



Neutral Citation Number: [2024] EWHC 2661 (Admin)

Case No: AC-2024-LON-003049

**IN THE HIGH COURT OF JUSTICE**  
**KING'S BENCH DIVISION**  
**ADMINISTRATIVE COURT**

Royal Courts of Justice  
Strand, London, WC2A 2LL

Date: 22 October 2024

**Before :**

**THE HONOURABLE MR JUSTICE PEPPERALL**

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**Between :**

**THE KING**  
**(on the application of MS by his**  
**litigation friend Erinç Argün Kayim)**

**Claimant**

**- and -**

**KENT COUNTY COUNCIL**

**Defendant**

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**Antonia Benfield** (instructed by **Osbornes Solicitors LLP**) for the **Claimant**  
**Joshua Swirsky** (instructed by **Invicta Law Ltd**) for the **Defendant**

Hearing date: 16 October 2024  
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**Approved Judgment**

This judgment was handed down remotely at 2pm on 22 October 2024  
by circulation to the parties by email and by release to the National Archives.

## **THE HONOURABLE MR JUSTICE PEPPERALL:**

1. On 27 October 2022, MS entered the United Kingdom unaccompanied and claimed asylum. He is an Afghan national and asserts that he was born on 25 Mizan 1385 on the Afghan calendar. Such date converts to 17 October 2006 on the Gregorian calendar and so, on his case, he turned 18 the day after the hearing before me. Kent County Council has carried out an age assessment and concluded that he is significantly older. It has assigned him the presumed date of birth of 16 October 2000.
2. By this claim for judicial review, MS challenges Kent's age assessment. He relies heavily on his tazkira, being an official identity document issued by the former Islamic Republic of Afghanistan. Following the age assessment, MS provided evidence to Kent seeking to establish the authenticity and reliability of the tazkira. The local authority is now considering that evidence and reviewing its age assessment. Meanwhile, MS seeks interim relief requiring the local authority to treat him in accordance with his claimed age under the Children Act 1989 pending determination of his age or further order.
3. At the conclusion of the hearing, I announced that I would grant interim relief in this case but thereafter stay these judicial review proceedings pending completion of the local authority's review. This judgment set out my reasons for making those orders.

## **BACKGROUND**

4. MS arrived in the United Kingdom by small boat on 27 October 2022. On arrival, he told Home Office officials that he was born on 15 October 2006. He now explains that he knew his date of birth to be 25 Mizan 1385 but did not himself know how to convert Afghan dates to the Gregorian calendar. The confusion, he says, arose because he relied on a fellow migrant who inaccurately converted his birthday to 15 rather than 17 October.
5. On 28 October 2022, the Home Office wrote to MS indicating that his claimed age had not been accepted. The letter continued:

“However, since your physical appearance and demeanour does not very strongly suggest that you are significantly over 18 years of age, the Home Office will treat you according to the processes designed for handling asylum claims from children, until further evidence of your age becomes available.”
6. On 7 November 2022, the Home Office changed its position and dispersed MS to accommodation for adult asylum seekers. It explained that MS had failed to produce any satisfactory evidence to substantiate his claimed date of birth and that two Home Office members of staff had assessed that his physical appearance and demeanour “very strongly” suggested that he was significantly over the age of 18.
7. On 23 January 2023, the charity Care4Calais expressed concern that MS was a child who was being inappropriately housed in adult accommodation. Two social workers employed by Kent County Council met with MS on 7 February 2023. They formed the view that MS did not actually know his date of birth and that he was likely to be older than he claimed. Nevertheless, it was determined that an age assessment was required and that meanwhile MS

should be accommodated as a child pursuant to s.20 of the Children Act 1989. On 29 March 2023, he was taken into care.

8. On reception at Appledore Reception Centre in April 2023, a support worker recorded their observation that MS was under 18 and suitable for children's services. Against this, the manager and support worker who worked with MS for a longer period in 2023 considered that MS's physical appearance and challenging behaviour towards staff and in the classroom were not consistent with his claimed age.
9. In January 2024, Kent commenced the age assessment. The assessment was detailed and conducted over a number of sessions in January, February and June 2024 by two experienced social workers. On 11 June 2024, MS was informed that the council had determined that he would be deemed to be an adult with a date of birth of 16 October 2000. In making that assessment the assessors considered a number of matters:
  - 9.1 The assessors considered MS's physical appearance. They noted that he had a slim build and was around 5 feet 6-7 inches in height. The assessors noted some signs of crow's feet and felt that the skin on his face appeared more worn than they would expect for a 17-year-old. He had a lot of acne scarring which suggested having completed puberty prior to the assessment. Subsequently, however, the assessors reported that MS had been prescribed cream for his acne which, they noted, could suggest that he was still going through puberty.
  - 9.2 The assessors noted that MS spoke softly but his voice had a deep tone to it, again indicating that he had completed puberty. They noted that MS became more animated when answering questions and that the volume and pitch of his voice rose when he felt strongly about the subject of discussion.
  - 9.3 They noted that he was clean shaven but that social media images dated between March 2020 and January 2024 showed him with facial hair for at least the last four years. The assessors considered that there were discrepancies between the appearance of a much younger child in the tazkira picture and social media pictures taken around six months before and after the date when the tazkira was issued.
  - 9.4 They noted guidance from the Royal College of Paediatricians that from 14-17 most boys will be either in puberty or completing puberty, which the college defines as the date when the boy's voice has fully broken or he grows a moustache or has early facial hair growth.
  - 9.5 The assessors considered MS's demeanour. They reported that he was at times challenging, assertive, belligerent and sarcastic; and concluded that his interactions with professionals were not what they would expect from young people of MS's claimed age. Against that, they took into account his limited access to education in Afghanistan, his reported childhood experience of having been beaten by an imam who was teaching him the alphabet, and his positive engagement with English classes at Appledore. Further, they noted that his claimed age might be supported by his apparent vulnerability and evident emotional distress when talking about his more difficult experiences.
  - 9.6 The assessors found that MS's account of his childhood in Afghanistan was lacking in detail and that it was difficult to establish a reliable timeline. Further, they considered him to be inconsistent on questions surrounding his use of mobile phones and contact with his family.

- 9.7 The assessors took into account other professionals' impressions of his age while he had been in care.
- 9.8 The assessors noted MS's independence but balanced that against the fact that he had had to look out for himself from a young age, including by working as a young boy.
- 9.9 The assessors considered a letter from Elliott Johnson of the National Document Fraud Unit dated 13 September 2023 in which he identified a number of concerns about MS's tazkira. Specifically, Mr Johnson compared the overprint and crest with comparison material and concluded that they had been produced in a different print process. He noted discrepancies in the ink figures of the serial number which he concluded appeared to have been altered from 18002540 to 18992530. Further, he considered that the manual entries for MS's date of birth and age appeared to be in a slightly different ink colour. Mr Johnson observed, however, that he was unable to say whether any alterations had been made officially and that he was unable to comment conclusively on the authenticity of the tazkira.
- 9.10 The assessors observed that it appeared that the only way that the official issuing the tazkira could arrive at MS's date of birth was to count back 14 years from the date that he met MS and his mother. They observed that such assessment was therefore "completely unreliable".
- 9.11 Finally, they considered the Home Office's observations that he was believed to be an adult based on his physical appearance, deep voice and inconsistencies in his interviews.
10. The authenticity and reliability of the tazkira are plainly important issues in this case. A certified translation of the document indicates that it was issued on 25/07/1399 which converts to 16 October 2020. The certified translation of the entry for MS's date of birth and age reads as follows:
- "Based on physical appearance age assessed as 14 years old in 1399  
Date of birth: 25/07/1385"
11. There is a photograph attached to the tazkira. The assessors described it as of a much younger child. While the assessors rightly noted the unreliability of assessment purely on physical appearance, it is not argued that the tazkira photograph is itself inconsistent with the suggestion that MS was 14 at the time that it was taken.

### **EXPERT EVIDENCE**

12. Both parties seek to rely on expert evidence in respect of the tazkira. Neither party had, however, sought or obtained permission to rely on such evidence. Rule 35.4(1) of the Civil Procedure Rules 1998 provides that no party may call an expert or put in evidence an expert's report without the court's permission. The parties appeared to be labouring under the mistaken belief that such rule does not apply to judicial review proceedings. It does and it is important, yet again, to draw that to the attention of practitioners in this field. Further, it is incumbent upon parties to identify the need for expert evidence as early as possible. The 2024 edition of the Administrative Court Guide makes these points in clear terms:
- "23.2.1 A party wishing to rely on expert evidence must obtain the court's permission to do so. Permission will be given only where expert evidence

is reasonably required to resolve the proceedings. There is no special dispensation from compliance with these rules in public law cases. The rules must be observed ...

23.2.5 A claimant must give careful thought to whether to apply for permission to adduce expert evidence. Any application for permission to adduce expert evidence, and for appropriate consequential directions must be made at the earliest possible opportunity. Ideally, this should be done in the Claim Form or, if later, as soon as the need for it arises.”

13. More broadly, the Guide makes the important point at paragraph 2.1.2 that the public nature of judicial review proceedings “does not mean that the court will overlook or tolerate breaches of directions made by the court or of obligations imposed by the Civil Procedure Rules or Practice Directions or by this Guide”. At paragraph 2.1.3, the Guide observes that the importance of procedural rigour is reflected in a number of sections of the Guide. It then draws attention to three specific areas, one of which is the need “to ensure that applications are made at the earliest stage possible and not left to the last minute (for example, see ... para. 23.2 for applications to adduce expert evidence)”. None of this is new; see, for example, the comments of Dame Victoria Sharp P in R (AB) v Chief Constable of Hampshire Constabulary [2019] EWHC 3461 (Admin), at [118].
14. Although neither party had previously identified the need for permission, each seeks permission to rely on expert evidence orally and neither, for understandable reasons, takes any point about their opponent’s failure to make a formal application at an earlier stage.

#### DR GIUSTOZZI

15. Antonia Benfield, who appears for MS, first seeks permission to rely on a report from Dr Antonio Giustozzi dated 21 July 2024. Dr Giustozzi is a senior research fellow at the Royal United Services Institute and is an author who has written a substantial number of books, journals and papers on recent Afghan politics, wars and society. Dr Giustozzi was provided with a copy of MS’s tazkira. He then reported:

“4. I passed on the copy to my researcher Saleem Safi, based in Kunar. Mr Saleem Safi is a journalist and researcher, who has participated in projects with me in the past, carrying out interviews with police and Taliban in the area. He always performed satisfactorily and reliably in his tasks. In verification, Mr Safi often found that the documents or the fact that he was tasked to certify were not genuine, adding to my trust for his work. He uses his contacts with local elders and Taliban developed during past projects to arrange meetings for verification purposes.

5. Mr Saleem Safi sought to make enquiries about [MS]’s tazkira by visiting on 14 July 2024 the Kabul Civil Registration Directorate located in the northern part of the city and meeting Mr Naim Pakteen, the directorate’s head of the inspection department.

6. Mr Safi shared the copy of [MS]’s tazkira. Mr Pakteen began to review it in the records. He found a match for the tazkira shared with him and confirmed that it is authentic. Mr Safi also asked Mr Pakteen whether the tazkira was the first one issued to [MS] and whether the date of birth was

taken from the birth certificate. Mr Pakteen replied that [MS] had been issued another tazkira earlier and that the date of birth was indeed taken from the birth certificate.”

16. Ms Benfield maintains that Dr Giustozzi is instructed as an expert in many tazkira cases and stresses the practical difficulties in obtaining evidence from the Afghan authorities following the return of the Taliban. That is as maybe and I do not underestimate the practical difficulties in these cases, but it is important to recognise that the only opinion offered by Dr Giustozzi is that his agent has apparently performed satisfactorily and reliably in the past, although he does not explain how such performance has been verified.
17. In my judgment, this is not expert evidence at all. Rather it is hearsay evidence as to what is recorded in the official records in Kabul. As to that:
  - 17.1 The Kabul records themselves are not being put directly in evidence.
  - 17.2 Evidence as to what those records contained even directly from Mr Pakteen would have been hearsay.
  - 17.3 Here, Dr Giustozzi’s evidence as to what Mr Safi told him that Mr Pakteen was able to confirm after consulting the records is multiple hearsay evidence.
  - 17.4 Such evidence is admissible under s.1 of the Civil Evidence Act 1995, although the fact that it is multiple hearsay plainly goes, among other matters, to the weight to be attached to the evidence.
18. Accordingly, I refuse permission to rely on Dr Giustozzi’s report as expert evidence but I have considered his report as hearsay evidence of the Afghan official records.

**DR ZADEH**

19. MS also relies on a report by Dr Jaweed Hassan Zadeh dated 13 August 2024. Dr Zadeh is a forensic document examiner with particular expertise in examining Afghan tazkiras. He has qualifications in various languages including a certificate in Pashtu from the University of Bradford and a diploma in police interpreting in Dari from the Chartered Institute of Linguists. He is studying for his M.A. in Applied and Forensic Linguistics. As well as giving expert evidence on disputed tazkiras, Dr Zadeh has carried out language analysis for the determination of someone’s origin in over 300 cases.
20. Dr Zadeh concluded that the tazkira was genuine. In reaching that view, he considered the format, layout, texture and size of the tazkira against known authentic documents. He considered the language, grammar, and use of terminology against what would be expected. He considered the inks, logos, emblems, rubber stamp, signatures and the department which had issued the document. Dr Zadeh concluded that the tazkira was in the correct format and printed on the standard paper which was used by the Islamic Republic of Afghanistan when issuing tazkiras in 2020. The coat of arms was consistent with that then used in Afghanistan, the heading was correct, the rubber stamp was applied in the correct manner, the serial number of the tazkira was properly applied using a stamp, and the ink used in such stamp displayed the expected characteristics. All of the security features of the document were present and correct, the appropriate cells were completed, and the provincial

information was correctly recorded. The signatures were consistent with the style used by government officials in Afghanistan and the use of Pashto for the printed part of the document and Dari for the handwritten entries was correct. Further, the document displayed appropriate wear and tear.

21. Dr Zadeh then commented on Mr Johnson's letter. He reported that the inks were the correct inks that would be used when issuing a tazkira and explained that difference of pressure when applying a handheld stamp can cause the irregularity identified in the serial number. He was heavily critical of Mr Johnson's lack of experience in assessing the authenticity of tazkiras.
22. In my judgment, Dr Zadeh's expert evidence of his forensic examination of the tazkira is reasonably required to resolve these proceedings and I give permission to MS to rely on his evidence on that issue. I do not, however, give permission to MS to rely on Dr Zadeh's evidence as to two further matters:
  - 22.1 First, Dr Zadeh and a colleague compared the photograph on the tazkira with MS's facial features during a video call. They concluded that the photo matched MS's facial likeness. In my judgment, facial recognition evidence is not reasonably required at this stage since Kent has not sought to argue that the photograph on the tazkira is not one of a more youthful MS. Even if such matter should later be put in issue, any expert evidence on the point would have to come from a facial mapping expert.
  - 22.2 Secondly, he and his colleague tested MS's knowledge of the Pashto and Dari languages. They found that MS's linguistic ability and dialects were consistent with MS's claimed area of origin. Again, such evidence is not reasonably required at this stage since Kent has not challenged that MS is an Afghan national who comes from Laghman province.
23. Should these proceedings continue after the stay that I have ordered, I direct that MS must re-serve Dr Zadeh's evidence excising those matters on which permission has been refused. That may be more than mere formal mechanics since what will be critical is whether the removal of those two pillars for the expert's reasoning affect his expert opinion in the case.

#### MR JOHNSON

24. Joshua Swirsky, who appears for the local authority, seeks permission to rely on an expert report by Elliott Johnson dated 25 September 2024. Mr Johnson is an Immigration Officer and Specialist Document Examiner employed by the Home Office. It will be recalled that his earlier 2023 analysis was taken into account by the local authority when assessing age in this case.
25. In his 2024 work, Mr Johnson examined the tazkira using a video spectral comparator and used the comparison information upon official Afghan tazkiras that was available to him. He noted that the photograph bore staple holes but it was not stapled to the tazkira and there were no corresponding staple holes in the substrate of the document. Mr Johnson questioned the seventh digit of the serial number which he concluded, after infrared

fluorescence testing, had been manually changed from 4 to 3. He also noted some lesser discrepancy in infrared fluorescence testing of the third and fourth digits.

26. Mr Johnson concluded that the tazkira contains an altered serial number but was again unable to comment on whether the alteration had been made officially or not. As in 2023, he confirmed that he was unable to comment conclusively on the authenticity of the tazkira.
27. In my judgment, Mr Johnson's evidence is reasonably required to resolve these proceedings and I give permission to Kent to rely upon it. Perhaps reflecting his greater familiarity with criminal proceedings, Mr Johnson's expert declaration referred to his understanding and compliance with Part 19 of the Criminal Procedure Rules rather than Part 35 of the Civil Procedure Rules. No point is taken by Ms Benfield and I have considered this evidence in determining the application for interim relief. Should, however, these proceedings continue after the stay, I direct that Kent must re-serve Mr Johnson's evidence with a compliant declaration pursuant to r.35.10.

## **THE APPLICATION FOR INTERIM RELIEF**

### THE LAW

28. There is no dispute as to the proper approach to this application:
  - 28.1 Subject to other factors, permission to apply for judicial review of an age assessment on the basis of factual error will normally be granted where the material before the court raises a factual case which, taken at its highest, could properly succeed in a contested factual hearing: R (FZ) v. London Borough of Croydon [2011] EWCA Civ 59.
  - 28.2 The test for granting interim relief in judicial review proceedings is that contained in American Cyanamid Co. v. Ethicon Ltd [1975] AC 396 as modified for public-law cases: R (Medical Justice) v. Secretary of State for the Home Department [2010] EWHC 1425 (Admin). Accordingly:
    - a) The Claimant must demonstrate a serious issue to be tried, namely a real (as opposed to fanciful) prospect of success of succeeding at trial.
    - b) The court must determine where the balance of convenience lies. In public law proceedings, this will involve taking into account not just the private interests of the parties but the wider public interest. The court should take the course which appears to offer the best prospect of avoiding or minimising injustice: R v. Secretary of State for Transport, ex parte Factortame Ltd (No. 2) [1991] A.C. 603.

### SERIOUS ISSUE TO BE TRIED

29. Ms Benfield stresses that at this interim stage MS does not need to establish that he has a strong case. She argues that, while it might be difficult to predict how the Upper Tribunal will determine age in this case, it cannot be said that MS's claim is unarguable. She submits that the tazkira is central to the case and that there is no conflict of expert evidence as to authenticity given that Mr Johnson resiled from giving an opinion on that issue. Citing FZ, she urges the court to take MS's case at its highest.



30. Mr Swirsky submits that the age assessment in this case was extremely detailed and conducted by very experienced social workers. There were multiple interviews and MS had every opportunity to clarify the problems with his account. Although he acknowledges that they were not before me, Mr Swirsky relied on the social media images which, the assessors concluded, were at odds with the image on the tazkira. He submits that it was evident that MS did not know his date of birth. As to the expert evidence, he submits that the difficulty with Dr Zadeh's report is that he had not identified the alteration of the serial number. Such evidence is, he argues, very concerning and gives rise to doubts as to the authenticity and reliability of the tazkira.
31. Even on MS's case, he turned 18 the day after the hearing. Accordingly, the reality was that relief was not sought in order to ensure that he is looked after as a child under s.20 of the Children Act 1989 but in order to require the local authority to provide him with the support that is required to be given pursuant to s.23C to children who were formerly looked after.
32. Such statutory obligation is triggered in the event that a child is looked after for a period of at least 13 weeks after the age of 14 and for at least 24 hours at the age of 16 or 17: Sch. 2, para. 19B(2)(b) and Care, Planning, Placement & Case Review (England) Regulations 2010, reg. 40. Accordingly, the relevant issue for the purpose of the claim for interim relief is not whether MS has an arguable case that he was born on 17 October 2006 or that Kent erred in concluding that he was born in or around October 2000, but rather whether MS has an arguable case that he is entitled to s.23C support. Given that there is no issue that he was at least 14 when he was taken into care on 29 March 2023, that in turn depends on whether MS has an arguable case that he did not turn 18 before 29 June 2023. Thus, the goalposts are not to establish an arguable case that MS was born in October 2006 or that Kent was wrong in its assessment, but that MS was born no earlier than 29 June 2005.
33. I acknowledge the detailed and careful age assessment in this case. There are a number of powerful pieces of evidence that support the council's assessment. Against that, there are a number of factors which, in my judgment, support MS's case that he was born no earlier than 29 June 2005:
  - 33.1 First and foremost, there is credible expert evidence before the court that the tazkira is a genuine identity document that would have been issued in Afghanistan in 2020. The inconsistency in the serial number does not, as Mr Johnson accepts, allow the court to conclude that it is not authentic or that anyone, other than perhaps the issuing official, has altered the document.
  - 33.2 Secondly, there is some hearsay evidence that a copy of the tazkira can be reconciled with official records held in Kabul.
  - 33.3 Thirdly, it was the Home Office's initial assessment on 28 October 2022 that, while it disputed MS's claimed age, this was not a case where MS's physical appearance and demeanour very strongly suggested that he was significantly over 18.
  - 33.4 Fourthly, while the preponderance of social-worker opinion was that MS was older, the initial impression at Appledore in April 2023 was that MS was under 18.
  - 33.5 Fifthly, the prescription of cream for his acne could suggest that MS was still going through puberty.

- 33.6 Sixthly, MS's demeanour might in part be explained by his difficult experience of education in Afghanistan.
- 33.7 Seventhly, MS's case might be supported by his apparent vulnerability and evident emotional distress when talking about his more difficult life experiences.
- 33.8 Eighthly, MS's independence is explicable by those experiences that meant that he had to look out for himself from a young age.
34. In addition, MS's case gains further support from the evidence of Erinc Argün Kayim and Jessica Kelly from the Refugee Council:
- 34.1 Ms Kayim is a children's advisor in the Age Dispute Project at the Refugee Council. Part of her role includes undertaking a referral screening interview with age-disputed young people. She met MS in September 2024 and found his appearance and demeanour to be consistent with his claimed age of 17.
- 34.2 Ms Kelly is a caseworker who has worked with MS since December 2023. She concluded that MS's appearance, demeanour, support needs, and interactions with adults were consistent with his claimed age.
35. Ms Kelly's assessment is not confirmed by a statement of truth but is set out in her Age Assessment Observation Report. More fundamentally, on proper analysis both Ms Kayim and Ms Kelly seek to give both factual evidence of their observations and interactions with MS and opinion evidence as to his true age. Mr Swirsky, however, takes the pragmatic approach that - by the same token - any evidence of age from the local authority's social workers is opinion evidence and that age-observation reports are placed before the Upper Tribunal in every age assessment case. It is therefore common ground that, at least for present purposes, the court should consider this material by way of balance to the authority's own age-assessment evidence.
36. There is also very weak evidence that the reported date of birth on the tazkira was supported by a birth certificate and was not simply assessed on the basis of MS's appearance in October 2020. As to that:
- 36.1 Mr Pakteen apparently told Mr Safi that the date of birth was taken from a birth certificate but it is not clear whether he deduced that from the tazkira itself and, if so, how or whether he discovered that alleged fact from some other records.
- 36.2 Dr Zadeh explained that from 2017 the former government in Afghanistan started to collect full dates of birth for use on tazkiras. Such details were taken from birth certificates, hospital letters confirming birth, or UNICEF vaccination cards. He said that the government used such data "next to the age assessment section".
- 36.3 Against that, the document states on its face that MS's age was based on his physical appearance. Furthermore, it would be a remarkable coincidence if a tazkira based on a birth certificate rather than assessment just happened to be issued on MS's fourteenth birthday.

Accordingly, this evidence does not materially advance MS's case.

37. In my judgment, carefully balancing all of the evidence in this case, it is at least arguable that the Upper Tribunal might find that MS was born no earlier than 29 June 2005 such that he is entitled to support under s.23C. Indeed, Kent has itself accepted that it should review its earlier age assessment in light of the evidence provided by MS.

#### BALANCE OF CONVENIENCE

38. Ms Benfield argues that any interim relief is likely to be in place for some months while Kent reviews the age assessment and, if necessary thereafter and permission is granted, these proceedings continue towards a final hearing. It is common ground that the balance of convenience requires the court to balance on the one hand the potential injustice to MS of being denied the support for those months that he is arguably entitled to under s.23C as a former looked-after child with the potential injustice to Kent in being required to divert scarce resources to provide such support to someone who it has determined is significantly over the age of 18 and who might not be entitled to support as a care leaver.
39. Ms Benfield argues that turning 18 is a critical stage in a young person's development and that the statutory scheme under s.23C is important in ensuring that calibrated support is offered to care leavers. She argues that s.23C support is materially different from the asylum support offered to young adults and that the balance of convenience is often found to favour requiring the provision of leaving-care support. She accepts that MS is not destitute but submits that he is vulnerable and needs to be in accommodation appropriate for a care leaver.
40. Mr Swirsky points to the difference between cases where a claimant seeks to be accommodated as a child and MS's case in which, even on his case, he accepts that he would turn 18 the day after the hearing. He submits that the age assessment had been made following a careful process and that the court should respect Kent's decision unless and until it was reversed. Mr Swirsky stresses the pressures on Kent which bears a substantial burden in respect of asylum seekers arriving by boat and the need to consider the wider public interest. He argues that an injunction would require this stretched local authority to spend money on supporting someone who it has decided should not have the benefit of limited resources. Against that, he argues that there is no evidence that MS is really struggling in asylum support.
41. The October 2015 guidance issued by the Association of Directors of Children's Services provides some expert observations on the balance of risk in these cases:

“Social workers are justifiably concerned about the implications of taking an unknown adult into their care, and potentially placing them with vulnerable children. Many social workers have limited options when it comes to placement, but any placement decision should be taken carefully, taking into account the needs of anyone already in the placement, of the carers, and of the child or young person about whom you may know little at the start. The risks of placing a relatively unknown child or young person are mitigated by the fact that they will be supervised, either closely or at least on a regular basis by those employed to care for and support them ...

The dangers inherent in not taking a child into your care are multiple. With regard to their care, a child who is being treated as an adult will not receive the support given by local authorities which is deemed necessary for other children and includes having safe

accommodation, the support of a social worker and a foster carer or keyworker/support worker, and support with all the other things a child needs, including access to education and health care ...

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

42. Further, standard practice – as recognised by the ADCS guidance and as followed here – is to look after children and young people under s.20 while the age-assessment process continues. While formally complete in this case, Kent is currently reviewing its assessment.
43. Granting interim relief would, of course, require Kent to expend scarce public resources on supporting a young person who it has assessed is significantly older than 18. Since, even on his case, MS became an adult the day after the hearing, interim relief would not require him to be accommodated with vulnerable looked-after children. Rather, relief would require the local authority to provide him with the tailored support that must be provided to care-leavers under s.23C:
  - 43.1 Under s.23C(2), the local authority must take reasonable steps to keep in touch or re-establish contact with the care leaver.
  - 43.2 Under s.23C(3), it must continue the appointment of a personal adviser and keep the former child’s pathway plan under regular review.
  - 43.3 Under s.23C(4), it must – in broad terms - give the former child assistance (including financial assistance and accommodation) to the extent that his welfare or his welfare and educational or training needs require it.
  - 43.4 The provision of asylum support is residual and does relieve a local authority of its statutory duty under s.23C: R (SO) v. London Borough of Barking & Dagenham [2010] EWCA Civ 1101, at [40].
44. In R (G) v Southwark LBC [2009] UKHL 26; [2009] 1 W.L.R. 1299, Lady Hale observed:

“The general aim of these new responsibilities [i.e. under sections 23A, 23B and 23C] was to provide a child or young person with the sort of parental guidance and support which most young people growing up in their own families can take for granted but which those who are separated or estranged from their families cannot.”
45. In finding in R (AS) v. Liverpool City Council [2020] EWHC 3531 (Admin) that the balance of convenience came down firmly in favour of the grant of interim relief to a clamant who, on his account, was a few weeks away from his eighteenth birthday, Nicol J observed, at [22], that the s.23C duties were “real and important” and that the availability of less suitable Home Office accommodation is not determinative. Likewise, the deputy judges granted interim relief in R (MO) v. London Borough of Newham [2022] EWHC 3224 (KB), Philip Mott KC, and R (BH) v. London Borough of Newham [2023] EWHC 1611 (KB), Clare Padley, shortly before and shortly after respectively the claimant’s eighteenth birthday.

46. Specific vulnerability is not a precondition for interim relief, although the case for relief will become more compelling where there is evidence of particular vulnerability: R (KRA) v. Cheshire East Council [2024] EWHC 575 (Admin), at [27], Fordham J. In this case, it is not suggested that MS will be destitute if no relief is granted since he is in Home Office accommodation. While not the most extreme case, there is evidence of vulnerability:
- 46.1 First, in a letter dated 23 November 2023, the Medway Young Person’s Wellbeing Service reported concerns about MS’s emotional wellbeing, his threats to hurt himself and his aggressive outbursts.
- 46.2 Secondly, in MS’s own evidence, he reported that he felt very alone and scared in his hotel accommodation. He said there were lots of strange adults who he tried to avoid by staying in his room. He was sharing a room with a much older male who hardly left their room. MS said that he did not even have privacy when getting changed. He suffers nightmares, sleeplessness and anxiety; and asserts that his mental health is deteriorating.
- 46.3 Thirdly, Ms Kayim noted in September 2024 that MS presented as extremely anxious. She observed that he fidgeted, his hands were shaking, his voice often broke and that he avoided eye contact. He broke down crying and sobbed inconsolably when talking about how much it upset him to be disbelieved about his age. Her professional assessment was that MS’s mental wellbeing is at risk in the absence of the support and regular supervision that he will need as a young adult.
- 46.4 Fourthly, Kent’s own assessment was that MS had experienced loss and traumatic events throughout his life, and that he appeared to find sleep a persistent problem.
47. Weighing all of these factors, I conclude that the balance of convenience favours interim relief. Accordingly, I order that the local authority should treat MS in accordance with his claimed age under the Children Act 1989 pending determination of his age or further order. It is of course possible that Kent’s current review might identify fresh evidence that supports its earlier assessment. In such event, Kent should have express liberty to apply to set aside or vary my order upon five clear days’ notice following completion of the review of its age assessment.

### **PERMISSION TO APPLY FOR JUDICIAL REVIEW**

48. Often it will be appropriate for the judge granting interim relief to grapple with the question of permission to apply for judicial review. In this case, I take a different view. MS’s original application, which has never been amended, sought a stay following the grant of interim relief pending the outcome of Kent’s review. Ms Benfield now argues that, having heard full argument on the application for interim relief, the court can and should grant permission. I consider that that would be premature and that, interim relief having been granted, it is now appropriate to stay these proceedings while Kent considers the new evidence, seeks answers to its questions and completes its review.