OUTER HOUSE, COURT OF SESSION

[2025] CSOH 15

A53/24

OPINION OF LADY CARMICHAEL

In the cause

ABDRAMAN ALI AHMAT (AP) (FE)

Pursuer

against

ABERDEENSHIRE COUNCIL

Defender

Pursuer: Halliday; Drummond Miller LLP
Defender: Blockley; DWF LLP

7 February 2025

[1] In this ordinary action the pursuer seeks declarator that his date of birth is 10 November 2006. In July 2023 the respondent's social workers carried out a brief age assessment and concluded that he was clearly over the age of 18 at that time. That meant that the respondent had no duty to accommodate him as a child.

Procedure

[2] These proceedings began as a petition for judicial review. The Lord Ordinary intimated that he was minded to refuse permission because the petition was incompetent, following the approach in *Abdullah* v *Aberdeenshire Council* [2024] CSOH 8. Rather than

proceeding to a hearing on permission, the Lord Ordinary put the case out by order for the purpose of ascertaining parties' views on whether the power of transfer in RCS 58.16 should be exercised. On the opposed motion of the petitioner, he appointed the proceedings to proceed as an ordinary action.

[3] The pursuer averred that if the defender accommodated him as a child before his 18th birthday, he would be entitled to remain in that accommodation until the age of 21 years by virtue of section 26A(3) of the Children (Scotland) Act 1995 ("the 1995 Act") and article 2 of the Continuing Care (Scotland) Order 2015. He amended to include a conclusion for interim declarator, but never moved a motion for an interim remedy.

Is the action academic?

[4] The case came to proof on 26 November 2024. By that time the pursuer was, on his own averments, already aged 18. I raised with parties the question of whether the summons raised only an academic issue. The defender had no plea to that effect.

[5] Counsel for the pursuer referred to *R (GE (Eritrea))* v *Secretary of State for the Home Department* [2015] 1 WLR 4123. In that case, like this, the claimant had on her own account turned 18 by the time of the proceedings. The deputy High Court judge dismissed the proceedings on the basis that the claimant had never been a "relevant child" for the purpose of section 23A of the Children Act 1989, and so could not be regarded as a "former relevant child" for the purposes of section 23C, even if it were later determined that she had been of an age such that she should have been looked after by the local authority. That being so the local authority could have no continuing obligations to her. The Court of Appeal agreed with that analysis, but found that the deputy judge had nonetheless erred in dismissing the proceedings, rather than proceeding to make an assessment of the claimant's age.

[6] The Court of Appeal accepted that the local authority had discretionary powers to make good any unlawfulness that it had committed in the past by dint of not having treated someone as a child who ought to have been treated as a child: paragraphs 54, 55, 70 and 73. The claimant had not made any application to the local authority for it to exercise such a discretion in her favour. In those circumstances the court accepted that the question of the claimant's age was not academic, allowed the appeal and remitted the case to the Administrative Court for the age of the claimant to be determined.

[7] Counsel for the pursuer referred to section 25(3) of the 1995 Act which provides:

> "A local authority may provide accommodation for any person within their area who is at least eighteen years of age, but not yet twenty-one, if they consider that to do so would safeguard or promote his welfare."

If I were to find that the pursuer turned 18 on 10 November 2024, that would open the door to the exercise of their discretion under that provision. The decision in *GE (Eritrea)* indicated that there was also a non-statutory discretion to seek to make good any earlier unlawful treatment of the pursuer. Counsel for the defender submitted that the only discretion available to the defender was that under section 25(3). There was only a remote possibility that the pursuer would ask the defender to exercise that discretion in circumstances where he had taken no steps to seek an interim remedy in these proceedings. His failure to seek an interim remedy suggested that it was unlikely that any exercise of discretion would be required in order to safeguard or promote his welfare.

[8] I concluded that the question of the pursuer's age was a matter that continued to be in dispute between him and the defender, and which was relevant to the future exercise of the power conferred by section 25(3). Following the approach in *GE (Eritrea)* I proceeded to hear evidence directed to assessment of the pursuer's age.

Agreed facts

[9] The pursuer is a national of Chad. He entered the United Kingdom by boat on 12 June 2023. He was detained by Home Office officials on arrival.

[10] On 13 June 2023 two Chief Immigration Officers, Grady Parkhill-Flemming and Luke Enness interviewed the pursuer. A social worker, Lovemore Dambanjera, was also present. An Arabic interpreter was provided over the phone. The interview took place at a processing unit called "Western Jet Foil" in Dover. During the interview, the pursuer provided a document to the officers.

[11] On 17 May 2024 this court granted commission and diligence for the recovery of that document. On 11 July 2024 Hannah O'Connor, from the Home Office's Illegal Migration Intake Unit, signed a certificate confirming that the Home Office were no longer in possession of the document the pursuer avers is his birth certificate. Ms O'Connor stated within this certificate that the document was last seen by Grady Parkhill-Flemming on or about 13 June 2023 at Western Jet Foil, Dover when it was "sealed in an evidence bag". The document has since been lost. The Home Office do not possess a digital or paper copy of the document.

[12] Shortly after his arrival in the UK, the pursuer claimed asylum. The screening interview in relation to that claim took place on 15 June 2023.

[13] The Home Office provided the pursuer with accommodation in the Hampton by Hilton hotel in Westhill, Aberdeenshire. The pursuer notified the manager of the hotel that the date of birth assigned to him by the Home Office was incorrect. In July 2023, the defender's social workers attended the hotel to interview the pursuer. The interview took place in the hotel reception. The social workers in attendance were: Natasha McDuma, Lee Waddell, and Meiyuk Hung. An Arabic interpreter was provided by telephone.

[14] On 21 July 2023 the defender sent the pursuer a letter informing him that the defender's social workers had concluded that he was significantly over 18 years of age. Ms Waddell prepared a brief enquiry report outlining the reasons for the conclusion reached in relation to the pursuer's age.

[15] The Scottish Government has issued guidance (6/3) which outlines good practice to support social workers in undertaking age assessments.

Evidence

[16] The pursuer gave evidence himself, and led evidence from Mr Luke Enness. The defender led evidence from Ms Natasha McDuma and Ms Lee Waddell.

The pursuer's case

The pursuer

[17] The pursuer said that his date of birth was 10 November 2006. The calendar used in Chad was the Gregorian calendar. When he arrived in the United Kingdom he was "sixteen and something", but had not turned 17. He left Chad in October 2022. His father was killed when he went to North Chad in 2017. There were rebels in that part of the country. He was 11 when his father died. His mother died as a result of ill-health in 2016. He was 10 when she died. He went to his maternal uncle and then stayed with his grandma. He had no siblings. He had never celebrated his birthday as a child. He is of the Muslim faith, and gave evidence that such celebrations were regarded as haram, or sinful.

[18] The pursuer's evidence was that he had not attended a state school, but a khalwa, attached to a mosque, at which he studied the Quran. His father took him there when he was 8 years old. Before that he had not been aware of his age, but at that time his father had

told him he was old enough to start attending and learning. When he first attended the khalwa he did not have a birth certificate, but the institution requested one. His father obtained a birth certificate in 2016 and provided it to the khalwa, where the information from it was noted. It was returned to his father.

[19] When he arrived in the United Kingdom, the pursuer gave his birth certificate to the officers who were interviewing him. They had asked him if he had any information that proved he was the age he claimed to be. He had had it folded up and stored between his phone and the phone cover. He said he had it wrapped in plastic so that it would not get wet. It was a small, long piece of paper with the name of his father, mother and two witnesses on it. He initially said that it was entirely handwritten, and then said that he was not sure about that, and had not checked it properly. It was written in French. It contained information other than the identity of his father and mother, but he could not remember what that was.

[20] The birth certificate was kept in his father's closet. When the pursuer went to stay with his grandmother, they took all his father's documents. His grandmother kept it in a large bag under her bed. When the pursuer left Chad, he travelled with his paternal uncle, who kept the document with him. Some months before the hearing, the pursuer learned that the Home Office had lost the document.

[21] The pursuer said that he had left Chad because he had a relationship with a girl called Aisha, and her family wanted him dead. Aisha studied at a school near the khalwa. Her family was the "governing family". Her brothers saw them meeting and after that the pursuer had problems with them. There was a physical altercation involving the pursuer and Aisha's brother. The pursuer was taken to the police station and was detained there for a period and then released.

[22] After leaving Chad the pursuer spent a month in Libya, then travelling by boat to Italy, where he spent 2 months before crossing the border into France. The pursuer spent 4 or 5 months before crossing to the United Kingdom. His first attempt at crossing was from Calais, but the vessel was intercepted and turned back. The pursuer then went by train to Boulogne where he and others slept in the forest before making a further attempt at crossing. He described the vessel on which he travelled as a plastic boat with an engine, which I infer to have been a rigid inflatable boat. The boat left France at dawn and arrived at the United Kingdom around noon. The journey was frightening. The French authorities chased the vessel but ultimately gave up the chase. They met another French boat which tried, unsuccessfully, to turn them back towards France. There was water coming into the boat, and the pursuer thought he was going to die. People were throwing their bags into the water.

[23] When the pursuer arrived the authorities gave him clothes and let him rest for the night, then interviewed him early the following morning. He was nervous. The interview related only to his age. He thought those interviewing him were two men and one woman. He understood the Arabic interpreter. The record of the interview suggested that he had initially said he was born in 2003, before saying that he was born in 2006. The pursuer denied ever having said that he was born in 2003. It suggested also that the pursuer had said, variously, that his father had told him his date of birth 5 years earlier, and 5 months earlier. The pursuer initially said that he could not remember whether he had said that his father told him his date of birth. He had not said that his father told him his date of birth either 5 years or 5 months earlier. He went on to say that his father had told him his date of birth in 2016, and he had told the immigration officers that. The officers had concluded

that his date of birth was 10 November 1996, and he had told them that that was not his age. That response was recorded in the record of the interview.

[24] In his second interview he had confirmed that the 1996 date of birth was correct because he had been told that the Home Office had to go by the date of birth allocated to him in the first interview. To end the interview he had to agree that that was his date of birth.

[25] The interview with the defender's social workers took place in the hotel reception. There were people sitting near them, but they had a space to sit in. Other people could hear what was being said because the interpreter joined by phone and the pursuer had to raise his voice so that the interpreter could hear it. The interview should have taken place in a private room, but there was no other solution. He was not offered a supporter for the interview. The social worker explained that the purpose of the interview as an age assessment. He felt that he was listened to.

[26] The pursuer met the social workers on a second occasion, when they gave him a letter and said that they had concluded that his claimed age was not his real age. He was not asked to comment on their reasons for reaching that conclusion. He denied having told the social workers that it was his mother who had told him his date of birth, although that was the response noted by the social workers in a document headed "Brief Enquiry [As to Age]". He thought he had said that it was dad who had told him.

[27] The pursuer said that he had asked his maternal uncle, who resided in Chad, about obtaining another birth certificate. His uncle said that that it would be very difficult. The pursuer would have to speak to immigration, and they might ask about his whereabouts, say that he was "wanted", and might "deport [him] again". The reference to "immigration" was to the authorities in Chad. He had also asked his uncle to obtain a letter from the

khalwa confirming his attendance there. Every time the pursuer asked him, his uncle said that he was busy, so that the pursuer got "fed up" and did not pursue the matter with him.

[28] In cross-examination, the pursuer said that he attended the khalwa from when he was 8 years old until 2022. When asked how old he was in 2022 he did not immediately answer, but said that he had never cared about how old he was until he came to the United Kingdom. It was something he had never previously regarded as important.

[29] During the journey from Chad to France the pursuer's uncle kept the pursuer's birth certificate. He had a small bag in which he kept it, and gave the document to the pursuer in France. When the pursuer first arrived in Italy he was taken to a camp, then transferred to another camp before becoming homeless. He was fingerprinted in Italy. His uncle had showed the document to the Italian authorities when the asked for identification. They took the details from it and then handed it back to the pursuer's uncle. The pursuer's uncle gave him the document just before he boarded the boat to come to the United Kingdom on the first occasion he attempted the crossing. On his return to France on that occasion, the authorities had not taken any details or fingerprinted him. The authorities let him and others go and they went to the forest. The document remained with the pursuer. A charity had provided a waterproof bag which was intended to keep phones and documents dry. The document itself was a "long paper" which he had folded down so that it would fit between his phone and the phone cover. The report of the age assessment by immigration officers said that the document recorded his date of birth as 23 November 2006, but that was definitely not correct. The date on it was 10 November 2006.

[30] The maternal uncle in Chad to whom the pursuer had referred in examination in chief was called Mohammed. The paternal uncle with whom he had travelled was Abu Bakir. Referred to a record of his interview with Home Office officials on 15 June 2023,

the pursuer said he had been doing his best to tell the truth. He accepted that his uncle, Abu Bakir, had provided money for the people smugglers in France to the extent of 400€, and that the pursuer himself had paid them a further 200€ to bring the pursuer to the United Kingdom by boat. Abu Bakir now lived in France. It would have been difficult for him to assist, from France, with obtaining a replacement birth certificate. In relation to making contact with the khalwa, that would be easier for his uncle Mohammed to do, but he had never done so, despite understanding the pursuer's situation in the United Kingdom.

Luke Enness

[31] Mr Enness is a Chief Immigration Officer. He was attached to the Western Jet Foil Unit in Kent in June 2023. On most days he would carry out initial age assessments. The purpose of such assessments was to choose the correct path for a person seeking to enter the United Kingdom. There were different processes for adults and for minors. He had a "vague" recollection of interviewing the pursuer for that purpose. During the interview the pursuer had been alert and seemed calm. Mr Enness believed that the pursuer gave his date of birth as 10 November 2006. He did not recall the pursuer mentioning 2003 as the year of his birth. He did not recall whether the pursuer had said that his father had told him his date of birth either 5 months or 5 years previously.

[32] The report of the age assessment recorded an observation that the pursuer had evidence of shaving which was "not a feature with Sudanese children under the age of 18." Counsel questioned why that observation appeared, as the pursuer was from Chad. Mr Enness said that had been an observation offered by the social worker, Mr Dambanjera. Evidence that the pursuer was shaving would have been a factor in Mr Enness' assessment.

[33] Mr Enness could not recall with "great accuracy" the document proffered by the pursuer. He did not believe that it looked like a birth certificate. If it had looked like a birth certificate he would have given it more weight in assessing the pursuer's age. The record of the assessment narrated that the document was obtained in 2016. That information would either have come from the pursuer, or from the document itself. The record read, "It was obtained in 2016 but looked freshly new with new ink for a handwritten document 8 years [sic]". Without seeing the document, Mr Enness could not say how he had gone about assessing the age of the document or the writing on it.

[34] Under the heading, "Summary and decision" the report narrated,

> "Abdelrahman provided slip he said was a birth certificate but nothing on it to suggest that it was an official document from Chad. The document looked to [sic] fresh to have been obtained 8 years ago."

Mr Enness' evidence was that he did not believe that the document presented was any sort of official document or birth certificate. He had seen many birth certificates from Chad, and it did not resemble a birth certificate from Chad. Mr Enness had sealed the document in an evidence bag and attached it to form IS91 (a form authorising detention). He handed it to the office of the bronze commander of the small boat operation command, a department also located at the western jetfoil. He did not remember which individual he handed it to. The document should have been uploaded to the record management system and case progression system. That was a different process form the one described in the Home Office's policy on the retention of valuable documents. He had, however, expected that the document would eventually be retained in the valuable document bank in accordance with that policy.

[35] In cross-examination, Mr Enness explained that it was his colleague Mr Parkhill-Flemming who completed the form recording the assessment of age.

Mr Parkhill-Flemming was the assessing officer in the case. A box had been checked beside the statement:

> "Two officers (one of at least chief immigration officer (CIO), higher executive officer (HEO) or higher officer (HO) grade) have separately determined that their physical appearance/demeanour very strongly suggests that they are **significantly over 18 years of age** and no other credible evidence exists to the contrary."

Throughout the interview Mr Enness had the opportunity to correct any statements that he disagreed with. He did not believe that he had disagreed with any of the statements recorded by his colleague, and he was content that the report was accurate. Had there been a disagreement between him and Mr Parkhill-Fleming as to whether the pursuer was a minor, he would have been treated as a minor. He had not double checked the report - particularly with regard to what was recorded as to the date of birth on the slip of paper - before it was finalised. The date "23 November 2006" would have been recorded by his colleague. If Mr Enness had seen it and disagreed, he and his colleague would have "returned to the document". He could not recall if that had happened in this case. If he had seen a discrepancy he would "potentially" have raised it.

[36] Mr Enness had no recollection as to whether the document provided by the pursuer showed any signs of water damage, or of folding, or whether it had been stored by the pursuer in a waterproof bag. He might have recorded tears or marks of folding, but would not necessarily have done so. Asked whether he would have described the document as seeming to be new if it had shown such signs, he said, "That is very dependent."

[37] Referred to the observations about the pursuer's appearance recorded in the report, which included observations that he had crows-feet in the corners of his eyes when he spoke, and visible nasolabial lines, Mr Enness said that the physical observations were "presented" by Mr Dambanjera. Had Mr Dambanjera's opinion as to the pursuer's age

differed from that of the immigration officers, it was the view of the immigration officers that would have prevailed.

The defender's case

Natasha McDuma

[38] Ms McDuma is a social worker employed by the defender. She received a BA in social work in South Africa in 1994 or 1995. She practised as a social worker in South Africa for 4 years. She has been registered with the Scottish Social Services Council since about 2003 and has acquired a number of qualifications in the United Kingdom. Ms McDuma has worked for the defender since 2008. She has worked with unaccompanied young asylum seekers in the context of children's services since February 2022. In March 2022 she undertook 2 or 3 days of online training relating to age assessment. JustRight Scotland provided the training. By the time of the proof she had conducted 25 or 30 age assessments. When she met the pursuer in 2023, she had carried out between three and five age assessments.

[39] In July 2023 Ms McDuma received a referral from Mears Housing who were providing the pursuer's accommodation, because the pursuer had said that he was a minor. She arranged to meet him, along with her colleagues Lee Waddell and Meiyuk Hung. An Arabic interpreter assisted by telephone. That was normal practice, as it was more cost effective than having an interpreter present. The questions for interview were planned in accordance with a format about which Ms McDuma had learned at the training she attended. She could not recall who had taken the lead with questions. If an answer required clarification, any of she or her colleagues could ask a follow-up question.

[40] The interview took place in the reception area of the hotel. Ms McDuma had requested a private room, but none was available. She did not regard that as satisfactory. The hotel had only recently been allocated as accommodation for asylum seekers, and there was no system in place to provide an interview room. Her team had subsequently had to "fight" to obtain that facility. She had not wished to delay the interview, because of the risk involved in leaving someone who might be a child in unsuitable accommodation. She had made sure that the area was clear of other people. It was a space to the rear of the reception area. There were people in the reception area, but there were no other people in the part of it where they conducted the interview. The pursuer did not appear to be distressed by the lack of a private room. He spoke quietly, tried to hide his face and did not make eye contact. The social workers had to ask some questions a few times to get an answer. The pursuer looked worried and very thin. His skin looked very dry. He had receding hair, and had creases or lines around his eyes and his mouth. Handwritten notes were taken and a report prepared from them. The meeting took between 45 minutes and 1 hour. The pursuer was not provided with an appropriate adult.

[41] After the interview, the social workers conducted a meeting, either in person or using Teams; Ms McDuma could not remember which. All three agreed that the pursuer was more than 18 years old. If there had been any disagreement the pursuer would in the first instance have been accommodated as a child, and the social workers would have gone on to carry out a full *Merton* age assessment; that is an assessment complying with the requirements first discussed in *R (B)* v *Merton London Borough Council* [2003] EWHC 1689 (Admin). Ms Waddell, who drafted the report, had signed it. Through oversight Ms McDuma had not done so, but she agreed with its content.

[42] The report (7/1) was headed "Brief Enquiry [As To Age]" and contained guidance on making a provisional decision as to age. It included the following:

> "This guidance should be considered where assessors are determining whether a decision can be made about a person's age based on their presentation and a brief enquiry or whether a full age assessment is required."

[43] Ms McDuma met the pursuer again on 21 July 2023 to explain the outcome of the assessment to him. She could not remember whether he said anything during that meeting. He appeared annoyed and sad.

[44] In cross-examination Ms McDuma said that she had no specialist knowledge or expertise in the assessment of young men from central Africa. She was familiar with the Scottish Government publication "Age Assessment Practice Guidance for Scotland" (6/3). The recommendation that two interviews be carried out several days apart did not apply where after a brief enquiry age assessment social workers agreed that the individual was more than 18 years. Ms McDuma said that the interview included questions that afforded the pursuer an opportunity to give an account of his life, including questions about school attendance, and about his parents and any siblings. By the time of the second meeting the decision was final, and the second meeting was not intended as an opportunity for the pursuer to make further representations which might alter the decision.

[45] Ms McDuma accepted that the 1996 date of birth referred to in 7/1 was a date assigned by the Home Office, rather than one offered by the pursuer. She accepted also that a shy child might avoid eye contact, and that a teenager might have a defined jawline and facial hair.

[46] In re-examination Ms McDuma explained that during her time working in South Africa she had encountered men from central Africa. At the time she assessed the pursuer's age she was working with young men from central Africa, although from Sudan, rather

than Chad. The defender was looking after boys from Sudan at that time. It had not been necessary to proceed to a *Merton* assessment because the social workers were all in agreement following a brief enquiry assessment. She would not normally expect someone aged 16 to have a receding hairline or skin that appeared to be aged. She had observed those features when she met the pursuer.

Lee Waddell

[47] Ms Waddell is a social worker employed by the defender, and works with a team dealing with unaccompanied child migrants. She has worked with that team since April 2023. She obtained a degree in social work in 2017. In May 2023 she undertook the course on age assessment described in Ms McDuma's evidence. Before meeting the pursuer, she had been involved in two age assessments, and by the time of the proof in more than ten.

[48] A brief enquiry would be the first step taken when the defender was made aware that a person who was being treated as an adult might be a child. The brief enquiry would result in a decision as to whether a full age assessment was required.

[49] Ms Waddell's evidence in chief about the arrangements to interview the pursuer was consistent with that of Ms McDuma. She too stressed the need for expedition to avoid the risk of a child being accommodated in an adult facility. She did not recall the pursuer having to raise his voice during the interview. Ms Waddell recollected that the pursuer had a distinctive receding hairline, and strong features. His skin was coarse with "crows feet" wrinkles. He had a prominent Adam's apple, and was quite slimly built. He appeared to be quite guarded. He was very matter of fact in answering questions and at times appeared not to want to provide further information. He did not present as anxious or overwhelmed

as one would typically see with a young person. She accepted that he might have been guarded because of where the meeting was being held, although she could not recall whether that was something she had thought about at the time. Based on her observations of his physical appearance and demeanour, she formed the view that he was over the age of 18.

[50] Ms McDuma had agreed with and approved Ms Waddell's report. Ms Waddell did not recall the pursuer saying anything at the second meeting, but she was satisfied that he understood the outcome of the assessment. She found the Scottish Government practice guidance helpful in her practice. Counsel asked Ms Waddell about a passage at page 9 of the document, headed "Whether to undertake an age assessment":

> "The key task at this stage is to decide whether an age assessment is required, as quickly as possible, to enable the individual to be transferred to the most appropriate accommodation and care arrangements based on their likely status as an adult or child.
>
> The decision as to whether it is necessary to undertake an age assessment is a professional judgement based on the individual's presentation and circumstances, physical appearance and demeanour. In making this decision, social workers should be alert to any unconscious bias (how our experiences of family, society and culture etc. have shaped our views) and ensure that decision making is reasoned and robust.
>
> Normally there will be no need for a prolonged inquiry into a person's age, if it is very obvious that the person is over the age of eighteen years. As such, if the physical appearance or demeanour of that person strongly suggests that they are significantly over the age of eighteen years, under this guidance, it is suggested that no prolonged inquiry in to the person's age is necessary. If the person is obviously a child, normally, no inquiry at all is called for."

Ms Waddell explained that based on how the service user presented during the assessment, she would use her expertise and training to come to a judgement.

[51] In cross-examination Ms Waddell said she had no specialist knowledge or experience so far as young men from central Africa were concerned. The brief enquiry was itself a form

of age assessment, but there was no need for an extended assessment if it was clearly evident that a person was over the age of 18 years.

[52] Ms Waddell did not recall discussion of the pursuer's life in Chad during the interview, and she could not recall whether he was given the opportunity to give an account of family life and education there. It was not until 2024 that private interview rooms had become available at the hotel where the pursuer was accommodated. Ms Waddell accepted that the 1996 date of birth was one assigned by the Home Office, rather than volunteered by the pursuer.

Submissions

Pursuer

[53] Although counsel for the pursuer had advanced an objection in the course of evidence to the social workers' expressing any opinion as to the age of the pursuer, he did not maintain that objection in submissions. Rather, he submitted that little weight should be attached to what the social workers said because they were not independent of the defender: *Kennedy* v *Cordia Services LLP* [2016] UKSC 6, paragraph 44(iii). It was difficult to separate their evidence of fact from their evidence of opinion.

[54] Counsel for the pursuer submitted that I should grant declarator as concluded for. In principle, assessments by Home Office officials and social workers might be persuasive and form an appropriate starting point for consideration of the pursuer's age: *Abdullah*, paragraph 55. In this case, however, the assessments were not persuasive, because they did not follow best practice. There was no legally relevant distinction between a full *Merton*-compliant age assessment and a short-form age assessment: *R (HAM)* v *Brent London*

Borough Council [2022] EWHC 1924 (Admin), paragraph 31. A *Merton*-compliant assessment would tend to be more persuasive than a short-form assessment or brief enquiry.

[55] The defender's brief enquiry had not been consistent with the Scottish Government guidance ("the SG guidance") in a number of respects. Best practice involved a blend of knowledge and experience, comprehensive information gathering and reasoned, evidenced judgment, safeguarded within a procedure which was transparent and met the requirements of existing law: SG guidance, page 6. A trauma informed approach was required: SG guidance, pages 14-15. The social workers in the present case had not appreciated that the pursuer might have mistrusted them, and had failed to interpret his lack of eye contact with that in mind. The pursuer had not been given a written statement of the purpose of the interview: SG guidance page 23. Neither of the defender's witnesses had much experience in age assessment at the relevant time, and although it was not unlawful for them to have undertaken the assessment, their lack of experience went to the weight to be given to their assessment. No appropriate adult had been provided: SG guidance page 20. The pursuer had not been interviewed on two occasions: SG guidance, page 21. The interview was not in a comfortable and private space: SG guidance, page 22. It was not clear that the social workers had tried to elicit as full an account as possible of the background and circumstances of the pursuer; Ms Waddell could not recall discussion of his life in Chad, and the report did not record any discussion of that sort. The pursuer had not had an opportunity to comment on the assessment findings before the assessment was concluded: SG guidance page 32.

[56] The defender's assessment had been based on the appearance and the demeanour of the pursuer. That was an unreliable basis for assessment: *R (AB)* v *Kent County Council* [2020] PTSR 746, paragraphs 21(6)-(9), 37.

Defender

[57] Counsel for the defender submitted that the pursuer's evidence was not credible and reliable. He could not explain why the date of birth on the document he tendered had been recorded by the immigration officers as 23 November 2006, or why it had been recorded as looking as if it were new. The pursuer had not adduced evidence from either of the uncles he had mentioned in his evidence. Counsel submitted that the pursuer's evidence indicated that he had not been treated as a child by the Italian authorities.

[58] The evidence of Mr Enness had been straightforward. He and his colleagues had reached the view that the pursuer was aged 26 when they met him. He did not think that the document tendered looked like a birth certificate from Chad. Ms McDuma was a very experienced social worker. Her observations cumulatively caused her to conclude that the pursuer was significantly above the age of 18 in 2023. Both she and Ms Waddell were credible and reliable witnesses. Counsel submitted that while individually the observations of these witnesses about the pursuer's physical appearance would not have excluded his being a child when they met him, those observations, looked at together, indicated that he was indeed over the age of 18 at the time.

[59] There had been no need for an extensive inquiry, because it had been clear that the pursuer was over the age of 18.

Supplementary submissions

[60] While preparing this opinion, I became aware of *R (CJ)* v *Cardiff City Council* [2011] EWCA Civ 1590, [2012] PTSR 1235, a decision in which the Court of Appeal found that there is no formal burden of proof in proceedings where a court or tribunal is determining a question of precedent fact as to the age of an individual. During the proof both counsel

had proceeded on the basis that there was an onus on the pursuer to prove that his date of birth was the one specified in his conclusion for declarator. Parties provided supplementary submissions in writing.

[61] The pursuer submitted that the position in *CJ* was consistent with passages in *AB* at paragraph 21, and in *Merton* at paragraph 38. I should follow the approach in *CJ*. The correct question for the court was not whether the pursuer had established, on the balance of probabilities, that his date of birth was 10 November 2006, but whether, on the balance of probabilities the pursuer was or was not born on 10 November 2006.

[62] The defender's submission was to similar effect. Counsel referred to *A* at paragraphs 45 and 51. The role of the court was to decide where the truth lay, rather than deciding between two competing positions. The defender did not accept that the role of the court was inquisitorial: see *CJ* at paragraph 22. The system remained an adversarial one and the role of the court was to decide where the truth lay on the evidence available.

Decision

The jurisdiction of the court

[63] Some discussion took place in the course of submissions as to the procedure adopted in this case. Counsel requested that I reflect the discussion in this opinion.

[64] An application of this sort, on the basis that it was brought initially, falls, in my opinion, within the supervisory jurisdiction of this court. Section 25(1) of the 1995 Act imposes a duty on a local authority to provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision for certain specified reasons. Section 25(2) gives the local authority a power to provide accommodation for any child in their area if they consider that to do so would safeguard or promote his

welfare. In deciding whether to offer accommodation the local authority is exercising a decision-making function that has been entrusted to it by the legislature. The manner of that decision-making is subject to control by the court. That produces a tri-partite relationship of the sort described by the Lord President (Hope) in *West* v *Secretary of State for Scotland* 1992 SC 385 at page 400; see also pages 412-3.

[65] The exercise of the jurisdiction conferred by section 25 of the 1995 Act requires that the person who may benefit from the accommodation be a child. Whether he is a child is question of precedent fact: *R (A)* v *Croydon London Burgh Council* [2009] UKSC 8, [2009] 1 WLR 2557, paragraphs 30-33; 53. Where the exercise of executive power depends on the precedent establishment of an objective fact, the courts will decide whether the requirement has been satisfied: see, for example, *R* v *Secretary of State for the Home Department, ex p Khawaja* [1984] AC 74. That does not, however, destroy the tri-partite character of the relationship. The determination of the precedent fact is a necessary part of the court's discharge of its supervisory jurisdiction in ensuring that the local authority operates within the law. It follows that I do not agree with the reasoning in *Abdullah* at paragraphs 64 and 65. There is not a standalone or "original" jurisdiction conferred on the court to determine the age of an individual. It is a jurisdiction to determine a precedent fact in the context of its supervisory jurisdiction.

[66] For the same reason, I do not agree with the reasoning of the Lord Ordinary in *L* v *Angus Council* [2011] CSOH 196, 2012 SLT 304 insofar as he proceeded on the basis that the determination of the precedent fact of age was something other than an exercise of the court's supervisory jurisdiction: paragraphs 55 and following. For the avoidance of doubt, I am not suggesting that it would be competent to transfer a judicial review of a decision taken by a local authority under the 1995 Act to the Upper Tribunal: see

section 20(4) of the Tribunals, Courts and Enforcement Act 2007. It follows also that I do not share the reservation expressed by the Lord Ordinary in *U* v *Glasgow City Council* [2017] CSOH 122, 2017 SLT 1109, in the first sentence of paragraph 24.

[67] By the time this matter came to proof, there was no live question of a failure to accommodate the petitioner as a child. I was satisfied that there was more than a remote prospect that the petitioner would seek to rely on his age in a future question with the local authority, for the reasons already discussed.

[68] The pursuer's conclusion does not raise an issue that is merely academic. On one view that is because his age is a fact precedent to the future exercise of public law powers - exercises of a jurisdiction - by the local authority. The potential legal relationship between the pursuer and the defender, to which the age of the pursuer is the precedent fact, remains one arising because of a power conferred on the defender by the Children (Scotland) Act 1995. There is no decision regarding the exercise of such powers currently under challenge - for example a decision not to accommodate him as a person aged between 18 and 21. I prefer the view that the dispute between the pursuer and the local authority about his age remains one properly within the scope of the supervisory jurisdiction.

[69] If I am wrong about that, absent the context of the exercise (or contemplated exercise) of a power conferred by legislation or other instrument, an action for declarator as to an individual's age would be competent. That would mean, in this context of this case, that it was rightly raised as a petition for judicial review, but has, coincidentally, come to rest in the "correct" procedure, the pursuer now having, on his own averments, turned 18.

[70] Whether age assessment decisions will continue to be challenged by way of judicial review may depend on whether section 54 of the Nationality and Borders Act 2022 is

brought into force. It provides for appeals to the First-tier Tribunal against age assessments of persons subject to immigration control, including age assessments by local authorities in connection with their responsibilities under the Children Act 1989 and corresponding legislation in Wales, Scotland and Northern Ireland.

The role of the court in age assessment

[71] It is clear from *A* that it is for the court to determine the precedent fact. As this matter is proceeding by way of action, there was no question of my being asked to review the decision of the defender on conventional judicial review grounds, or to reduce it. Had the matter proceeded by way of petition for judicial review, the position would probably have been the same. It is difficult to see what practical benefit there would be in reviewing the process of decision-making where the factual decision is one that will be taken of new by the court.

[72] I heard some submissions about practice in the courts in England and Wales. It is apparent from cases such as *HAM* and *AB* that in some cases the High Court has adjudicated as to whether the local authority decision has been made lawfully, with the Upper Tribunal ruling on the issue of precedent fact in relation to the age of the individual. In *HAM* Swift J was dealing with a case in which it was contended both that the age assessment was substantively wrong, and that the council carried out the assessment unfairly. It was agreed that the substantive matter should be transferred to the Upper Tribunal: paragraph 37. Swift J was dealing only with questions about the fairness of the process, and ultimately found that one of the complaints about the fairness of the process was made out: paragraph 51. He made a declaration to that effect, and transferred the substantive matter to the Upper Tribunal. In *AB* the Court of Appeal granted relief requiring the council to

conduct a full *Merton*-compliant assessment, but did not quash the existing assessment, on the basis that it provided material on which the defendant might build: paragraph 58. The matter was also to be transferred to the Upper Tribunal for fact-finding: paragraph 58.

[73] The courts of England and Wales have also, however, recognised that if a claimant succeeds in establishing that the determination of his age is substantively wrong, orthodox judicial review challenges are likely to be subsumed by the court's factual finding as to the claimant's age, and the orthodox judicial review challenges will fall away as unnecessary: eg *R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59, paragraph 5. In *R (SB)* v *Royal Borough of Kensington and Chelsea* [2023] EWCA Civ 924, at paragraphs 85 and 86, the court noted that to "hive off" to the Administrative Court a challenge on conventional judicial review grounds might add to costs and delay in the litigation. It noted also that once permission to proceed had been granted, challenges to the procedure undertaken by the local authority would be unlikely to play a significant part in the court's decision, based on all the evidence, about the claimant's actual age. Once permission had been granted the norm should be that the whole case be transferred to the Upper Tribunal.

Burden of proof

[74] The reasoning of the Court of Appeal in *CJ* appears at paragraphs 22 and 23 of the judgment:

> "22. […] I am persuaded that the nature of the inquiry in which the court is engaged is itself a strong reason for departure from the common law rule which applies a burden to one or other of the parties. I gratefully adopt Laws LJ's analysis that the High Court is exercising its supervisory jurisdiction and in so doing is applying the rule of law. Neither party is required to prove the precedent fact. The court, in its inquisitorial role, must ask whether the precedent fact existed on a balance of probability. I make it plain that I am not proposing that the burden of proof should not be applied in any case in which an individual is claiming a benefit under a qualifying statutory provision. Whether a burden of proof should

> be applied at all and, if so, where it should rest, will depend upon the terms of the statute conferring the power to act: see the judgments of Baroness Hale JSC and Lord Hope DPSC in *R (A)* v *Croydon London Borough Council (Secretary of State for the Home Department intervening)* [2010] PTSR 106 (at para 2 above). In the Court of Appeal of Northern Ireland Lord Carswell CJ held in *Kerr* v *Department for Social Development* [2002] NICA 32 using ordinary principles of construction of the qualifying statute, that the claimant bore the burden of establishing his entitlement to a payment in respect of his brother's funeral expenses, but the department bore the burden of establishing any of the regulatory exceptions to that entitlement. I would confine my conclusion as to the absence of a burden of proof to the particular decision under the Children Act 1989 which faced Ouseley J on this occasion.
>
> 23. In the present case there was a range of powers and duties exercisable by public authorities dependent upon the single issue of age. Where the issue is whether the claimant is a child for the purposes of the 1989 Act it seems to me that the application of a legal burden is not the correct approach. There is no hurdle which the claimant must overcome. The court will decide whether, on a balance of probability, the claimant was or was not at the material time a child. The court will not ask whether the local authority has established on a balance of probabilities that the claimant was an adult; nor will it ask whether the claimant has established on a balance of probabilities that he is a child."

[75] Parties were at one in their supplementary submissions in saying that I should adopt a similar approach to that described by the Court of Appeal, and I have done so when considering the evidence. These proceedings were conducted as adversarial proceedings. They were not inquisitorial in the sense that the court was itself conducting or leading the inquiry. The exercise in this case is one of assessing the evidence provided by the parties to the proceedings and deciding where the balance of probabilities lies.

The age assessment jurisprudence of the Upper Tribunal

[76] I have become aware that the Upper Tribunal, in the exercise of its judicial review jurisdiction, has developed an extensive body of jurisprudence bearing on the matters that it regards as potentially relevant evidence in cases of this sort, and associated directions for case management. The duty of candour in judicial review proceedings - which requires the disclosure of information that may be adverse to the case of a party - applies to both parties:

see, for example *R (BG)* v *London Borough of Hackney* [2022] UKUT 00388 (IAC). I was not addressed on that case, and did not seek submissions about it, as I did not intend to rely on it. I have not approached my assessment of the evidence on the basis that the pursuer was under a duty of candour of the sort that applies in judicial review proceedings. A ruling was made at an earlier stage that these proceedings did not engage the supervisory jurisdiction and parties proceeded on that basis. If this court is to be asked in the future to make factual assessments about the age of a person in the context of its supervisory jurisdiction, parties should be prepared to address the relevance or otherwise of the caselaw of the Upper Tribunal in this area. Case management hearings and orders may be desirable.

Assessment of the evidence

[77] The pursuer's evidence is the only evidence that points positively to his being a child at the time he arrived in the United Kingdom, and to his date of birth being the one in relation to which he seeks declarator. I have no reason to, and do not, doubt the pursuer's account that birthdays were not celebrated during his childhood, or that the practice of doing so was regarded as haram. In other respects, however, the evidence he gave about his age was not credible and reliable. A notable feature of his evidence was the vague and unsatisfactory nature of the answers he gave in relation to some of the matters that bore most closely on his age.

(a) He did not provide a direct answer when his counsel asked him how old he had been in 2022, instead saying that it was something that he had never thought about before coming to the United Kingdom.

(b) His explanation as to why he had not made efforts to obtain a replacement birth certificate was unsatisfactory. It is not clear why that would involve him in speaking to the immigration authorities in Chad.

(c) His explanation as to why he had not pursued matters further with his maternal uncle regarding confirmation from the khalwa of his attendance there was also unsatisfactory. The pursuer said that he had just got "fed up" because his uncle said he was busy. That is surprising in circumstances where the pursuer has sought to challenge the assessment of his age.

I am cautious about placing too much weight on the pursuer's demeanour in court. I do not know how he usually presents, and there may be cultural factors relating to the presentation of young men from central Africa about which I am not aware. There was, however, a contrast between his vague and evasive answers and demeanour when he was being asked about the matters that I have listed above and his answers and demeanour relating to some other matters. He presented as engaged and confident when speaking about his attempts to cross the English channel, and gave a fairly detailed and vivid account of those events. I have taken into account the differences I observed in his demeanour in assessing his credibility.

[78] There was very little in the pursuer's evidence by way of detail about his life in Chad, or the activities that he engaged in there, or at what dates. In relation to his attendance at religious education at the khalwa he said that he had attended from the age of 8, but did not mention the year when he first attended. He said nothing about his life in the United Kingdom, or any difficulties he might have experienced while being accommodated with adult asylum seekers.

[79] I have taken into account the absence of evidence from the pursuer's paternal uncle. I have no reason to doubt that he travelled with the pursuer as far as France, that he now resides on France, or that he had custody during much of the pursuer's journey of the document that the pursuer surrendered to Home Office officials shortly after he arrived in the United Kingdom. There is no obvious reason why evidence from him was not provided in these proceedings. There was no explanation as to why evidence from him could not be made available. On the pursuer's evidence his uncle had provided most of the funding to the people traffickers who transported the pursuer from France to the United Kingdom, and had been willing to assist him to that extent in the past. The unexplained absence of that evidence is relevant notwithstanding the absence of an onus of proof on the pursuer.

[80] It is not the fault of the pursuer that he cannot produce the document that he gave to the Home Office officials. The Home Office has lost it. It is not available for production or scrutiny in these proceedings. Counsel for the pursuer submitted that the efforts to recover the document by commission and diligence reflected positively on the pursuer's credibility: he would not have sought to recover a document that he did not think was genuine and of assistance to his case. I do not draw that inference. The attempt to recover the document is neutral so far as the credibility of the pursuer is concerned. It was a document of some potential importance in the case and given that the Home Office is not a party in this case, it is readily understandable that the pursuer should have sought to recover it from the Home Office.

[81] I accept that it was Mr Enness's genuine belief that the document he saw was not a birth certificate from Chad, and accept his evidence that he had seen birth certificates from Chad. I attach no significant weight to that evidence, however, in circumstances where the document is not available for production and scrutiny in this process. Mr Enness had little

recollection of his meeting with the pursuer, and his evidence went no further than to indicate that he had no reason to think that what was recorded in the Assessing Officer's Report by Mr Parkhill-Fleming was incorrect. At one point in his evidence he said that he would have "returned to the document" tendered by the pursuer, "had he seen it and disagreed with" the record made by his colleague. I was not confident, on the basis of that evidence, that he had in fact scrutinised his colleague's draft report in any great detail. So far as the date of birth on the document - recorded in 7/2 as 23 November 2006 - is concerned, the accuracy of the report cannot be tested, because the document has been lost.

[82] There is no positive evidence from Mr Enness, Ms McDuma or Ms Waddell to support the proposition that the pursuer's date of birth is 10 November 2006. I am not deciding in these proceedings whether it was lawful for the defenders to reach a conclusion on the basis of a brief enquiry, rather than a more extensive assessment. I require to consider the evidence the witnesses provided in court and whether, and to what extent, it assists me in assessing where the balance of probabilities lies.

[83] The law since *Merton*, and published guidance, including the SG guidance, has proceeded on the basis that assessment should be carried out by experienced social workers. It is reasonable to think that social workers who have experience of working with young people will have some resulting advantage in assessing the behaviour, speech and other characteristics of people who say they are under 18 years of age. Both Ms McDuma and Ms Waddell were social workers with a number of years of experience. They were generally credible and reliable witnesses as to fact. I had the clear sense that both felt a significant responsibility to try to identify people who were or might be children and who were being provided with accommodation as adults. Both worked in children's services. Both had received training in relation to the assessment of age. I consider that they can be regarded

as having some experience and training relevant to the assessment of age. All that said, however, I have not relied on the view that they formed about the pursuer's age, or afforded it any weight.

[84] Both witnesses disclaimed, at least initially, any particular expertise so far as young men from central Africa were concerned, although Ms McDuma went on to refer to her experience working in South Africa with men of central African origin, and also to working in Scotland with children from Sudan. They did not spend a great deal of time in the company of the pursuer. Their conclusion, which was that he was aged more than 18 when they met him in 2023, was based primarily on his physical appearance and demeanour. I accept that, generally, physical appearance and demeanour require to be approached with caution in this context. Little else about their encounter with him is recorded in their report. I accept that they may well have asked him about his life in Chad, but his responses to any such questions are not recorded, and I did not hear evidence about what those questions or answers were. There is little in the evidence from Ms McDuma and Ms Waddell that assists me in assessing the age of the pursuer. The assessment they carried out was of a limited character, and not accompanied by the features and safeguards described in *AB* at paragraph 21. An assessment with those features is likely, in general, to yield more information, and more reliable information.

[85] I accept the evidence of the witnesses as to the observations that they described regarding the physical appearance of the pursuer at the time that they met him. At that time, on his own account, he would not yet have turned 17. As they acknowledged, at least some of their observations about his personal appearance were not necessarily inconsistent with his claimed age - for example the presence of facial hair on his upper lip and his having a strongly defined jaw line. None of the physical features that the social workers observed

points positively to the pursuer's having been a child when they met him. As well as the characteristics just mentioned, they noted that he had a protruding Adam's apple, that his hands were veiny, that his skin appeared aged, with visible crow's feet round his eyes. They noted also that he had "distinct receding hairlines".

[86] Both counsel submitted that it was open to me to take account of my own observations of the pursuer in court. So far as his physical appearance is concerned I have not done so. His position in the witness box did not permit me to make any detailed observations as to the appearance of his face or his hands. I did not observe anything notable about his hairline, but I do not know how his hair was styled when social workers observed him, and note that their observations regarding a receding hairline coincide with the observations noted by Mr Parkhill-Fleming. I would in any event have been reluctant myself to embark on assessment of his age placing much weight on appearance alone. That approach has been deprecated in the caselaw.

[87] The Home Office Assessing Officer's Report recorded that the pursuer initially said he was born in 2003 and gave accounts that his father told him his date of birth variously 5 months and 5 years earlier. Counsel for the defender did not place any emphasis on these passages in submissions. I have not placed any weight on them in assessing the credibility of the evidence that the pursuer provided in court. Mr Enness had very little recollection of the interview. I would in any event have been cautious about placing too much weight on responses given on arrival in the aftermath of a journey of the sort described by the pursuer. The defender's brief enquiry report recorded that the pursuer said that it was his mother who had told him his date of birth. I am satisfied that the pursuer did provide that answer to the social workers. It is inconsistent with what he said in court, and I have taken it into account in assessing his credibility and reliability.

Conclusion

[88] Having assessed all of the evidence available, I am unable to find on the balance of probabilities that the pursuer's date of birth is 10 November 2006. The evidence that supports that proposition comes only from the pursuer, and I do not accept the material parts of his evidence as credible and reliable. No other evidence supports that proposition. It is highly unlikely that his date of birth is later than 10 November 2006. If it were later than 10 November 2006, I would expect that to have been his case. It is more likely than not that his date of birth is earlier than 10 November 2006. There is nothing in the evidence to enable me to make a positive finding as to what the pursuer's age is, or what his date of birth is.

[89] I therefore sustain the defender's second plea-in-law and grant decree of absolvitor.