OUTER HOUSE, COURT OF SESSION

[2025] CSOH 14

P880/23

OPINION OF LORD LAKE

In the Petition of

DASTAN IBRAHIMI (FE/LA)

Petitioner

for

Judicial review of an age assessment decision of Glasgow City Council

Petitioner: Winter; Drummond Miller LLP
Respondents: Welsh; Harper Macleod LLP

6 February 2025

[1] The petitioner seeks asylum in the United Kingdom but the petition is not directly concerned with that matter. When he came to the United Kingdom, the petitioner initially lived in Liverpool but he travelled to Glasgow before his asylum claim was considered. There, he sought accommodation from the respondents under the Children (Scotland) Act 1995, section 25(1), on the basis that he was under 18. In July 2023, the respondent carried out an age assessment of the petitioner and determined that he was over 18. It is that decision which is challenged in this application.

[2] A number of issues arise and it is most convenient to deal with them individually in turn.

Competency of the application

[3] In light of the decision in *Abdullah* v *Aberdeenshire Council*, 2024 SLT 143, it appeared that an issue might arise as to whether the decision on an age assessment could properly be the subject of judicial review. Both parties made submissions on this matter. Unlike the position in *Abdullah*, however, the assessment here was made in terms of Part 4 of the Nationality and Borders Act 2022. As counsel identified, the decision in *Abdullah* makes it clear that it is not considering the situation of such an assessment (para [53]). The respondent accepted that the supervisory jurisdiction of the Court of Session was available, and I consider this issue no further.

Whether the remedies sought have any practical effect

[4] The respondents submitted that the court should refuse the petition as being academic on two bases. The first was that, on the basis of the petitioner's own averments, he turned 18 on 13 January 2024. The age assessment carried out by the respondent is therefore no longer of any practical effect and if any assessment was carried out in future, he would be an adult. The second is that the respondents have made an offer in an "open" letter dated 1 July 2024 to withdraw the assessment and dispose of the petition by dismissal with no finding of expenses. The letter making the offer clarified that if the petitioner applied for support from the council in future, it would consider his request on its merits at that time. This offer was made on the basis that, while the council did not consider that there was any flaw in the decision taken, it has no interest in supporting the assessment as it was no longer effective.

[5] In support of the respondents' submissions, I was referred to the judgment of Elisabeth Laing LJ in *R (SB)* v *Kensington and Chelsea Royal London Borough Council*, [2024] 1

WLR 2613, where, in a question as to whether a decision as to age could be challenged, the court decided that there was no live issue in the situation where it was accepted that the individual was now over 18 and had never been looked after by the council (paragraphs 77 and 78). I was also referred to the opinion of Lord Sandison in *Abdullah* at para [66] in which he adopted the approach that had been taken by the Court of Appeal in *SB*. It was submitted that as reduction of the decision would have no practical effect, by reference to the opinion of the Lord President (Carloway) in *Wightman* v *Secretary of State for Exiting the European Union*, 2019 SC 111, para [22], the court should refuse the remedy sought.

[6] The respondents noted that the petitioner has no outstanding applications for any assistance and no person is or would be relying on the assessment that had been made by the respondents. This meant that the fact that other provisions of the 1995 Act are age dependent do not mean that the matter is not academic. The petitioner's Note of Argument said that in future the petitioner "may need to invoke" section 25(3) or 29(2) of the Act and it was submitted that this wording demonstrates how hypothetical the concern really is. In addition, section 29 did not apply as the requirements in subsection (2) for it to apply are cumulative and, as the petitioner had never been looked after by the respondents, he cannot satisfy them.

[7] The petitioner accepts that he is now 18 years old but it was submitted on his behalf that the petition was not hypothetical or academic for a number of reasons which, inevitably, overlapped to some extent. They may be summarised in the following groups:

(a) Age is part of a person's identity and the petitioner ought not to have to go through life with the wrong age attributed to him.

(b) The assessment might have a bearing on decisions taken by the Secretary of State for the Home Department. The Home Office might take the council's

assessment into account in a number of ways; (1) when considering the petitioner's credibility in the context of his claim for asylum, (2) it would be given considerable weight by them if they were considering his age in future and, (3) where there was a disagreement between the petitioner and the Home Office as to his age, it was policy for the local authority to carry out an age assessment and they might have regard to it in that context. Home Office guidance, "Assessing Age", states that the Home Office will give considerable weight to local authority age assessments when carrying out age assessments of their own. It was also contended that if the decision was reduced, in the event of a dispute as to the petitioner's age, the Home Office might decide to refer the petitioner for an age assessment in terms of the Nationality and Borders Act 2022 and that he might request such a referral if the current decision was reduced.

(c) If not reduced, it was said that the age assessment might be acted upon by an immigration tribunal. It might affect assessment of his credibility and the tribunal might take the view that he should have challenged the council's assessment in court as it would not be competent to challenge the assessment before it.

(d) In future, the petitioner might wish to invoke section 25(3) of the Children (Scotland) Act 1995. This states that a local authority:

> "may provide accommodation for any person within their area who is at least 18 years of age but not yet 21 if they consider that to do so would safeguard or promote his welfare."

[8] More generally, by reference to *Swan* v *Secretary of State for Scotland*, 1998 SC 479 at 485, it was submitted for the petitioner that in considering whether proceedings were

academic, it was necessary to consider the particular circumstances of the case. It was noted that in *R (AE)* v *London Borough of Croydon*, [2012] EWCA Civ 547, para [2], the Court of Appeal had decided that a person's exact age was important not only because there was a duty to provide accommodation if the person was under 18, but there might also be an entitlement to support between the ages of 18 and 21, a person's age might affect how the Secretary of State for the Home Department discharges functions relating to immigration and asylum and a favourable finding would enhance the person's credibility. In relation to the second of these points, it was noted that in *R (MVN)* v *London Borough of Greenwich*, [2015] EWHC 1942 (Admin), Picken J concluded that the fact that the applicant was an adult did not make the proceedings academic as local authorities owe certain duties to children in their area which do not end when the person turns 18 if they are a "care-leaver".

[9] It was submitted that if the decision was withdrawn by the respondents but it was not accepted that it was flawed, it would, in effect, be left standing as there would be a record of it having been made and would be known to persons making a decision in future. The question might be asked why the respondent would make any other decision in relation to the petitioner if an application was made in future under section 25. It was submitted also that even if the decision was set aside, the evidence which formed the basis of it would remain.

[10] It was contended that it was immaterial that no application had been made under section 29 as even taking account of the pursuer's accepted age, he was not eligible to apply as he had not yet reached the minimum age of 19. Taking all these matters together, it was submitted that there was a live dispute and that the decision reached in *SB* was not relevant to the petitioner's situation.

[11] In response, the respondent argues that if the assessment was withdrawn, there would be no extant decision attributing the "wrong" age to the petitioner, and nothing to be taken into account by the Home Office or a Tribunal. If the petitioner's age was a live issue for a decision in future, there could be no doubt that he would be an adult but, in any event, the decision-maker would have to reach a view of their own and the respondent's decision was not in any way determinative. If there was a dispute as to the petitioner's age in future, it would be open to remit the matter to the National Age Assessment Board.

[12] It seems that many of the issues raised by the petitioner are unlikely to make any difference to him. If it was the case as he claimed that it was known by other parties that there has been a decision by the respondents, it would be likely that the same persons would know that it had been withdrawn and was not supported by the respondents. While it is correct to say that the evidence on which the respondents relied in making the decision challenged cannot be made to disappear if the decision is withdrawn, that would still be the position if this action proceeds to a final determination. If the decision is withdrawn, it is not easy, however, to see what significance that evidence relied on in making it has to a different decision to be taken at a different time for different purposes in different circumstances. Although the hypothetical question was posed as to the basis on which, if the decision was not formally reduced, the respondents would ever reach a different decision in future if the matter came before them, the straightforward answer is that it would depend on the material before the respondents at the time. Whether such future decision was challenged and whether it would withstand challenge depends on too many unknown factors for that to be a useful or relevant factor to consider in the current context.

[13] For the purpose of future decisions and in relation to whether a reference might be made to the National Age Determination Board, it seems to make no difference whether the

decision has been withdrawn or reduced. In neither case is there an extant decision which bears upon the matter that could affect the decision as to whether a reference is necessary or appropriate. It is not apparent how the issue of whether a decision had been withdrawn or reduced could have any practical impact on the question of whether an applicant was an "age-disputed person" within the meaning of the Nationality and Borders Act 2022, section 49. That applies where the decision-maker has insufficient evidence to be sure of the age. A reference under the Act may be made whether or not the decision is reduced. Both withdrawal and reduction will mean that there is no decision to be taken into account and the basis on which this came about has no bearing on the sufficiency of available evidence. If there is no extant decision, the issue of whether it is accorded weight just does not arise.

[14] Turning to the issues surrounding the possibility of applications under other provisions of the 1995 Act, the natural reading of the words of section 29(2) would suggest that the requirement that the young person was formerly looked after by the local authority is in addition to the age requirement rather than being an alternative. This is apparent from the use of the word "and" between the two parts of the subsection and is confirmed by the heading which precedes the section. While section 25(3) is capable of applying to the petitioner, this is quite hypothetical. That section has applied to the petitioner since he turned 18 but assistance under it has neither been provided nor sought. To the extent that in *MVN* reliance was placed on duties owed by the local authority to the applicant, I was not addressed on the responsibilities of local authorities that arise under the Children Act 1989 which applied there and which would be relevant to understanding the decision. Nonetheless, it does appear that the Act imposes a continuing duty rather than just conferring a power to give assistance. That difference from the Scottish Act is material to the decision in *MVN* that the proceedings had a practical effect.

[15] When account is taken of these various factors it is apparent that the facts in *SB* are analogous to the facts of the present case. The conclusion there - that "there is no more than a remote possibility of a potential future dispute between R and the Council to which the Decision might be indirectly relevant" - is applicable here also. I consider that the petition is academic or hypothetical and sustain the second plea-in-law for the respondents.

Substantive grounds of challenge

[16] Although the above is sufficient to dispose of the application, the substantive arguments have been presented before me and, in case this matter is reclaimed and a different view is taken as to whether the application is academic, I will consider and outline the arguments on the merits. The submissions in relation to the challenge fell into four principal areas: (1) adequacy of reasons; (2) procedural fairness; (3) irrationality; and (4) failure to make adequate inquiries ("the *Tameside* duty").

Adequacy of reasons

[17] The duty to give reasons and the requirements as to the contents of those reasons were not in dispute between the parties. It was submitted that the reasons given by the respondents in their decision letter leave the informed reader in real and substantial doubt as to what it was about the petitioner's appearance that resulted in the view being taken that he was clearly over 18. It was said that the decision letters simply quoted the test derived from case law and that this is not the same as, and does not amount to, a statement of the reasons for the decision (*R* v *Birmingham City Council ex p. B*, [1999] ELR 305 at 310H-311B per Scott Baker J). While it is indeed not enough merely to restate the relevant issue or test, the issue in the present case was whether the petitioner was under or over 18. In *R (B)* v

Merton London Borough Council, [2003] EWHC 1689 (Admin), Stanley Burnton J considered how that issue might be addressed. He noted that in cases in which there was no reliable documentary evidence of date of birth or age, the decision would depend on the history given by the applicant, on his physical appearance and on his behaviour (paragraph 20). He recognised that, "there may be cases where it is very obvious that a person is under or over 18" and that in such cases "there is no need for prolonged inquiry" (paragraph 27). He said that judicialisation of the process was to be avoided and that:

> "In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary."

The decision in relation to the petitioner was one in which it is said by the respondents that the decision-maker was entitled to proceed on his appearance alone. In the decision letter dated 19 July 2023, reference is made to *Merton* and then it states:

> "In this instance, on the basis of a visual assessment of your appearance, demeanour and a brief enquiry with the assistance of an interpreter, it is our opinion that your appearance and demeanour strongly suggest that you are significantly over 18 years of age."

In the circumstances, this is not a restatement of the relevant test. It identifies the factors which have been relied on in reaching the conclusion that the petitioner was clearly over 18. These are factors which have been accepted in previous authority as being relevant and sufficient. This was a decision that was open for the respondent's employees to make.

[18] The petitioner submitted that there was doubt as to the reasons as it was not stated what it was about the petitioner's appearance and demeanour had led to the conclusion. That, however, it not the correct approach to this issue. It would nearly always be possible to identify further information that might be given as to how each conclusion and sub-conclusion was reached. What is required, however, is a statement of how the decision

was made on the principal issue of the age of the petitioner. Any other approach would tend to lead to the "judicialisation" which Stanley Burnton J made it plain should be avoided. From reading the decision as it stands, an informed reader would be aware what factors had been relied on in reaching the decision that the petitioner was obviously an adult.

[19] The petitioner also argues that he was left in real and substantial doubt as to what was vague about his description of his travels and why it is said his answers were abstract. However, these are not factors relied on in the decision letter given to the petitioner. For this reason and for the reasons I have stated in relation to the conclusion as to his appearance, the challenge on this basis is rejected. For completeness, I would add that the respondent produced affidavits from the employees who had undertaken the assessment of the petitioner. There was a dispute as to whether these were in elucidation of what stated in the decision letter or amounted to *ex post facto* reasoning. In relation to these issues, I was referred to *R (Nash)* v *Chelsea College of Art and Design*, [2001] EWHC 538 (Admin) at [34-36] per Stanley Burnton J, and *Chief Constable, Lothian and Borders Police* v *Lothian and Borders Police Board*, 2005 SLT 315 at [65] and [70] per Lord Reed. I have not found it necessary to rely on the contents of the affidavits in relation to the reasons challenge so do not consider their status of their contents further.

Procedural fairness

[20] In relation to procedural fairness, the petitioner contended that fairness required that, at a stage when the decision was still provisional, he should have been told of the points that were considered adverse to his case so that he might address them. He contended that this was not done and that this rendered the decision-making process unfair.

While submitting that the requirements of fairness depended on the particular situation and that it was relevant that this was not a decision of a court, the respondent accepted that it was necessary in this situation that the petitioner be informed of the factors which it was considered weighed against him before the decision was made. They, however, contended that this requirement had been satisfied.

[21] Fairness requires that a person is made aware of factors that are against him in relation to a decision so that he or she is in a position to make representations. What is required is that the person be informed of the "gist" of the case against them (*R* v *Secretary of State for the Home Department, Ex parte Doody*, [1994] 1 AC 531 at 560). The reason for the requirement to give information to the individual is relevant to the consideration of what information must be provided. This means that in order to evaluate whether the petitioner was given sufficient information, it is necessary to have in mind the basis on which the decision was actually taken. As noted above, in this instance it was taken on the basis that his appearance and demeanour strongly suggested that he was over 18.

[22] It is useful to consider what is said in the cases cited to me about the requirement to give notice and the basis on which it is required to achieve fairness. In *BM* there is no detailed discussion of the basis for the requirement but there is reference to two further cases in which it is considered. The first is *R (Z)* v *Croydon London Borough Council,* [2011] EWCA Civ 59, [2011] PTSR 748. There, Sir Anthony May P referred to factors such as the absence of documents, inconsistencies or a provisional conclusion that the applicant is not telling the truth along with reasons for that view as being matters which might be disclosed. The second case was *R (NA)* (Afghanistan) v *London Borough of Croydon,* [2009] EWHC 2357, in which Blake J, having considered other authorities, considered that it was inconsistencies that should be put to the applicant for comment or explanation to see if there was a credible

response. This was important because of the danger of misunderstandings or mistranslations when speaking to someone for whom English is not their first language. In *R (HAM)* v *Brent London Borough Council*, [2022] PTSR 1779, Swift J emphasised that fairness required that where a person's credibility was an issue and the decision-maker was minded to conclude he was lying, that view and the reasons for it should be explained to give him a chance to respond (para [11]). In *R (MVN)* v *London Borough of Greenwich*, [2015] EWHC 1942 (Admin), Picken J again referred to *Z*.

[23] It is relevant that the persons who made the decision in relation to the petitioner considered that this was an instance in which it was possible to make the decision on the basis of appearance and demeanour alone, and that it did not turn on credibility of explanations. The rationale for putting adverse conclusions to a person where they relate to their credibility or inconsistencies in the information they have provided, is to avoid errors in understanding. The same factor does not arise in relation to assessment of appearance and demeanour which makes it clear that the person is 18 or over. Where, on the basis of matters observed, something is obvious, verbal explanations or rationalisations for the features noted would have little bearing on the decision. The fact that the decision in relation to the petitioner was taken on the basis of his appearance and demeanour, indicates that it was thought on the basis of these alone that it was clear he was over 18. To use the expression from *Merton*, it was a "clear case". It was not one which turned on what had been said and this reduced the scope for misunderstandings or miscommunications.

Irrationality

[24] The petitioner claims that in a number of respects, it was irrational for the respondents' employees to rely on particular physical characteristics in making an

assessment. It is claimed that it was irrational because the features in question are capable of arising in a person under 18. However, for irrationality to vitiate the decision, it is necessary that the conclusion that is reached is unreasonable. The approach in seeking to challenge each of the ingredients of the decision in this way is not valid. It ignores the fact that the determination of age requires that all these factors - and many others - are considered together. A decision is irrational if having done that, the conclusion is one which could not reasonably have been reached.

[25] It was argued that a more stringent review of rationality should be undertaken by the court considering the impact that an incorrect age assessment could have on the petitioner. While is it established by case law that, in situations in which an incorrect decision can have significant adverse consequences, a more exacting standard of review may be required ("anxious scrutiny"), no submissions were made to me as to what it was about the age assessment that would put it in such a category. It cannot be the case that *any* adverse consequence would lead to a heightened standard of review, or the general rule would be eclipsed.

[26] Finally in this section, it is claimed that it was irrational to have relied on the lack of disclosure of the live asylum claim. The decision letter does not rely on this as a basis for the decision, so this issue does not arise.

The duty to make inquiries (the "Tameside" duty)

[27] The obligation that this challenge is founded on originated in the speech of Lord Diplock in *Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* ([1977] AC (HL) 1014). It was recently restated by Hallet LJ (as she then was) in *Plantagenet Alliance Ltd* v *Secretary of State for Justice* ([2015] 3 All ER 261, at paragraph 100)

and that restatement has been applied recently in Scotland by Lady Haldane in *Scottish Ministers, Petitioners* ([2023] CSOH 89). As re-expressed, the duty on the decision-maker is to take such steps to inform himself as are reasonable. As this is a matter of reasonableness and discretion, the court will only intervene if no reasonable decision-maker would have been satisfied, on the basis of the inquiries made, that it possessed the information necessary for the decision.

[28] As with any challenge alleging irrationality, the test for a challenge on this basis to succeed is a high one. I do not consider that it is met in the present circumstances. The petitioner claims that there should have been inquiries made of the police in Liverpool or the Home Office as to the petitioner's uncle and his role in the petitioner's arrival in the United Kingdom. However, that part of the account given by the petitioner was not relied on in determining his age. If it was being relied on, it would be easier to envisage a conclusion that no person would rely on a factual matter which was key to making a decision unless steps had been taken to check the facts, but that was not the situation here. While another decision-maker might have made the inquiry, I do not consider that it was unreasonable to proceed in absence of it.

Conclusion on the merits of the petition

[29] On the basis of the foregoing, had the petition not been academic, I would have refused the remedy sought. I sustain the second and third pleas in law for the respondent, repel all other pleas in law and refuse the petition.