JUDICIAL REVIEW OF AGE ASSESSMENT DECISIONS IN THE UPPER TRIBUNAL

1. Unlike with 'fresh claim' judicial reviews, transfer of these judicial reviews to the Upper Tribunal is discretionary. Section 31A of the Senior Courts Act 1981 currently[1] provides:

> 31A Transfer of judicial review applications to Upper Tribunal
> (1) This section applies where an application is made to the High Court–
> (a) for judicial review, or
> (b) for permission to apply for judicial review.
>
> (2) If Conditions 1, 2, 3 and 4 are met, the High Court must by order transfer the application to the Upper Tribunal.
>
> (2A) If Conditions 1, 2, 3 and 5 are met, but Condition 4 is not, the High Court must by order transfer the application to the Upper Tribunal.
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> (3) If Conditions 1, 2 and 4 are met, but Condition 3 is not, the High Court may by order transfer the application to the Upper Tribunal if it appears to the High Court to be just and convenient to do so.
>
> (4) Condition 1 is that the application does not seek anything other than–
> (a) relief under section 31(1)(a) and (b);
> (b) permission to apply for relief under section 31(1)(a) and (b);
> (c) an award under section 31(4);
> (d) interest;
> (e) costs.
>
> (5) Condition 2 is that the application does not call into question anything done by the Crown Court.
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> (6) Condition 3 is that the application falls within a class specified under section 18(6) of the Tribunals, Courts and Enforcement Act 2007.
>
> (7) Condition 4 is that the application does not call into question any decision made under–
> (a) the Immigration Acts,
> (b) the British Nationality Act 1981 (c. 61),
> (c) any instrument having effect under an enactment within paragraph (a) or (b), or

[1] An amendment made by s. 22 of the Crime and Courts Act 2013, not yet brought into force, will remove the restrictions on transfer of immigration and nationality judicial reviews by deleting s. 31A(2A), (7) and (8) and amending the section accordingly.

(d) any other provision of law for the time being in force which determines British citizenship, British overseas territories citizenship, the status of a British National (Overseas) or British Overseas citizenship.

(8) Condition 5 is that the application calls into question a decision of the Secretary of State not to treat submissions as an asylum claim or a human rights claim within the meaning of Part 5 of the Nationality, Immigration and Asylum Act 2002 wholly or partly on the basis that they are not significantly different from material that has previously been considered (whether or not it calls into question any other decision).[2]

2. An age assessment judicial review cannot currently be started in the Upper Tribunal because they are not in a class specified for the purposes of s. 18(6) TCEA 2007 by direction of the Lord Chancellor.

3. These claims are currently still subject to the restrictions in s. 31A(7) and (8) as to the transfer of judicial reviews from the High Court where they call into question immigration and nationality decisions. So if a judicial review of an age assessment challenges *both* a local authority decision as to age *and* a decision on a person's immigration or nationality status, it cannot be transferred to the Upper Tribunal.

4. The discretionary transfer of age assessment judicial reviews followed the decision of the Supreme Court in *R (A) v Croydon LBC* [2009] UKSC 8, which held that for the purposes of the Children Act 1989, whether someone is a 'child' on a particular date is a question of fact to be determined by the Court itself, rather than being subject to review on conventional public law grounds. The Administrative Court did not want to be burdened with holding mini-trials and so a decision was taken to start transferring such claims on a discretionary basis to the Upper Tribunal.

5. The First-tier Tribunal and Upper Tribunal (Chambers) Order 2010, brought into force on 29 November 2010, allocates to the Immigration and Asylum Chamber of the Upper Tribunal any application for judicial review which 'is made by a person who claims to be a minor from outside the United Kingdom challenging a defendant's assessment of that person's age.'

6. In *R (FZ) v LB Croydon* [2011] EWCA Civ 59, [2011] PTSR 748, the Court of Appeal said that:

31 The Administrative Court does not habitually decide questions of fact on contested evidence and is not generally equipped to do so. Oral evidence is not

[2] This is the provision inserted by s. 53 Borders, Citizenship and Immigration Act 2009 and requiring fresh claim judicial reviews to be transferred.

> normally a feature of judicial review proceedings or statutory appeals. We would therefore draw attention to the power which there now is to transfer age assessment cases where permission is given for the factual determination of the claimant's age to the Upper Tribunal under section 31A(3) of the Senior Courts Act 1981, as inserted by section 19 of the Tribunals, Courts and Enforcement Act 2007 . The Upper Tribunal has a sufficient judicial review jurisdiction for this purpose under section 15 of the 2007 Act and by article 11(c)(ii) of the First-tier Tribunal and Upper Tribunal (Chambers) Order 2010 (SI 2010/2655). Transfer to the Upper Tribunal is appropriate because the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims. If an age assessment judicial review claim is started in the Administrative Court, the Administrative Court will normally decide whether permission should be granted before considering whether to transfer the claim to the Upper Tribunal. The matter could be transferred for permission also to be considered, but the Administrative Court should not give directions for the future conduct of the case after transfer, and in particular should not direct a rolled-up hearing in the Upper Tribunal.
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> 32 It should be noted that transfer cannot at present be made if the claim calls in question any decision made under the Immigration Acts or the British Nationality Act 1981, but the present is not such a case. It is suitable for transfer. We shall accordingly order transfer of the present claim to the Upper Tribunal at Field House, 15 Breams Buildings, London EC4A 1DX, which will give further directions. In doing so, we take note of, but do not adopt, submissions on behalf of the claimant made in writing after the hearing, that his case should not be transferred because of his vulnerable personal circumstances. In this respect, as in others, he will receive an entirely appropriate hearing before the Upper Tribunal.

7. A review of cases citing *R (A) v Croydon* suggests that fairly significant numbers of age assessment judicial review claims continue to be decided in the High Court, although experience suggests that the majority are transferred, at least where there is no issue about the prohibition on transfer of cases which call into question an immigration decision.

8. In *R (J) v SSHD* [2011] EWHC 3970 (Admin), the Claimant applied to set aside an order for transfer of his claim to the Upper Tribunal. His appeal against the refusal of further leave to remain had been allowed by the First-tier Tribunal on the ground that it had accepted his case about his age, and the Secretary of State had accepted that decision and granted him further leave to remain until he would be 17.5 years on his accepted age. He argued that because the Defendant's case would be that the Immigration Judge had been wrong, his application for judicial review 'called into question' a decision made under the Immigration Acts, even though it did not directly challenge that decision (indeed, he supported it). Nicol J rejected that application, holding that:

> 24 The decision of the immigration judge was confined to immigration matters. He concluded that the Secretary of State had erred in law in refusing to grant the claimant further leave to remain in the United Kingdom. He remitted the matter to the Secretary of State for her to give further consideration to whether the claimant should be granted further leave to remain in the United Kingdom. As it happens, the Secretary of State has given the claimant further leave to remain in the United Kingdom. The present proceedings for judicial review do not call into question — in the sense of impugning — the validity or legality of the decision made by Judge Ajula in the sense that I have just described. The decision may have proceeded from a view as to various factual matters, but that is often the case with one decision being dependent on factual decisions in relation to others.
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> 25 I do not accept Mr Suterwalla's submission that the provisions of Section 31A should be given a wide or broad interpretation. It must be remembered that the sub-section in question confers a power on the High Court. It is not an obligatory requirement for the court to transfer matters to the Upper Tribunal. It can take into account all the circumstances of the case. It is also to be remembered that when Section 31A was first inserted into the 1981 Act by the 2007 statute the Asylum and Immigration Tribunal was not at that stage to be incorporated into the unified system of a First Tier Tribunal and an Upper Tribunal. In that context it made clearer sense for the power to transfer to the Upper Tribunal to be subject to the qualification that it was not to divert matters that would otherwise call into question decisions made under the Immigration Acts. That condition of course is still extant and must be observed. But the necessity or the desirability of giving that exclusion a wide interpretation has lost, in my judgment, some of its force because the Asylum and Immigration Tribunal has now been absorbed into the unified appellate structure.

9. Unlike in respect of fresh claim judicial reviews, the Upper Tribunal has issued no specific practice directions or statements about age assessment judicial reviews, and has no published guidance. Indeed, its website is completely silent on the subject. It has, however, developed a practice of holding directions hearings and giving detailed directions for the conduct of claims, which are modelled on the directions recommended for age assessment judicial review claims by Holman J in *R (F) v Lewisham BC* [2009] EWHC 3542 (Admin); [2010] 1 F.L.R. 1463. It has also adopted an interventionist approach of seeking to persuade the parties to talk to each other and reach an agreement about the claimant's age without the need for a hearing in the Upper Tribunal. It has also applied the other practice directions, statements and guidance notes of the Upper Tribunal where relevant, such as the Joint Presidential Guidance Note No.2 of 2010: Child, Vulnerable Adult and Sensitive Appellant Guidance.

10. In its more recent judgments, it has adopted a standardised summary of the law on age assessment claims:

> 7. Following the judgment of the Supreme Court in *R (A) v Croydon LBC* [2009] 1 WLR 2557, our task in these proceedings is to resolve the issue of the applicant's age, as a matter of fact. In *R (AE) v London Borough of Croydon* [2012] EWCA Civ 547 Aikens LJ said that:-

> "This is because the determination of a young person's age is a 'precedent fact' to the local authority exercising its statutory powers under section 20(1) of the [Children Act 1989]. There is a right and a wrong answer and that, ultimately, is for a court to decide." [3].

8. In carrying out that exercise, the Tribunal must, effectively, act in an inquisitorial role, and decide, on the balance of probabilities, whether the applicant was or was not a child at the time of the age assessment (*R (AE)* at [23] and *R (CJ) v Cardiff CC* [2011] EWCA Civ 1590 at [22] and [23]).

9. There is no burden of proof in these proceedings (*R (CJ)* at [22]). We are mindful that at [21] of *R (CJ)* the Court made it clear that, whilst there is no formal "benefit of the doubt" principle, we are not thereby expected to eschew a "sympathetic assessment of evidence" and:-

> "In evaluating the evidence it may well be inappropriate to expect from the claimant conclusive evidence of age in circumstances in which he has arrived unattended and without original identity documents. The nature of the evaluation of evidence will depend upon the particular facts of the case."

The Upper Tribunal's approach

11. The Upper Tribunal has promulgated fourteen decisions following substantive hearings in the period of more than two years since it started hearing these cases. Its decisions are published in a searchable database on its website[3] along with all other decisions of the Upper Tribunal. Its first decision quashed the age assessment on public law grounds without conducting a fact-finding hearing[4] but in all other cases[5] it has carried out a full fact finding hearing, often over a number of days. It has then reached a decision on age: in all but two cases, that decision has been that the applicant is older than he claimed to be, although often it has reached a different conclusion to the local authority (even holding in at least one case that the applicant was older than he had been assessed to be), and has often been as critical of the local authority witnesses as of the applicant.

12. In *R (on the application of MK) v Wolverhampton City Council AAJR* [2013] UKUT 00177 (IAC), the applicant argued that despite having found against him on the question of fact as to his age, the Tribunal should still grant relief in respect of the lawfulness of the respondent's assessments of his age. The Tribunal refused to do so, despite expressing

[3] http://www.ait.gov.uk/Public/SearchReported.aspx
[4] *R (ota JS) and R (ota YK) v Birmingham City Council (AAJR)* [2011] UKUT 00505 (IAC), overturned on appeal: *R (K & Others) v Birmingham City Council & Others* [2012] EWCA Civ 1432; [2013] 1 All E.R. 945
[5] Save one which was dismissed without a substantive consideration because the claimant did not attend and was not represented.

serious concerns about both the process and the findings of the assessments, holding that no useful purpose would be served by granting relief, albeit that:

> What I have had to say about them stands as part of my judgment in this case. It is to be expected that the respondent will draw the necessary lessons, as regards any future age assessments it may need to undertake. (para 139)

Delay

13. In *MK*, the respondent council argued that any relief should be refused on grounds of delay because the applicant had failed to act 'promptly'. The chronology was that following an acceptance by the SSHD of MK's claimed age, he had approached the local authority for support. It instructed an independent social worker to assess his age, which was completed in October 2011. MK and his solicitors were then given the opportunity to respond to the assessment, which they did. In due course and on 9 March 2012, the local authority informed MK that it intended to terminate his support on 26 March 2012. The claim was issued on 29 March 2012. The respondent accepted in the Upper Tribunal that the material delay was that after 9 March 2012, when it actually communicated a decision based on the age assessment. The Upper Tribunal rejected the Respondent's argument, holding that the Applicant had been right to send a further pre-action letter and there had been no material delay.

Relationship with appellate proceedings

14. The Upper Tribunal has been clear, as have the Court of Appeal and High Court, that the age assessment judicial review procedure against local authorities is distinct from any assessment carried out by the Tribunal (whether in the First-tier Tribunal or Upper Tribunal) as part of the statutory appellate process. Thus, for example, in *Rawofi (age assessment – standard of proof)* [2012] UKUT 00197(IAC), the Upper Tribunal held that:

> Where age is disputed in the context of an asylum appeal (in contrast to age assessment in judicial review proceedings), the burden is on the appellant and the standard of proof is as laid down in R v Secretary of State for the Home Department Ex parte Sivakumaran [1988] AC 958 and R (Karanakaran) v Secretary of State for the Home Department [2000] EWCA Civ 11.

15. Likewise, in *R (K & Others) v Birmingham City Council & Others* [2012] EWCA Civ 1432; [2013] 1 All E.R. 945, the Court of Appeal confirmed that the local authority is not bound by the assessment of age made by the SSHD or by the First-tier or Upper Tribunal in the course of an appeal against a decision of the SSHD.

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