applications for permission to apply for judicial review, and if permission to apply for judicial review is granted, for judicial review. The decisions which are the subjects of those applications are decisions of the Defendant ('the Council'). The Council is the local authority for its area.

2. Cs claimed to be unaccompanied child asylum seekers ('UASC'). The Council having assessed their ages, decided that Cs were not under 18 (that is, not children). If that was right, the Council had no functions in relation to Cs under the Children Act 1989 ('the Act'). Pursuant to the Act, the Council had been providing Cs with services (including placements with foster carers) pending its assessment. The Council withdrew services from Cs as soon as it had reached its decision about their ages.

3. Cs' claim is based on what happened in this case, which they describe as a policy or practice, and which, they argue, is unlawful. That is that the Council stopped providing Cs with services at the same time as it provided them with summary reasons for its decision that they were not children, but before it had given them the full reasons for that decision (see statement of facts and grounds, paragraph 67(iii)). As I explain below, that aspect of the Council's policy or practice has changed with effect from April 2017, so that a young person is now given the full reasons for the decision at the same time as it is announced. The Council then withdraws services from the young person. To the extent, therefore that that aspect of the Council's former practice is challenged, that challenge is now academic.

4. This policy or practice of withdrawing services at the same time as the decision is given to the young person is said in the skeleton argument to be procedurally unfair, because it denies Cs a 'fair and proper opportunity' to challenge the withdrawal of services by means of an application for interim relief. Cs also assert that this denies their constitutional right of access to justice. Cs also claim that this is a breach of article 8. It is said that the Council's decision to withdraw services interferes with Cs' support networks and social links. It claimed that in this context, too, Cs have been denied effective access to a court to challenge any such interference. Cs say that the decision to stop support right away could not be justified because it is disproportionate. It was suggested, instead, that Cs should have been given seven days' notice before support was withdrawn. I will describe Cs' arguments in more detail, below.

5. Cs were represented by Mr Suterwalla and Ms Elliott-Kelly, and the Council by Mr Swirsky. I thank all counsel for their written and oral submissions. I am also grateful to both Mr Suterwalla and to Ms Elliott-Kelly and to Mr Swirsky for the notes they sent me after the hearing on the test for granting interim relief in public law cases, the Localism Act 2011, and on delay.

The facts

6. This claim raises a question of principle. It is not necessary for me to say much about the facts which raise this question.

C1

7. C1 arrived in the United Kingdom on 11 January 2017. When he arrived, it is said that he told the Home Office that his date of birth was 20th October 1998. His claimed age was disputed by the Home Office. C1 denies that he gave this date to Home Office. He says that he said that he was born on 20 October 2000.

8. He was then referred to the Council for his age to be assessed. The Council assessed his age by interviewing him twice, on 3 and 7 February 2017. There was a 'minded-to meeting' on 23 February 2017. A summary decision notice (or pro forma) was given to him on the same day. The Council decided that C1 was over 18 when he came into the Council's care. He was told that he would be given full reasons for that decision within 28 working days. The Council stopped providing accommodation and support for C1 on 23 February 2017.

9. The Council then referred C1 to the Home Office (via the RC). Shortly afterwards he was dispersed to Wakefield. The Council gave full reasons for the decision on 15 March 2017 (in accordance with its promise).

10. The Refugee Council ('the RC') referred C1 to solicitors on 6 March 2017. They sent an urgent pre-action protocol letter to the Council that day. On 9 March 2017, the Council refused to reinstate support. The Council said it would provide a full assessment that day, but did not do so.

11. On the same day, Fraser J granted interim relief requiring the Council accommodate C1 as a child. On 4 April 2017, Popplewell J granted C1 permission to apply for judicial review of the Council's decision that he was not a child, and transferred that part of this application to the Upper Tribunal. He joined C1's and C2's claims, and ordered a 'rolled-up hearing' of the two applications for judicial review of the Council's policy or practice of ending support at the same time as it decides that a young person is not a child.

C2

12. C2 arrived in the United Kingdom from Afghanistan on 8 August 2016. The Council's case is that, according to the Home Office, he claimed when he arrived to have been born on 24 August 2002. That date was disputed by the Home Office. His case is that he did not give that date to the Home Office. He only ever gave a date in the Afghan calendar. Later he told one of the Council's social workers that his birthday was 13 (his case) or 26 (the Council's case) April 2001 (in fact he said 6/2/1381 in the Afghan calendar).

13. As his age was disputed C2 was transferred into the Council's care. He was interviewed twice, on 17 and 23 January 2017. There was a 'minded-to meeting' on 1 February 2017. The Council gave its decision to C2 the same day. The Council decided that C2 was over 18 when he came into the Council's care.

14. C2 was given short written reasons in a decision notice (or pro forma). This document said that the Council would give him full reasons for the decision within 28 working days. C2 instructed solicitors on 2 February 2017. They sent an urgent pre-action protocol letter to the Council that day. The Council replied on 3 February. It said that C2 was not a child and that it was not safe to keep him in a household with children.

15. The Council intended C2 to be referred to the RC immediately, but his foster carer, who disagreed with the decision, continued to accommodate him until 3 February 2017. He was then sent to Brigstock House by the RC.

16. C issued this claim on 7 February 2017. Morris J granted interim relief that day, requiring the Council to accommodate C2 as a child. C had been transferred that day to Liverpool. On 12 April 2017 Popplewell J made an order similar to the order which he made in C1's case (see above).

17. The Council did not give C2 its full reasons for the decision until 9 May 2017. The Council's evidence is that the reasons were prepared in good time, but the need to send them to C2 was overlooked because of the litigation. The Council has apologised for this delay.

The general evidence

18. Cs' skeleton argument summarises the evidence from Stuart Luke, Cs' solicitor, and from Francesco Jeff, who is C2s' litigation friend and a Senior Children's Advisor employed by the RC. It is clear from paragraph 4 of Mr Luke's June 2017 witness statement that there are close links between his firm and the RC, which refers cases to his firm. Cs' evidence shows, and I accept, that it can take many days for a young person to get legal aid, and that this affects the speed with which a young person can get interim relief once services have been withdrawn. Cs have provided evidence (helpfully arranged in spreadsheets) about a number of similar cases in which Mr Luke's firm has acted for young people. In C2's case, Mr Luke's firm was able to apply (successfully) for interim relief within seven days of the Council's decision; but in other cases it has taken longer. For example, in SK's case, it took about two weeks. In AA's case, Mr Luke's firm sent a pre-action protocol letter 11 days after the decision. In some cases, for reasons which are not explained, applications for interim relief were made much later, or were not made at all. In all cases where the RC was involved, the young person was promptly referred to Mr Luke's firm, and that that firm took prompt action. In some cases (for example DZ), the Council conceded once solicitors were instructed. Seven applications for interim relief were made in 14 cases, and four succeeded. Cs have also shown, by reference to the 14 cases in which Mr Luke's firm acted since July 2014, that five out of 14 challenges to age assessments by the Council have succeeded in the Upper Tribunal, five have failed, and four have not yet been decided.

19. In one case (TA) it is said that the Council adopted 'good practice': that is, in response to a pre-action protocol letter, the Council agreed to continue to provide services for two weeks after the service of full reasons for its decision. Mr Luke also refers to the approaches of other local authorities. I make clear that none of the local authorities referred to has had the chance to comment on this material. He says that Lambeth London Borough Council changed its policy in 2016; after that, it did not

end support until it had served a full decision, and that it gives seven days' notice that support will end. It is not clear to me exactly when that notice is given. Harrow London Borough Council, it is said, continue to support a young person for three months after any decision that that person is an adult. Birmingham City Council is said to adopt a case-by-case approach and in some cases to continue support if a challenge is intimated. Kent County Council, however, is said to adopt an approach similar to the Council's. In some cases it is said to have withdrawn decisions when they have been challenged for not being '*Merton*-compliant' (see further, paragraph 32, below).

20. Mr Luke says in paragraph 64 of his June 2017 witness statement that the Council's policy or practice causes significant harm and prejudice, because, as I read this paragraph, it may result in young people who are later found to be children being treated for a period as adults. He says that this harm would be avoided if the Council gave notice before withdrawing support and also served a full decision at the same time, so that the young person could get advice.

21. C's skeleton argument also summarises the Council's evidence about its procedures. In short, the Council used to tell a UASC of its decision at an 'outcome meeting' and then give full reasons for the decision up to 20 days later. The second document was more detailed. That was the procedure which applied in these two cases, although, as the Council accepts, in the case of C2, the full reasons were provided 'exceptionally' and, I would add, 'unacceptably' late. The procedure now is that young people are given full reasons for the decision at the outcome meeting.

22. The Council's evidence is that, since April 2017, its procedure, in broad terms, has been in seven stages.

    i) The young person is given a letter at the outset of the assessment. This explains the procedure and what can be expected at each stage. It gives the dates of proposed interviews. It explains that the young person's claimed age is disputed and what that means. It also explains the three possible decisions which the Council might reach, and the consequences of each. It follows that a young person will know what will happen if the decision at the outcome meeting is that he is not a child.

    ii) Two experienced social workers will interview the young person (usually twice, but more often if necessary).

    iii) The two social workers will also get information from other sources such as schools, and foster carers.

    iv) They will get medical or other expert evidence if that is necessary.

    v) The social workers will have a 'minded-to meeting' with the young person. At that stage they will tell the young person about any adverse inferences which they are minded to draw, so that he can comment on them.

    vi) The social workers will have a further, 'outcome meeting' with the young person. They will tell him their decision, and give him a copy of the full

reasons for the decision. This meeting can be on the same day as the 'minded-to' meeting, or later.

vii) At that point (if the Council decides that the young person is not a child), it stops providing services to him. The Council's evidence is that the Home Office expects the assessment to be done in 28 days, and only provides funding in disputed cases for that period; funding ceases in any event on the day when the Council decides that the young person is not a child. There are (at a general level) safeguarding concerns for a responsible authority in maintaining a foster placement provided on the assumption that the young person was a child, once the Council has decided, after a full (and on the Council's case, *Merton*-compliant) assessment, that the young person in question is an adult, not a child.

The young person is accompanied at all meetings by an appropriate adult and an interpreter.

23. The Council's evidence also deals with the financial and administrative consequences for the Council of its obligations to UASC under the Act. Because Lunar House, the Home Office's asylum screening unit, is in Croydon, the Council has many more UASC to assess and to provide services for than other local authorities (with the possible exception of Kent County Council). There were 95 new cases in 2016. The Council does not assess a person's age in every case, but only where it seems necessary to do so. It did 137 assessments in 2015: they took up to three months to complete.

24. Reports exhibited to the Council's witness statement show that the numbers of UASC in the Council's area were 445 by May 2016. By May 2016, there were 407 male and 38 female UASC. There is some sharing of the burden by other London local authorities. The Council had been missing deadlines because of numbers. Of the 96 young people assessed last year, 23% were found to be adults. In 2015-16, 84 UASC were reported missing to the police.

25. In mid-February 2017, 813 children were in the care of the Council. 402 were UASC and 411 were local children. 87 out of 10,000 children in the Council's area are in care, which is higher than the national average (60 per 10,000). The figure was 89 at the end of April 2016. Out of the total of 821, 435 were UASC. Boys outnumber girls in both groups, but by a bigger proportion among the UASC.

26. Cs point out that the Council accepts that it has power to provide accommodation pursuant to the broad power conferred by section 1 of the Localism Act 2011, but only does so for short periods in cases where the person would otherwise be homeless. The Home Office has statutory responsibility for supporting adult asylum seekers, and in practice will support a former UASC, though often in accommodation which is outside, and may be many miles from, London. The Council's evidence is that it will provide accommodation for a very short period in such cases (often overnight, until the Home Office has made suitable arrangements) in order to ensure that the young person is not street homeless. I have not heard argument on this point, but counsel's post-hearing notes suggest that this practice may well be lawful. I say no more about this point, as it is of marginal relevance to my decision on these claims.

The legal framework

27. Section 17(1) of the Children Act 1989 ('the Act') imposes a 'general duty' on every local authority to 'to safeguard and promote the welfare of children within their area who are in need…by providing a range and level of services appropriate to those children's needs.'. 'For the purpose principally of facilitating the discharge' of that general duty, section 17(2) provides that every local authority is to have 'the specific duties and powers' in Part 1 of Schedule 2 to the Act. One of those duties is imposed by paragraph 3 of Schedule 2. This provides that where it appears to a local authority that a child within their area is in need, the authority may assess his needs for the purposes of the Act at the same time as it assesses his needs for the purposes of other listed statutory provisions.

28. By section 17(6) the services provided by a local authority in the exercise of functions conferred by section 20 may include providing accommodation and giving assistance in kind or in cash. Section 17(10) defines 'child in need' for the purposes of Part III of the Act. There is little doubt that in many cases a UASC is a 'child in need'.

29. Section 20(1) imposes a duty on every local authority to provide accommodation for any child in need in their area who appears to it to need accommodation for the reasons listed in section 20(1). It is likely that many UASC will appear to need accommodation for one or other of those reasons. Section 22(3)(a) requires a local authority looking after a child to safeguard and promote his welfare.

30. *R (A) v Croydon London Borough Council* [2009] UKSC 8; [2009] 1 WLR 2557 decides that if there is a dispute about it, the question whether a young person is a child is a question of fact for the court. The majority of the Supreme Court left open the question whether the decision on a person's age was a determination of civil rights and obligations for the purposes of article 6.

31. The Act imposes no express duty on a local authority to do an age assessment. Nonetheless, a public body has a duty to take reasonable steps to equip itself with the information which is necessary to enable it to decide whether or not to exercise a statutory function: cf *R v Secretary of State for Education and Science ex p Tameside Metropolitan Borough Council* [1977] AC 1014 per Lord Diplock at p 1065B. In order to equip itself to decide whether it has a duty under paragraph 3 of Schedule 2 to assess a child's needs, a local authority must take reasonable steps to investigate whether or not a person asking it for help is in fact a child.

32. In *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin); [2003] 4 All ER 280, Stanley Burnton J (as he then was) was asked by the parties to give general guidance about the process a local authority should adopt when assessing the age of a UASC. An assessment which is consistent with that guidance is described as a '*Merton*- compliant assessment', although, as Mr Swirsky explained in his oral submissions, that expression is a term of art and is used now to describe a more elaborate process than that set out in the *Merton* case.

33. Applications for judicial review in age assessment cases are started in the Administrative Court. There is a modified test for the grant of permission to apply for judicial review: see *R (FZ) v Croydon London Borough Council* [2011] EWCA Civ 59; [2011] PTSR 748. Once permission to apply for judicial review is granted, most

cases are transferred to the Upper Tribunal for a fact-finding hearing. There is no burden of proof on either party: *R (CJ) v Cardiff City Council* [2011] EWCA Civ 1590. It is not clear, therefore, what decision the Upper Tribunal should make if it is left in doubt after hearing the evidence.

34. *A v Croydon London Borough Council* [2008] EWCA Civ 1445; [2009] PTSR 1011 is the decision which was reversed by the Supreme Court in *R (A) v Croydon London Borough Council* [2009] UKSC 8; [2009] 1 WLR 2557 (see above). There were three issues in the Court of Appeal. Two were considered by the Supreme Court. The third, which was not considered by the Supreme Court, was whether a young person's rights to respect for his private life (conferred by article 8) were engaged in the assessment of his age. The appellant who argued this point wished to rely on article 8 in order to attract its procedural protections (Ward LJ's judgment, paragraph 87). Ward LJ said, at paragraph 88,

> *"Although as Munby J accepted in the A, B, X and Y case 6 CCLR 194, para 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 claimants 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."*

35. At paragraph 90, he said '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.' Chadwick and Maurice Kay LJJ agreed with Ward LJ's judgment (with one shared and irrelevant reservation). This aspect of the decision of the Court of Appeal was not reversed by the Supreme Court, and I am bound by it.

36. The simple point is that the decision of the local authority is part of its overall consideration of the question whether it owes duties under the Act to a young person. It is not a 'judgment' either in personam or in rem. It is not made by a court. It is a decision by a public body governed by public law. Whether a later decision of a court in connection with an age dispute is a judgment in rem is a question which I am not required to decide and express no view about (cf *R (PM) v Hertfordshire County Council* [2010] EWHC 2056 (Admin) [2011] PTSR 269 paragraph 54 per Hickinbottom J (as he then was) and *R (AS) v Croydon London Borough Council* [2011] EWHC 2091 (Admin) (HHJ Thornton QC)).

37. I reject any suggestion, based on *AS*, that the law has moved on since *A* in the Court of Appeal. First, a decision of a Deputy Judge does not overrule a decision of the Court of Appeal. Second, and significantly, it is important for this purpose not to confuse the decision of the local authority and any later pronouncement of a court; that is one of the points which Ward LJ made in the passage I have cited. The Deputy Judge in *AS* was asked, in the context of a consent order, to decide whether the declaration of the claimant's age in a consent order made by the court was a judgment in rem. The Deputy Judge in *AS* decided nothing about the question in this case, which is whether the decision of local authority is a judgment in rem. It clearly is no such thing.

38. The Association of Directors of Children's Services ('the ADCS') has published non-statutory guidance about assessing age. The Defendant considers that this is relevant, and has taken it into account. Mr Suterwalla made some submissions about it, but I am not persuaded that those advance this claim in any way, or that the Defendant has, in these cases, acted contrary to the terms or spirit of this guidance. There is also guidance issued by the Home Office and the ADCS in June 2015. This sets out arrangements for joint working agreed between the Home Office and the ADCS acting on behalf of local authorities.

The issues

39. The first question is whether the Council's practice or policy of ending support under the Act at the same time as it announces its decision that a young person is not a child is unlawful because it breaches Cs' common law right of access to justice. The second is whether that practice or policy is an unlawful and disproportionate interference with Cs' article 8 rights.

Access to justice

40. Mr Suterwalla accepted, on the basis of *R (Medical Justice) v Secretary of State for the Home Department* [2011] EWCA Civ 1710, that the question is whether the policy or practice abrogates the common law right of access to justice. It is important to be clear what this principle entails. A right of access to justice is a right of access to the courts to challenge an adverse decision (see, for example paragraph 21 of that case). The courts are institutions staffed by human beings and are neither perfect nor infallible. The right of access to justice is not an absolute right to be protected from injustice, which is an altogether different, and probably, unattainable thing. I consider that Mr Suterwalla was apt to elide these two different concepts in his submissions, an elision which is understandable, since the phrase 'access to justice' is inherently ambiguous. He submitted that the law requires that young people in cases like these have an effective opportunity to approach the court before any services are withdrawn. This was the foundation of his further submission that the Council was obliged to give a young person a short period of notice before withdrawing services.

41. He submitted that the policy or practice exposed young people to injustice in two main ways.

    i) If they were not given notice before services were withdrawn, they would be exposed to the injustice of being deprived of services to which they might be entitled, if the Upper Tribunal later quashed the Council's decision, or if the

Court ordered interim relief; whereas, if they were given notice, they could apply for interim relief so as to ensure that the services continued to be provided pending a decision on an application for judicial review of the age assessment.

ii) They would be more likely to get interim relief if they applied for it at a point when they were still receiving services, as that would then be 'the status quo' when the court considered the application for interim relief. The Council's policy or practice prevented them from making an application for interim relief at a point at which they could preserve the 'status quo' (that they were receiving services).

42. None of the cases he relied on establishes that the right of access to the court is a right to be protected from suffering any potential injustice. In my judgment, the references to risks of injustice in the cases to which Mr Suterwalla referred are to risks such as not having a fair hearing, or not having enough time in which to seek legal advice and apply to the court in order to prevent a serious interference with rights such as removal from the United Kingdom. I accept it may seem unfair that a local authority may decide that a young person is not a child, and that the Upper Tribunal may later decide that he is. Retrospectively, he has suffered an injustice, because, for a period, the local authority has decided not to provide him with the services to which, as it turns out, he was entitled. It is remediable, but only to an extent. The services can be reinstated if he is still entitled to them, and, as Mr Suterwalla accepts, he would, in the meantime, have been supported and housed by Secretary of State for the Home Department.

43. The risk of that type of injustice is inherent in any public law decision which is supervised by the court. It is particularly acute in age assessment cases. The Supreme Court has decided that there is, in law, only one right answer to the question how old a young person is. But there is no scientific way of answering that question. Finding out the answer is an art which involves difficult multi-factorial judgments. Conscientious and experienced social workers, acting in good faith, can reasonably disagree about what the answer is. The other side of that coin, of course, is that it would be unjust to the Council, and to other young people in its area, if it has to spend scarce funds on continuing to support a young person who, on its assessment, is not a child, and the Upper Tribunal in due course upholds the Council's decision.

44. The right of access to justice in these cases, does not, in my judgment, confer absolute protection against the risk I have just described. It has, rather, two facets. The first is the right to apply to the court, in accordance with the court's relevant procedures, to have the Council's decision corrected, if that decision is wrong. It is not a right never to have a wrong decision made, or a right not to be exposed, for a period, to the consequences of a wrong decision.

45. I accept Mr Suterwalla's submission that the right of access to justice has a second facet. That is the right to apply to the court for interim relief to stay a decision of a local authority, pending the court's determination of the age dispute. But it is important to emphasise that that is a right, again, to apply in accordance with the court's relevant procedures. Those procedures include the approach which the court applies on an application for interim relief in a public law case (see, for example, *R (Medical Justice) v Secretary of State for the Home Department* [2010] EWHC 1425

(Admin), *Smith v Inner London Education Authority* [1978] 1 All ER 411 and *De Falco v Crawley Borough Council* [1980] 1 QB 460). *Smith* and *Medical Justice* were decisions on applications for injunctions to restrain a public authority, whereas *De Falco* was a decision about an application for a mandatory injunction, where a stricter test applies. I am grateful to counsel for the full review of the relevant authorities provided in their post-hearing notes.

46. Part of Mr Suterwalla's submission relied on showing that it was difficult, in practice, and as a matter of law, to get mandatory interim relief in a public law case. I accept, of course, that in these cases, a young person cannot be expected to apply in person to the immediates or duty judge as soon as he gets the Council's decision. I accept that he will need advice and that if the time taken to get legal aid and to give notice to a prospective defendant is taken into account, any application to the court will inevitably be made after services have been withdrawn.

47. An aspect of this part of his argument was his submission that a young person is more likely to get mandatory interim relief if he applies for it while he is still receiving services, rather than after a decision has been made to stop providing them. I record Mr Swirsky's response to this argument: 'No local authority I represent would ever make such a submission. It would be laughed at'. Cs' counsel did not refer to any authority in their post-hearing note which supported this submission.

48. For what it is worth, I would not be disposed to accept this submission. In my judgment, unless there has been unexplained and inexcusable delay in applying for interim relief, in most, if not all cases, the 'status quo ante' in a case like this is the status quo ante the impugned decision, not the status quo ante the application for interim relief (cf the contrast between 'something that [the defendant] has not done before' and an 'established enterprise' at p 408 G-H per Lord Diplock in *American Cyanamid Co v Ethicon Limited* [1975] AC 396). So, in my judgment, where the application for interim relief is made as soon as reasonably practicable (taking into account delays in obtaining legal aid) the 'status quo' is likely to be that the young person was receiving support from the local authority. I note that Mr Suterwalla accepted that the practical effects of the Council's policy or practice were factors which a court considering an application for interim relief could and should take into account.

49. But even if this submission and his other submissions about the difficulty of getting mandatory interim relief are right, they do not advance Mr Suterwalla's argument. Any such difficulties are part and parcel of the right of access to justice to which Cs are entitled. That right is a right to apply to the court for it to determine an application in accordance with the substantive and procedural law which applies to the case in hand. Whether relief is granted is a question, on the facts of the particular case, for the judge who considers the application. It is not a right to have special rules applied which do not apply to other applicants for the same, or for similar, relief. At times it seemed as if Mr Suterwalla was arguing that a successful challenge to the Council's policy or practice was a route to getting different and better access to justice than other claimants in public law cases can expect. It follows that I reject Mr Suterwalla's submission that the law requires that a young person, in a case like these cases, to have an effective opportunity to approach the court for interim relief before any services are withdrawn.

50. I do not accept that the evidence shows that the Council's practice or policy interferes in any way, still less abrogates, Cs' (or others') right of access to justice. The evidence shows that Mr Luke's firm has been able to apply for judicial review of many age assessments, in some cases successfully, and to apply for interim relief, also, in some cases, successfully. It is true that in any case where an application for interim relief has not been made, or has failed, and the application for judicial review has ultimately succeeded, young people will have been deprived, for a period, of services to which they were entitled. But that does not show that their right of access to the court has been restricted in any way. The other side of the coin is that the Council has not had to support, for any period, any young person who, it has decided, is an adult (other than in those cases where the court granted interim relief and the application for judicial review later failed).

Article 8

51. Mr Suterwalla relied on the disruption to Cs' support networks, schooling, friendships and relationships with foster carers which were caused by the withdrawal of support. Those relationships are relatively short-lived, as they developed over the period for which the Council was supporting Cs; the longer of the two periods is five months. Mr Suterwalla submitted that some young people had not been able to say good-bye to their friends and referred to the fact that many have been dispersed to distant parts of the country (see further, paragraph 13 of his skeleton argument, summarising the evidence of Mr Jeff).

52. The short answer to the article 8 claim is the decision of the Court of Appeal on the third issue in *A v Croydon*. I do not need to decide whether a decision of the court in an age assessment dispute is a judgment in rem. I have no doubt, however, that a decision of a local authority is not a judgment of any kind, still less a judgment in rem. It follows, for the reasons given by Ward LJ, that it does not engage article 8. One of the consequences of an adverse decision is that, as a result of the Council's practice or policy, services are withdrawn. I consider that it is artificial, and wrong, to distinguish between the decision of the Council and its consequences. If the decision does not engage article 8, I do not see how its consequences can.

53. In case I am wrong about that, I should consider what I would have decided if I had held that article 8 was engaged. Mr Suterwalla accepted that if the Council withdrew services after making an adverse decision, that would be in accordance with law. The only question, he said, was whether there was a less intrusive measure. He submitted that there was: giving notice of a short period, perhaps seven days, and maintaining services in the meantime. The failure to apply that less intrusive measure made the withdrawal of services disproportionate. He submitted that the Council's two justifications (cost and safeguarding concerns) were weak and not supported by any or sufficient evidence.

54. The question whether there is a disproportionate interference with Cs' article 8 rights is a question for the court, not for the Council. But I consider that I should defer to some extent to the Council's reasons for not continuing to support a young person after it has made an adverse decision.

55. I accept that at a general level, there are likely to be safeguarding concerns if the Council continues to accommodate a young person with children after it has decided

that that young person is an adult. I also accept that the Council is entitled to have a general rule in such cases, rather than having to identify specific concerns with each such young person. The fact that the same person has previously been accommodated without difficulty with children only goes so far; the Council's decision on the age assessment is a – very – material change in circumstances. The Council is in a much better position than I am to decide what those concerns are and how best to mitigate them.

56. I do not accept that the Council's failure to adduce evidence of the cost of supporting a young person weakens this part of the Council's justification for not supporting a young person once it has decided that he is an adult. First, there is no dispute that at that point (if not earlier) the Council ceases to receive any subsidy from the Home Office. Second, it is self-evident that the cost, whatever it may be, is money which, if spent on this young person, cannot be spent on a child for whom the Council actually is responsible. Third, I can take judicial notice of the fact that local authorities have had to make very significant savings in the last few years.

57. Had it been necessary for me to decide this issue, I would have held that any interference with Cs' article 8 rights which is caused by the policy is proportionate and justified in accordance with the test described by Lord Sumption SCJ in paragraph 20 of *Bank Mellat v HM Treasury* [2013] UKSC 39; [2014] AC 700. See also paragraph 74, per Lord Reed, with which Lord Sumption agreed.

58. In addition to the points relied on by the Council, there is the important factor that once the Council has decided that an applicant is not child, it is entitled to act on its assessment of the position, and to withdraw services. The obvious reason for that is that, on the Council's assessment, the young person is no longer entitled to those services. The right of access to justice does not require the Council to continue to provide those services for any period, short or long, in case its decision is wrong. The only route by which the Council can be required to continue to provide services is if it is ordered to do so by the court on an application for interim relief in an individual case.

Conclusion

59. I grant permission to apply for judicial review in both cases. I dismiss these applications for judicial review.