In the Upper Tribunal (Immigration and Asylum Chamber) Judicial Review

JR-2022-LON-000273

In the matter of an application for Judicial Review

The King on the application of
BG (Anonymity direction made)
(BY HIS LITIGATION FRIEND KEVIN PERKINS)

Applicant

versus

London Borough of Hackney

Respondent

ORDER

BEFORE Upper Tribunal Judge Stephen Smith

HAVING considered all documents lodged and having heard Ms A. Benfield of counsel, instructed by the Joint Council for the Welfare of Immigrants, for the applicant and Mr H. Harrop-Griffiths, of counsel, instructed by the London Borough of Hackney Legal Services, for the respondent at a hearing on 4 to 6 of October 2022

IT IS DECLARED THAT:

1. The Applicant's date of birth is 1 January 2002 such that he was 19 years of age upon entry to the UK on 8 September 2021.

IT IS ORDERED THAT:

2. The application for judicial review is dismissed.

3. The order for interim relief made on 18 February 2022 is hereby discharged.

4. The Applicant shall pay the Respondent's costs of the claim (including the costs reserved) not to be enforced without the permission of the Tribunal and subject to an assessment of the Applicant’s ability to pay under the Legal Aid, Sentencing and Punishment of Offenders Act 2012, section 26. Any costs shall be the subject of a detailed assessment, if not agreed.

5. There shall be a detailed assessment of the Applicant's publicly funded costs.

Permission to appeal

6. I reject the suggestion that the applicant was provided with an unfair and insufficient period within which to formulate an application for permission to appeal. The draft judgment was circulated on 16 November 2022, six working days before it was handed down on 24 November 2022. By way of analogy, PD40 at paragraph 2.3 merely requires the parties to be sent a copy of the draft judgment by 4PM the second working day before the judgment is handed down (see also paragraph 11.6.2 of the *Administrative Court Judicial Review Guide 2022* to similar effect).

7. Granting the application to defer an application for permission to appeal would have entailed adjourning the handing down of the judgment and would have been contrary to the overriding objective. Rules 44(4A) and 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008 compel the Upper Tribunal to give or refuse permission to appeal to the Court of Appeal at a hearing that disposes of "immigration judicial review proceedings" (a term defined to include the discretionary transfer of proceedings from the High Court, such as these: see rule 1(3)). Accordingly, granting the application for an extension would have necessitated delaying the hand down decision, which in turn would have entailed delaying lifting the interim relief the applicant has enjoyed pursuant to the order of Bourne J dated 18 February 2022.

8. Turning to the substance of the grounds, they are unarguably a series of disagreements of fact and weight, challenging the findings of fact reached by a trial judge who had the benefit of reviewing the whole sea of evidence.

9. Ground 1 (failure to make express findings concerning the respondent's age assessment) fails to engage with paragraphs 28(c) and 79 of the judgment, which explain why, including in response to a concession by Ms Benfield (see para. 28(c)), it was not necessary to make additional findings concerning the age assessment itself.

10. Ground 2 is a classic attempt to relitigate the case. For example, as stated at paragraph 49, it was the applicant who reported the 21 March 2022 birthday to his social worker: see page 101 of the supplementary bundle. Mr Ullah's evidence under cross-examination was that he had "no idea" of the origins of the various dates of birth, and that he had not discussed any of them with the applicant and was not (contrary to the suggestion in the grounds) assigned to the applicant unilaterally by the local authority. It was open to the tribunal, on the basis of the oral and documentary evidence, to conclude that the applicant had proffered a 2007 date of birth, as one of several dates in his changing narrative.

11. Grounds 3 and are unarguably disagreements as to the weight attracted by the applicant's witnesses, and do not reveal an arguable error of law.

12. Ground 4 criticises reasoning that was unarguably open to the tribunal and fails to engage with the fact that it is not necessary expressly to deal with all submissions made. The applicant's reliance on *R (AS) v Kent County Council* [2017] UKUT 00446 IAC is misplaced, since the methodology there deprecated was the respondent council's practice of building up a 'bank' of images of adolescent boys of apparently different ages, against which to 'benchmark' age assessments of putative children of apparently similar ages. The photograph in these proceedings was of two small children whose ages were not eight to ten years apart, even when noting (as the tribunal did) the caution with which such assessments should be approached.

13. In summary, having carefully considered the proposed grounds of appeal, I have decided to refuse permission to appeal to the Court of Appeal. It is not arguable that I have erred or that there is some other reason that Court should consider this matter.

Signed: Stephen H Smith

Upper Tribunal Judge Stephen Smith

Dated: **24 November 2022**

The date on which this order was sent is given below

For completion by the Upper Tribunal Immigration and Asylum Chamber

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): **24/11/2022**

Solicitors: JCWI Ref No.
Home Office Ref:

Notification of appeal rights

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).

Case No: JR-2022-LON-000273

IN THE UPPER TRIBUNAL
(IMMIGRATION AND ASYLUM CHAMBER)

Field House,
Breams Buildings
London, EC4A 1WR

24 November 2022

Before:

UPPER TRIBUNAL JUDGE STEPHEN SMITH

- -

Between:

THE KING
on the application of
BG
(ANONYMITY DIRECTION MADE)
(BY HIS LITIGATION FRIEND KEVIN PERKINS)

Applicant

- and -

LONDON BOROUGH OF HACKNEY

Respondent

- -

Ms A. Benfield
(instructed by the Joint Council for the Welfare of Immigrants), for the applicant

Mr H. Harrop-Griffiths
(instructed by London Borough of Hackney Legal Services) for the respondent

Hearing dates: 4 to 6 October 2022

- -

J U D G M E N T

- -

Judge Stephen Smith:

1. BG is a citizen of Afghanistan. He claims to have been born on 1 January 2008, and that he was aged 13 when he arrived in the United Kingdom

clandestinely on 8 September 2021. That is disputed by the respondent council which assessed him to be 22 years of age (without specifying a date of birth), following a meeting on 27 September 2021, served on 26 November 2021. It is the role of this tribunal to assess the applicant's probable age and date of birth.

Procedural history

2. These proceedings commenced as an application for judicial review brought before the High Court on 25 January 2022. Bennathan J ordered anonymity and refused the applicant's request to join the Secretary of State for the Home Department as an interested party on 28 January 2022. Bourne J granted interim relief to the applicant on 18 February 2022 and transferred the matter to this tribunal for a substantive age assessment hearing to take place.

3. On 23 June 2022 Upper Tribunal Judge Mandalia conducted a case management hearing. His ensuing case management directions required the applicant to make his social media accounts available to the respondent for "review", and subsequently to disclose "all relevant material following a proportionate search" of his social media and other electronic communication accounts. On 11 July 2022, the applicant applied for those paragraphs of Judge Mandalia's order to be set aside. That application was heard by the Vice President, Mr C. M. G. Ockelton, and Upper Tribunal Judge Blundell ("the Panel") at a hearing on 18 August 2022. By agreement between the parties, Judge Mandalia's case management directions were varied, and the panel agreed an order amending Judge Mandalia's case management directions. The agreed order was approved by the Panel and circulated to the parties in advance of the substantive hearing before me. The Panel also heard submissions on the process pertaining to social media and other similar material which might be followed in such cases in the future and issued a judgment on 27 October 2022.

4. The Panel's interlocutory judgment addressing the submissions concerning the general approach to social media and related matters had not been circulated to the parties (or me) by the time the substantive hearing was listed on 4 October 2022. An issue arose at the substantive hearing as to whether the parties would need to refer to its contents in order to formulate their submissions concerning the applicant's social media materials, some of which had been provided to the tribunal pursuant to the agreed amendments to Judge Mandalia's earlier case management directions. The substantive hearing proceeded before me without the benefit of the Panel's judgment, but as soon as the Panel's judgment had been circulated to the parties, I issued directions in the following terms:

> "… if either party wishes to supplement their submissions made at the substantive age assessment hearing conducted on 4 to 6 October 2022 in light of the interlocutory judgment of the Vice President and Judge Blundell dated 27 October 2022, it must do so in writing by 4PM on Friday 4 November 2022."

5. Neither party responded.

Factual background

6. The applicant claims to have been brought up by his mother in near-total seclusion in the family home in a small rural village. He was rarely, if ever, permitted to leave the house. He did not go to school and cannot read or write. He has very few memories of his father, who (he claims) was murdered by the Taliban when he was very young. The applicant has an older brother, Z, who fled to this country some years before he did. Z has been recognised as a refugee by the Secretary of State for the Home Department following an allowed appeal before the First-tier Tribunal ("the FTT") and has appeared as a witness in these proceedings.

7. The applicant's claim to know his age stems from the circumstances under which he claims to have fled Afghanistan. One evening, the applicant and his mother heard gunshots and a large explosion. They were terrified. They ran to the applicant's uncle's house, leaving all their possessions behind, with one exception. The applicant had with him a photograph of him with his father and Z when they were small children ("the photograph"). The uncle called some men who the applicant had never seen before. They came and took him away on what became his year-long journey to the UK. He has now lost all contact with his mother.

8. Shortly before he left his uncle's house with the three men, the applicant's uncle asked his mother how old the applicant was. She told him that he was born in 2008, and the uncle passed the details on to the three men, adding that they should treat him, the applicant, well since he was young. That is how the applicant found out his claimed date of birth of 1 January 2008.

9. The three men took the applicant on a long journey, initially by road, later by foot, walking for up to seven hours daily, often sleeping outside. The men mistreated the applicant, beating him and on one occasion stabbing his trunk.

10. The applicant eventually arrived in Turkey, and later Serbia, where he stayed in a camp with other children, for a year. He was given an ID card by the camp, and he used a smartphone belonging to one of the other children, S, to take a photograph of it. S would later help the applicant to set up a Facebook account and give the smartphone to him. S took a picture of the photograph of the applicant with Z and his father and uploaded it to the Facebook account he created for him.

11. The applicant travelled by car from Serbia to Austria. The applicant met some other Afghan children who were going to France. They let the applicant join them, and he travelled with them to Calais, and then accompanied the two boys on a dinghy to British waters, where he was rescued at sea on 9 September 2021.

12. The applicant was arrested as an illegal entrant and claimed asylum, giving a date of birth of 1 January 2006. He was initially assessed by the Home Office to be a 25 year old man on the basis that his physical appearance and demeanour "very strongly" suggested that he was 25 years of age or over, and that his more probable date of birth was 1 January 1996. The applicant was moved to temporary accommodation in a hotel in London

which accommodates only adults.

13. On 27 September 2021, two social workers employed by the respondent conducted an age assessment interview with the applicant. He was not supported by an appropriate adult and does not appear to have enjoyed the "minded to" procedure, whereby he would have had the opportunity to respond to the preliminary views of the assessing social workers before the assessment was finalised.

14. Meanwhile, the applicant had established contact with Z in the "summer" of 2021. Z was scrolling through Facebook and saw an image of the photograph of him with the applicant and their father. He sent a friend request to the account holder, who, through chatting on Messenger, he discovered was his brother.

15. Z arrived in the United Kingdom in 2013 and was assessed by Thurrock Borough Council to have been born on 1 January 1998, rather than his claimed date of birth of 1 January 2000. Z did not challenge that assessment, although he maintains that his correct date of birth is, in fact, 1 January 2000. Z claimed asylum and, although it appears that he was granted leave as an unaccompanied minor, his asylum and humanitarian protection claim was refused and a subsequent appeal against that refusal was dismissed, as was a subsequent appeal against an in-time application for further leave to remain. Z exhausted all avenues of appeal in those proceedings on 27 August 2015 and 26 July 2016 respectively. On 15 October 2017, Z made further submissions to the Home Office which appear to have been refused as a "fresh claim", thereby attracting a right of appeal. The appeal was heard by the FTT on 19 February 2020. By a decision promulgated on 10 March 2020, the FTT allowed Z's appeal against the refusal of his asylum claim, on the basis that he was a member of the particular social group of persons with mental health conditions and learning disabilities. Z has subsequently been granted leave to remain as a refugee.

16. Z was assisted in his asylum claim by Kevin Perkins, a registered Child, Adolescent and Adult Integrative Psychotherapist, who is qualified in mental health and general nursing. Mr Perkins works for an organisation called the Baobab Centre for Young Survivors in Exile. He is Z's psychotherapist and appeared as an expert witness before his third appeal before the First-tier Tribunal. The Baobab Centre provides casework and advocacy services for the young people it assists.

17. Mr Perkins is the applicant's caseworker with the Baobab Centre and litigation friend in these proceedings. The casework he provides for the applicant is, in his words, "psychotherapistically informed", but he is not the applicant's psychotherapist. The applicant has his own psychotherapist with the Baobab Centre, Lorenza Manzoni. Mr Perkins and Ms Manzoni both appeared before me as witnesses and each consider the applicant to be a child, in terms to which I shall return.

The hearing

18. The substantive hearing took place at Field House on 4 to 6 October 2022. The applicant gave evidence and participated in the hearing through a Pashto interpreter; I was satisfied that the applicant and the interpreter were able adequately to understand one another and communicate through each other. In order of appearance, I heard evidence from Z, the applicant, Nazeem Ullah (the applicant's foster carer), Mr Perkins and Ms Manzoni. They each adopted their witness statements and were cross-examined.

19. By way of a reasonable adjustment, I permitted Mr Perkins to sit next to the applicant and Z when they gave evidence. At times I considered that Mr Perkins was leaning too closely towards the applicant and Z, and asked him to move further away.

20. The documentary evidence consisted of an agreed trial bundle and a supplementary "Social Work Disclosure" bundle. Ms Benfield handed up a 2021 Human Rights Watch article entitled, *This is our opportunity to end the Taliban's use of child soldiers*.

The law

21. In *R (A) v London Borough of Croydon* [2009] UKSC 8 [2009] 1 W.L.R. 2557, Lady Hale held that the issue of whether a person is a child or not is a question of fact, for the court to decide upon an application for judicial review. Having considered the value judgements made by local authorities when addressing that question, she said, at paragraph 27:

> "But the question whether a person is a 'child' is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers."

22. She added at paragraph 32:

> "The word 'child' is undoubtedly defined in wholly objective terms (however hard it may be to decide upon the facts of the particular case)."

23. In *R (B) v London Borough of Merton* [2003] EWHC 1698 (Admin); [2003] 4 All ER 280, Stanley Burnton J held that, in cases where objective verification is impossible, it is necessary to take a "history" from the person concerned: see paragraph 28:

> "Given the impossibility of any decision-makers being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16-20, it is necessary to take history from him or her with a view to determining whether it is true. That will enable the decision-maker in such a case to decide that the applicant is a child."

24. Neither party bears the burden of proof. As this Tribunal held in *R (AM) v*

Solihull Metropolitan Borough Council (AAJR) [2012] UKUT 00118 (IAC) at paragraph 12:

> "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."

25. In *MVN v London Borough of Greenwich* [2015] EWHC Civ 1942 (Admin), Picken J recorded the common ground between the parties that many of the principles applicable to the assessment of asylum claims should apply to the determination of age assessments: see paragraphs 27 and 28. I adopt and apply those principles to these proceedings: all evidence should be taken into account, including background materials and expert testimony; credibility should not be assessed in isolation, but in the context of the background materials; expert evidence should form part of the credibility assessment; credibility should be assessed "in the round"; allowances should be made for the inherent difficulties likely to be faced by asylum seekers when seeking to give their history in a different language and culture.

Findings of fact

26. I did not reach the following findings of fact until I had considered the entirety of the evidence, in the round. The hearing before me was listed for three days. The oral evidence was extensive. The parties each relied on skeleton arguments, and Ms Benfield additionally and helpfully provided written closing submissions. While I have considered all materials, evidence and submissions, in the interests of brevity I do not set everything out in this judgment. I will recite the evidence, submissions and materials I have considered to the extent necessary to reach and give reasons for my findings.

27. My findings of fact are structured as follows:

    a. Preliminary observations;

    b. Medical evidence;

    c. Impact of the decision of the FTT promulgated on 10 March 2022;

    d. Review of the witness and documentary evidence;

    e. Conclusions.

Preliminary observations

28. I make the following preliminary observations.

    a. First, there is no longer any suggestion that the applicant was born in 1996, which was the year assigned to the applicant by the Home Office upon his arrival in the country. Although the age

assessment conducted by the respondent did not ascribe a particular date of birth of the applicant, by concluding that he had the appearance of a 22-year-old man in September 2021, it must follow that it concluded that he was born in approximately 1999.

b. Secondly, while the applicant's appearance and demeanour are inconclusive, his physical appearance is, in my opinion, at the older end of the spectrum. However, it is plausible that some under 18s would appear to be as old as the applicant, if not older. I make similar observations concerning his demeanour. It is necessary, therefore, to take a "history" from the applicant, in accordance with the guidance given in *Merton* by Stanley Burnton J. The applicant's physical appearance and demeanour are, nonetheless, part of the factual matrix in the proceedings.

c. Thirdly, the applicant's age-assessment appears to have been conducted without the applicant enjoying the benefit of an appropriate adult or the so-called "minded to" procedure. Since, properly understood, these proceedings are not a public law challenge to the respondent's age assessment but rather a fact-finding process, any failures in the conduct of the age assessment itself go primarily to the weight the conclusions of the document attract in my assessment. It forms part of the evidential landscape, to be ascribed weight as appropriate, and considered as part of my overall review of the evidence in the round. As will be seen from my analysis below, the age assessment does not form part of my analysis. As Ms Benfield very fairly accepted during her closing submissions, the fact that I am able to make my own assessment cures the earlier defects in the fairness of the age assessment.

d. Fourthly, the evidence of the applicant and of Z about the applicant's age in large part rests on what their mother told them about how old the applicant was. She told them their ages when they each left for the UK. On their case, they were each were reliant on her for their knowledge and understanding of their key life events, including the reported death of their father. She may have been wrong or misunderstood by the applicant or Z (or have been both wrong *and* misunderstood by the applicant and Z). At its highest, the applicant's claim to a 2008 date of birth is based on what his mother told him. On his case (and his evidence before me) he did not know his age, or that of Z, when he was growing up, and never spoke to his mother about it. He also claims that he does not understand either the Western or Afghan calendars.

e. Finally, I am not considering the applicant's asylum claim.

Medical evidence

29. I have considered the medical evidence provided on behalf of the applicant. By a letter dated 11 October 2021 addressed to "to whom it may concern", Mr Perkins wrote that he was of the opinion that the applicant

had significant mental health problems that were consistent with a presentation of complex post-traumatic stress disorder coupled with depressed mood and elevated levels of anxiety. Ms Manzoni's evidence is to similar effect.

30. The applicant was examined by Dr Ryan Barclay of the EQUIP Community Mental Health Service on, according to Mr Perkins first witness statement at paragraph 7, 27 January 2022 (Dr Barclay's letter following the consultation is dated 4 February 2022; it does not specify the date of the consultation itself). Dr Barclay concluded that it was likely that the applicant experienced post-traumatic stress disorder with difficulties around anxiety and depression, but that he did not have an underlying psychotic disorder.

31. I accept that the applicant's medical conditions, along with the trauma he is likely to have experienced on his journey to the United Kingdom, mean that he is a vulnerable individual, and that reasonable adjustments are required in my analysis of the credibility of his evidence. I take into account the guidance given in the Joint Presidential Guidance Note No. 2 of 2010 to that end and I calibrate my assessment of the applicant's evidence and credibility accordingly.

32. The medical evidence itself is, I find, neutral in relation to the issue of the applicant's age. Dr Barclay states under the "*Personal history*" section of his letter (internal page 3) that the applicant had been "misidentified with the wrong age of 26yo [sic] and has been treated as an adult, despite being 15-16yo." Under the section headed "*Impression*" (internal page 5), Dr Barclay again states that the applicant's age "has been misidentified by the home office [sic] and it is very clear he is not an adult based on his appearance and evidence from his brother."

33. In my judgment, Dr Barclay did not purport to give a medical diagnosis of the applicant's age. His analysis provides little reasoning as to the basis upon which he appeared to reach that conclusion. Dr Barclay said that he based his "impression" on the applicant's physical appearance and the "evidence" of his brother, Z. Z had not been present at the consultation, so Z's contribution to Dr Barclay's understanding of the situation must have come from the applicant himself, or from Mr Perkins. By recording the initial attribution of a date of birth in 1996 to the applicant in the "personal history" section of his letter, it appears that Dr Barclay was merely reciting the personal history that had been provided to him by someone at the meeting.

34. Under cross-examination, it was put to Mr Perkins, who was present at the consultation, that he must have been the source of Dr Barclay's summary of the applicant's history. Mr Perkins said he could not recall having said that. I find that surprising, since a large part of the focus of Mr Perkins' concern throughout his engagement with the applicant has been to resolve the disputes around his age. Further, in Mr Perkins' witness statement dated 7 February 2022, made shortly after the consultation with Dr Barclay, Mr Perkins wrote at paragraph 9:

> "I was able to give Dr Barclay the claimant's both personal and legal history. I explained that the claimant's age was being disputed by both the Home Office and the defendant."

35. I prefer Mr Perkins' written account to his oral evidence in this respect. I will return to my overall assessment of Mr Perkins' evidence below.

The decision of the First-tier Tribunal in Z's appeal

36. It is common ground that Z is the applicant's brother. Since there is a material overlap in some of the evidence considered by the FTT in its decision of 10 March 2022 concerning Z and the matters under consideration in these proceedings, namely the applicant's childhood circumstances in Afghanistan, matters relating to the death of his father, and Z's understanding of and evidence on those matters, the findings reached by the FTT are, in principle, capable of being relevant to my findings. This is a so-called "different party" case (as to which, see *Secretary of State for the Home Department v Patel* [2022] EWCA Civ 36 at [37] and [38]), whereby the principles in *Devaseelan (Second Appeals - ECHR - Extra- Territorial Effect) Sri Lanka* * [2002] UKIAT 00702 may apply with the appropriate modifications and caution.

37. It is not my role to make findings concerning the applicant's protection claim. However, to the extent the FTT reached findings concerning the applicant's father and the circumstances of his childhood, those findings are in principle relevant to my analysis of the applicant's age in this case. The FTT's findings were reached according to the lower standard applicable to protection proceedings, whereas the standard of proof applicable to my analysis is the balance of probabilities standard, meaning a degree of caution is required before adopting wholesale such findings reached on the basis of a lower standard of proof, within a different jurisdictional framework. It also appears that the FTT had the benefit of two earlier decisions reached by different constitutions of the FTT in relation to Z, which featured adverse credibility findings. I have not been provided with those decisions.

38. Against that background, the relevant findings reached by the FTT on 10 March 2020 are as follows:

    a. Z experiences learning difficulties and displays symptoms of mental illness (paragraph 38).

    b. On Z's evidence, his (and therefore the applicant's) father was killed when he, Z, was approximately seven years old (paragraph 44).

    c. Z was kept at home as a child and did not attend school (paragraph 45 and 46).

39. Z also claimed that he was only informed of his age by his mother upon his departure from Afghanistan. The brothers' claims as to how they knew their ages are either rigidly similar in a way that lacks credibility, or, in light of the FTT's findings, credible, albeit to the lower standard. That the FTT accepted Z's claim to have been confined at home as a child without attending school is capable of lending credence to the applicant's claim to have been brought up in similar circumstances.

'The photograph'

40. The photograph of the applicant, Z and their father is, in principle, significant. Since the applicant claims to have been born in 2008, on his case it must have been taken in 2009 or later, since he is a small toddler of one to two years in the image. Yet, Z's evidence to the FTT and the findings of the FTT were that the father was killed when Z was approximately seven years old. Since Z was assessed to have been born in 1998, if the father was killed when he was aged seven, that would date the image to have been taken in 2005 at very the latest, assuming the latest the image could have captured was immediately before the father died. In my judgment, the image is likely to have been taken much earlier than 2005.

41. At least two points tell against the above analysis.

42. First, Z's evidence as to his age when his father died does not appear to have been a disputed issue before the FTT, and so a degree of caution is required before holding findings on undisputed issues reached to the lower standard of proof in relation to Z against this applicant, in these proceedings which are governed by the balance of probabilities. Z only knew the details of when his father died as a result of what his mother told him.

43. Secondly, Z appears consistently to have maintained that his date of birth was incorrectly assessed by Thurrock Borough Council as 1998, whereas, in fact, he was born in 2000.

44. In relation to the first point, I accept that a degree of caution is required when ascribing significance to the contents and timing of the photograph in isolation. I will return to this point.

45. However, in relation to the second point, these proceedings cannot be used to mount a collateral challenge to the age assessment conducted by Thurrock BC in 2013. Z did not challenge the decision at the time. The applicant's solicitor, Cecilia Correale, writes at paragraph 12 of her witness statement dated 21 January 2022 that Z was not represented "at the time and failed to challenge the outcome of this assessment within the limitation period". The age assessment was dated 19 November 2013, and by 24 February 2014, Z was represented by Barnes, Harrild and Dyer in his asylum matter, since they accompanied him to the substantive asylum interview that was conducted on that date. At question 6, concerning Z's date of birth, there is a handwritten annotation that Z claimed to be 13½ years of age at November 2013, and that "*this may be subject to challenge Fisher Meredith Sols* [sic]". That interview was only a very short time after the three month limitation period for an application for judicial review expired (assuming Z's age assessment was served on the day it was concluded, 19 November 2013; in practice, there is usually a lag of several days), and Z was legally represented at the time. The reference to Fisher Meredith solicitors means that Z had clearly sought to engage solicitors to challenge the age assessment at the time. There is no evidence he sought to apply for the modest extension that would have been necessary to lodge an out of time application, assuming the age assessment was served on 19 November 2013. I will therefore proceed on the basis that the unchallenged assessment of Z's age by Thurrock BC was correct.

46. In my judgment, while a degree of caution would be required to determine

the applicant's present age based on a photograph of two small Afghan boys taken at the latest in 2005 in isolation, it is of potential relevance, in the round. The image does not show two boys with an eight year age gap, based on Z's claimed age, namely 22, and the applicant's claimed age, 14. Still less does it feature two boys with an age gap of even longer, namely nine to ten years, based on Z's assessed age (24), and the applicant's claimed year of birth, 2008 (making allowances for the fact that 1 January is a notional date). The difference in the photograph is, at most, four years. The older boy is four to five years of age. The younger is one to two years of age.

Review of the remaining witness and documentary evidence

47. The applicant claims he knows little of his age, as I have already observed above. His account is characterised by his claimed near-complete lack of knowledge or understanding of his age or date of birth. When he arrived in the UK and claimed asylum, he gave a date of birth of 1 January 2006 to immigration officials. The applicant's evidence is that the line with the interpreter, who attended by telephone, was poor, that it kept breaking up, and that his claimed date of birth was incorrectly recorded. I struggle to accept that the line would have been so poor as to prevent the applicant from conveying his case that he was born in 2008. A poor line would be audible to all participants, enabling remedial steps to be taken, e.g. reconnecting the call. Since the purpose of the applicant's initial discussion with immigration officers was to determine the applicant's age, it would be surprising if the Home Office failed correctly to capture something as central as the applicant's then claimed date of birth.

48. Further, the applicant's representatives have taken no steps to invite the Home Office to correct its records as to the applicant's claimed date of birth. That is despite the applicant's solicitors challenging an error in the 'IS97' form issued by the Home Office, on the basis that it incorrectly stated that the applicant had been subjected to a full *Merton*-compliant age assessment at the border. He had not, and a revised IS97 document was issued on 27 November 2021 which stated that the applicant's assigned age was based on his physical appearance which "very strongly suggested" that he was 25 years of age or older.

49. The applicant now maintains that he was born in 2008, but even that year, on his case, is simply relaying information that his mother provided for the first time during the hastily made arrangements for him to leave the UK. He claimed to one of his social workers that he had turned 15 on 21 March 2022, which would give a 2007 year of birth (see the notes of the review dated 4 April 2022 at page 101 of the supplementary bundle).

50. It is significant that the applicant has given inconsistent years for the year of his birth, namely 2006, 2007 or 2008. While I make allowances for the difficulty the applicant may experience in giving a coherent account of his age due to his vulnerability, I found his evidence to lack credibility. His evidence is either characterised by rigid adherence to what his mother is said to have told him, for the first time, in a hastily arranged journey out of Afghanistan, with an inability to provide any accompanying details, or variations in the age that he has provided on different occasions since

arriving in this country; 2006, 2007 and 2008. None of those claimed years of birth are consistent with the timing of 'the photograph', which was taken, at the latest, in 2005.

51. The applicant appears to have used two Facebook accounts. The first is the account that S is said to have set up, in name "AJ". The applicant had access to that account after his journey to the UK, until at least 14 September 2021, according to the screenshots at pages 1 to 9 of the Social Work Disclosure Bundle. The second account is that which was set up for him by Z, in the name of "WL", on 6 December 2021 (see paragraph 4 of Ms Correale's statement dated 22 August 2022), listing the applicant as a female with the date of birth of 1 January 2005.

52. I have a number of credibility concerns arising from the applicant's social media activity and accounts of his smartphone usage. In his first witness statement, which was dated 3 May 2022, the applicant said that he no longer has access to the "AJ" Facebook account set up for him by S because he had forgotten the password. He did not say when he had lost access (see paragraph 30), but it must have been after his arrival in the UK. That contrasts with the applicant's oral evidence, in which he said that the device had broken when it fell from his pocket, with no mention of the forgotten password. Under cross-examination, Z said that the applicant lost everything, including the broken phone, in the hotel room where he was staying. When he was cross-examined, the applicant didn't seem to know anything about losing everything in his hotel room but did maintain that his smartphone and SIM card were broken thus preventing access to the AJ Facebook account, with no mention of having lost access through having forgotten the password to that account. I find that the applicant has not provided the full details of his social media accounts to the respondent or to his solicitors. He has provided inconsistent explanations as to the fate of his original smartphone and Facebook account. His evidence lacks credibility. That is not to say he would have been expected to disclose the entirety of his private social media activity, but rather that his attempts to minimise his social media presence give rise to broader concerns about his overall credibility.

53. Having made allowances for his vulnerability, it is difficult to ascribe much weight to the evidence of the applicant. Even if it did attract weight, at its highest it would be an account of a conversation in which his mother told him about his age on a single occasion, having never discussed the topic before. Similar observations apply in relation to the applicant's Serbian ID card, which features a 2008 year of birth: it merely reflects the account the applicant relayed from his mother and was not assigned following any form of assessment. The year the applicant now relies upon as a result of the conversation with his mother, 2008, is inconsistent with the findings of the FTT that Z's evidence was that their father died when he, Z, was 7, in approximately 2005 given Z's 1998 date of birth.

54. I found aspects of Z's evidence to be evasive, even when making allowances for his vulnerability and mental health conditions. Z had a clear command of the questions that were being put to him and answered in detail. At times, when the questions became challenging, he answered back, as it were, by posing a question in response to that put to him by Mr Harrop- Griffiths.

55. I find that Z was able to identify lines of questioning that were adverse to his brother's case, such as when he was challenged about having said, in his own age assessment interview in 2013, that the applicant was 8 years old. In my judgment, Z understood the implications for the applicant's present claimed age of him having previously told Thurrock BC that the applicant was 8 when he, Z, left Afghanistan for the UK in 2013: by definition, the applicant could not have been born in 2008 if that were so.

56. Even making allowances for Z's vulnerabilities, I find that the account he gave to Thurrock in 2013 is likely to have been an accurate report of how old he thought his brother was at the time, in contrast to the present attempts he has made to resile from his earlier accounts. It is also what he said in his evidence before the FTT in February 2020: see paragraph 3 of Z's asylum witness statement dated 20 August 2019. I find that in his evidence before me Z was well aware of the adverse implications for the applicant's case of having given those previous accounts. As the questions in cross-examination started to probe this issue in further depth, Z's answers became deflective and sought to avoid the question. Even making allowances for Z's mental health conditions and mild learning disabilities, the impression I had of his evidence was of a young man able to identify that what he had said in 2013 and 2019 was problematic for the case his brother now advanced before me, and that he was taking steps through his evidence to resolve that perceived problem. The answers that he gave could not withstand scrutiny, for example by seeking to turn the question around, by asking Mr Harrop- Griffiths who told him how old the applicant was; asking Mr Harrop-Griffiths how old he, counsel, was; how he knew his brother was older than he claimed to be, and similar.

57. Mr Ullah's evidence was largely straightforward. He has extensive experience of working with young people for a number of years. His view is that the applicant is a child, although he was sure to emphasise that he was unable to offer a concluded view on that issue. He had not discussed the applicant's age with him and, of course, nor would he have had the benefit of viewing the materials that I have, in the round. At one point, when pressed by Mr Harrop- Griffiths, his evidence was straying towards the overly defensive, but in my judgment that was most likely due to the fact he was being pressed to agree that the applicant was at least 20 years old, which was at odds with the general thrust of his evidence. Mr Ullah's evidence attracts some weight.

58. I was not greatly assisted by the evidence of Mr Perkins. Perhaps the most significant feature of Mr Perkins' evidence is that his opinion as to the applicant's age as a child is undermined by the steps he took, on 9 February 2022, to sign the applicant up to an English course for those aged over 19 at a Further Education college. In my judgment, doing so was either wholly inconsistent with his stated view that the applicant is a child, or revealed a significant disregard for the safeguarding of someone who was, on Mr Perkins' evidence, a young and vulnerable child, thereby giving rise to broader concerns about his professional judgment.

59. Mr Perkins' role in signing the applicant up with the college, and his wider role in the applicant's social care provision, were discussed at a meeting with the applicant's social workers on 17 March 2022: see page 152 of the

supplementary bundle. The meeting notes record that Mr Perkins remained silent when he was asked to opine as to the applicant's age ("*Kevin and his manager stayed silent and would not give a view*"); in his oral evidence before me, Mr Perkins claimed not to remember being asked for an opinion on the applicant's age. I struggle to accept that he was unable to recall being asked for his opinion as to the applicant's age since his opinion as to how old the applicant was struck at the heart of the issue the meeting was convened to discuss. My concerns about the broader actions of Mr Perkins in this respect echo the observations of the respondent's officials following that meeting, which state:

> "If Kevin genuinely believed [the applicant] to be 14 (which the applicant claimed to be at the time) this was highly inappropriate and unprofessional even if to engage [the applicant] in some form of positive activity such as education. The fact that the college did not question the applicant's age also raises doubts about his claimed age."

60. Mr Perkins sought to address his actions in this respect in his supplementary witness statement, in which he said (paragraph 2) that he had enrolled the applicant because he had been assessed to be an adult, so he had no option but to enrol the applicant at an adult college. In my judgment, that does not explain why or how it could possibly be appropriate to enrol a 14 year old boy in an adult education setting. It may explain *how* to enrol a young boy in an adults-only setting by evading the age-based restrictions imposed by the college, but it does not adequately explain *why* it was appropriate to do so. Nothing in Mr Perkins' oral evidence has persuaded me otherwise.

61. Moreover, by 9 February 2022, Mr Perkins had already been appointed to be the applicant's litigation friend (see paragraph 4 of Bennathan J's order dated 28 January 2021) and so would have been aware the applicant had applied for interim relief, and that Bennathan J had given directions for an abridged timetable for an Acknowledgement of Service to be served by the respondent. On 18 February 2022, Bourne J granted interim relief, which led to the applicant being removed from the course on which Mr Perkins had enrolled him. As his caseworker at the Baobab Centre and litigation friend in these proceedings, Mr Perkins should have been well aware of the steps in the litigation process (indeed, on his written evidence he had fully explained such steps to Dr Barclay at the consultation at the same time: see paragraph 9 of his witness statement dated 7 February 2022). Further, the social care notes reveal Mr Perkins' detailed awareness of the later stages of the litigation; for example, at a meeting with the applicant's social workers on 30 June 2022, concerning Judge Mandalia's social media order: see page 93 of the supplementary bundle. In my judgment, there was no justification for Mr Perkins taking matters into his own hands in a manner that was wholly inconsistent with the case he supported the applicant in advancing, which involved placing someone he considered to be a young boy with a very young psychological functioning age into an adults-only environment, representing to the college that the applicant was aged over 18.

62. The focus of much of what Mr Perkins said in his oral evidence was the applicant's "psychological age". Upon being pressed by Mr Harrop-Griffiths

in cross-examination, it took a number of attempts for Mr Perkins to concede that the concept of "psychological age" is divorced from chronological age, which it plainly is. If any authority for that proposition be needed, see the quote from Lady Hale in *Croydon* at paragraph 22, above ("…'child' is undoubtedly defined in wholly objective terms…"). In cross-examination, Mr Perkins was reluctant to ascribe an age to the applicant, despite his repeated insistence that he was a "young person"; it took Mr Harrop-Griffiths several attempts to secure Mr Perkins' clarification as to the applicant being under the age of 18.

63. Mr Perkins' evidence attracts significantly less weight as a result of the above factors. Although he has had the benefit of lengthy periods of exposure to the applicant, his actions have at times undermined his view that the applicant is a child. I found aspects of his evidence to be evasive. It attracts little weight.

64. The final witness was Ms Manzoni. Her qualifications as a psychotherapist and counsellor were not challenged. She has particular expertise of working with adolescents and young people and has counselled the applicant weekly since January 2022. I have addressed the clinical implications of her evidence above, although I had in mind, as at all times, my analysis of the evidence in the round. This case was Ms Manzoni's first appearance as a witness in age assessment proceedings.

65. Ms Manzoni has not provided evidence in the form of an expert report and nor was her evidence expressed in the terms one would expect an expert's report to be framed, for example by applying the guidance at paragraphs 23 to 27 of *MOJ & Ors (Return to Mogadishu) Somalia CG* [2014] UKUT 00442 (IAC), or by referencing and reviewing the relevant sources. However, her evidence was powerful and impassioned. Her engagement in her work, and this applicant, is evident. She explained at some length under cross-examination what she considered to be the "psychological traits" of the functioning of the mind, stating that the applicant's "psychological age" is 12 to 16, but that he functions as a much younger child. She explained that she defined the psychological traits based on "neuroscience and development", and that young people could generally be categorised as being in early childhood, "in the middle", early adolescence from 11 to 13, puberty from 13 to 15, and late adolescence from 17 to 24. She concluded that the applicant is in puberty, and that he must be aged 11 to 14.

66. Putting to one side the fact that Ms Manzoni's witness statement was not in the form of a referenced and sourced expert report, the difficulty with her evidence is that it relies on categorising so-called psychological and other traits of generic categories of young people in the absence of any empirically based reference point concerning boys from Afghanistan. It is well established that in age assessment cases, in particular, there are very few reference points against which to compare physical or emotional characteristics in order properly to assess an individual's age.

67. At paragraph 16 of *Solihull*, the Vice President addressed the lack of reference data concerning physical development, in these terms:

> "The difficulty is exacerbated by the lack of any clearly-based

> data. In relation to Afghans in particular, our understanding is that there is no group of Afghans in Afghanistan of certain age. It is obviously difficult to see how the assessment of one individual can be justified if it is based not on similarity to the development of another individual whose age is known, but merely on similarity of development to another individual whose age is also only assessed. Secondly, those individuals who raise questions of the assessment of their age typically have a history, or claimed history, beginning with childhood and early youth in a country of relative poverty, continuing with a long and arduous journey that is claimed to have taken place during their mid-teens, and concluding with a period living in a country of relative affluence such as the United Kingdom."

68. As to mental development, he said, at paragraph 19:

> "So far as mental development is concerned, it is very difficult indeed to see how any proper assessment can be made from a position of ignorance as to the individual's age. Most assessments of mental development are, in essence, an assessment of whether the individual is at average, or below or above average, for his chronological age. Without knowing the age, a person who appears to have a mental age of (say) 15 may be 15, or he may be a bright 13 or 14 year old, or a dull 16 or 17 year old. There is simply no way of telling."

69. Ms Manzoni's evidence appears to be based on the assumption that psychological traits in young people are capable of analysis against an objective reference point. That cannot be right, as she later accepted, by recognising that a range of factors go to a person's psychological development, such as their environment, their social interactions, friendships and life experience. In fairness to Ms Manzoni, she recognised that she could not arrive at a numerical assessment of a person's chronological age. She said that this applicant's attitudes towards, and relationships with, authority figures are characteristic of a child; he thinks adults hold all the power, she said.

70. The greatest value of Ms Manzoni's evidence is that she has had the benefit of spending an hour with the applicant on a weekly basis since January 2022. But even those interactions are limited; she does not appear to have seen the applicant "going about his ordinary life" (*Solihull* at paragraph 19), and her contact with him has been in the relatively controlled environment of her consultations. In addition, as the applicant's therapist, Ms Manzoni has, by definition, had cause to engage with some of the most traumatic features of the applicant's past, which include flashbacks from his journey to the UK, intrusive imagery, insomnia, and his consequential reduced ability to deal with stress (see paragraph 3 of her statement). Understandably, those are matters someone in the position of this applicant may wish to discuss with their psychotherapist, as this applicant appears to have done. What Ms Manzoni's evidence does not do is address whether the heightened focus in her sessions on the applicant's traumatic life experiences could be responsible for what appear, in her opinion, to be the applicant's younger traits. Under cross-examination, Ms

Manzoni confirmed that it was no part of her role to consider evidence from other sources, or even address how the applicant manages in everyday life outside their sessions. Her opinion, she accepted, is based on the confines of her interactions with the applicant as his therapist.

71. For these reasons, while I accept that the opinions of Ms Manzoni are genuinely held, and that she did her best objectively and impartially to assist the tribunal, her evidence is largely neutral, and does not take matters much further.

Conclusion

72. I draw the above analysis together, and deal with any relevant remaining submissions not already addressed, in the following terms.

73. First, the medical evidence was neutral as far as the issue of the applicant's age was concerned.

74. Secondly, the findings of the FTT on 10 March 2020 are relevant to my assessment; the FTT observed that Z's evidence was that he was approximately seven when his father died, meaning that the photograph must have been taken at the very latest in 2005, based on Z's 1998 date of birth.

75. Thirdly, 'the photograph' is, in light of my overall analysis of all remaining evidence, a significant document, especially when placed alongside the findings reached by the FTT, and Z's 1998 date of birth. Despite the caution with which that document may be used as a basis to extrapolate dates, it nevertheless does not reveal two boys with an eight or nine (or even ten) year age gap. The difference in age is likely to be approximately four years, at most. That would suggest the applicant was born in 2002.

76. Fourthly, the evidence of the applicant attracted little weight, and the weight attracted by his witnesses was, when taken in the round, largely neutral. The applicant has given differing accounts of his age, and, at its highest, the provenance of his knowledge of the 2008 date of birth he now relies upon (as opposed to the alternative dates in 2006 and 2007) is a hasty conversation with his mother, on the final occasion he saw her. He has not given a full picture of his social media presence and has sought to explain the fact he no longer has access to the "AJ" Facebook account with inconsistent explanations.

77. The evidence of Z attracted little weight, and I reject his attempts to distance himself from his 2013 account of the applicant being aged 8 when he left the country in 2013. I accept that the cultural tradition in Afghanistan does not celebrate birthdays, but there is no evidence that day to day life passes with no general awareness or appreciation of people's ages. Indeed, Ms Benfield's reliance on the Human Rights Watch article *This is our opportunity to end the Taliban's use of child soldiers* suggests that there is a sufficient cultural awareness of children's ages in Afghanistan to enable the deplorable practice of recruiting child soldiers to target 12 or 13 year old boys, with indoctrination beginning as early as the age of 6. The article gives examples of families whose 15 and 16 year old children were killed in combat following their recruitment as child soldiers.

It was not until the applicant was asked a leading question by Ms Benfield in re-examination that he introduced, for the first time, his claimed lack of *any* awareness of ages and stages of development in Afghanistan ("*Before you left Afghan, did you understand the concept of age, with someone getting older as time passed?*"). I find that Z would have been aware of the applicant's approximate age upon his own departure from Afghanistan, but that his understanding of the applicant's age would not necessarily have been accurate.

78. Mr Perkins' evidence attracted little weight, for the reasons set out above. Ms Manzoni's evidence was well-meaning but neutral. Mr Ullah's evidence attracted some weight, to which I shall return.

79. Fifthly, it is nothing to the point, as Ms Benfield submitted, that there were no witnesses from the respondent and that the age assessment itself bears little weight. Neither party bears the burden of proof, and, in any event, the local authority has provided social care materials, challenged the evidence advanced by the applicant, and made detailed submissions accordingly. I have not based my analysis on the contents of the age assessment, so any concerns advanced by Ms Benfield as to the process and content of that document fall away.

80. Drawing this together, the strongest evidence the applicant is able to rely upon is that of Mr Ullah, who has had the benefit of observing the applicant go about his everyday life. Mr Ullah's evidence that the applicant's physical appearance and demeanour are suggestive of the applicant being a child attract weight. However, his opinion was reached without considering the broader sea of evidence I have heard and analysed above. He has not discussed the applicant's age with him, and nor, it seems, has he considered the chronology of when the photograph was taken by reference to the departure of Z from Afghanistan and the age gap between the applicant and Z. I must set the weight which Mr Ullah's evidence attracts against the broader considerations telling in the other direction.

81. I find that the Photograph was taken at the latest in 2005, when Z was approximately 7 years old, but that it was likely to have been taken considerably earlier. Z left Afghanistan in 2013, when he was 15. At the time, as Z said when he arrived in the UK, the applicant, his younger brother, was 8, but that may have been inaccurate. I find that the photograph shows two young boys who were, at the most, four years apart in age. Since Z was born in 1998, that gives the applicant a year of birth of 2002. He would have been approximately 11 when Z left Afghanistan in 2013. That age is consistent with his physical appearance. The applicant's evidence as to his claimed date of birth, at its highest, is wholly reliant upon, and rigidly reflective of, an account given to him by his mother, which was inconsistent with Z's evidence before the FTT. Although 11 is older than the figure of 8 given by Z during his own age assessment, there is a margin for error in relation to such matters, and Z's own evidence was that he did not know details of his brother's actual age.

82. Doing the best I can, I find to the balance of probabilities standard that the applicant was born on 1 January 2002, so that when he arrived in the UK in

September 2019, he was 19 years old.

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