IN THE UPPER TRIBUNAL
(Immigration and Asylum Chamber) Claim Number: JR/3432/2019

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House
On 8, 11 and 21 November 2019

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Queen
(on the application of BT)
(ANONYMITY DIRECTION MADE)

Applicant

And

MILTON KEYNES COUNCIL

Respondent

Representation:

For the Applicant: Miss A Benfield, Counsel instructed by Instalaw Solicitors
For the Respondent: Mr A. Underwood, QC, instructed by Milton Keynes Council Legal Department

JUDGMENT

1. The applicant is a citizen of Eritrea. He arrived in this country, clandestinely, on 18 February 2019. He claims that he was born on 23 June 2002, meaning he would have been 17 years old at the time. That claim is disputed by the respondent, Milton Keynes Council, which, in a so-called "eyes on" assessment ("the eyes on

assessment") conducted shortly after his arrival, concluded that the applicant was over the age of 18, although did not attribute a specific age. On 19 September 2019, shortly before the fact finding hearing originally scheduled in these proceedings on 8 and 9 October 2019, the respondent conducted a full, *Merton*-compliant age assessment ("the age assessment"), concluding that the applicant's date of birth was 23 June 1994, giving him an age of 25.

2. On 29 May 2019, Kate Gallafent, QC, sitting as a Deputy Judge of the High Court, granted the applicant permission to challenge the respondent's eyes on assessment by way of judicial review, and directed that the application be transferred to the Upper Tribunal, pursuant to section 31A(2) of the Senior Courts Act 1981. Thus, the matter came before me for the applicant's age to be determined.

Applicant's case

3. The applicant claims that he was born on 23 June 2002 in Eritrea. He knows his age, he claims, because his parents told him from a young age. They would celebrate his birthday each year with baked bread and a number of candles corresponding to his age. The applicant's childhood was, he claims, characterised by tragedy. At the age of five, in 2007, he left Eritrea with his mother because his father, a Pentecostal Christian, had been killed by the government. He had no siblings. They moved to Sudan to live with his aunt and uncle. This was the beginning of what the applicant views as his 12 year journey to this country. He did not go to school in Sudan, although he did play with other children.

4. The applicant's case is that when he was nine, in 2011, he moved to Ethiopia, where he lived for around five years. He claimed experienced difficulties in Ethiopia, due to racial animosity towards people from Eritrea. He says he was prevented from playing with other children and called names. In 2016, aged 13 but nearly 14, he returned to Sudan.

5. The applicant claimed to have returned only briefly to Sudan before taking a flight to Turkey, arranged by his aunt and uncle. His case is that he stayed in Turkey for two months, before travelling to Greece by sea, initially landing in Lesbos, where he

stayed for a few weeks, before sailing to Athens. He claims the boat was intercepted by the authorities, and that he was fingerprinted and asked his date of birth. He says he stayed in Greece for around two and a half to three years – he cannot remember exactly – before moving to Belgium, and onwards to France. He made his way to "the Jungle" in Calais before taking a lorry to England. He claims his aunt and uncle in Sudan arranged his travel through an agent. While he was in Greece, the agent spoke to the applicant's aunt and uncle by telephone. They said that the applicant's mother had died while he had been travelling through Europe. She had been ill before he started his long journey, he claims.

6. The lorry made its way to a service station on the M1, near Milton Keynes, where the applicant was arrested upon disembarking. He was taken to a police station, where he was assessed by the custody sergeant to be in the region of 23 to 24 years' old. Following two days' detention in police cells, the applicant was assessed by two social workers employed by the respondent to have been born on 23 June 1994. They did not consider it necessary to conduct a full "*Merton*-compliant" age assessment, they later wrote to the applicant, as they considered him to be "significantly" over the age of 18 and consequently had "no doubt that the Children Act 1989 has no application here."

7. The respondent's case is that there has been a consistent attribution of age to the applicant of substantially more than 18 years. This began with the custody sergeant, the social workers who conducted the eyes-on assessment, and those who conducted the full age assessment. The respondent claims the appropriate adult appointed by the Refugee Council to support the applicant during the age assessment interview process, Collin Ocaya, conceded to one of the assessing social workers that he thought the applicant was significantly over 18.

8. The respondent submits that there can be no criticism of the methodology of the full age assessment. The respondent also points to conflicting accounts provided by the applicant of his age and his travels through Eritrea and Sudan, which I shall explore below. The respondent contends that the account the applicant has provided of his travel to Turkey, through Greece, Belgium and France is "incoherent". The applicant

had no visible means of support throughout his long journey through Europe and on to the United Kingdom, yet he was able to amass €390 in cash, which he had on his person upon his arrest at the service station on the M1. The respondent submits that that is not conduct indicative of the applicant being a child.

9. The applicant obtained interim relief from the High Court to require him to be treated as a child. As such, he has been placed into semi-independent living, supported by a keyworker. He receives a financial allowance. He is supported by the respondent's social services team as though he were a child, for the time being, pending the outcome of these proceedings.

Procedural background

10. This matter has an unfortunate procedural background, and the respondent has failed at several key junctures in its responsibilities towards the Tribunal. It is not necessary to outline the failures in further depth at this stage, other than to highlight the following significant events.

11. First, the respondent informed a different constitution of the Upper Tribunal at a Case Management Review that it had not, and had no intention to, undertake a full "*Merton*-compliant" age assessment. That was incorrect and misleading, as such an assessment was already well underway, as those representing the respondent should have known. The fact finding hearing listed at that hearing had to be adjourned subsequently. The solicitors with conduct for the matter in the respondent's legal department were directed by Upper Tribunal Judge Coker to provide a full explanation for the delay. A written explanation dated 19 September 2019 was provided by Opheas Shiridzinodya and Nicola Monerville, the solicitor with day to day conduct of the matter and principal solicitor respectively.

12. Secondly, and against that background, on the first day of the adjourned fact finding hearing, it emerged that the respondent had not informed its own witnesses, who all featured on the timetable agreed between counsel on both sides, that they would be required to attend the tribunal on that day. This necessitated last-minute changes to

the agreed timetable, and the wasting of a considerable amount of judicial time on the first day.

13. Thirdly, despite having purported to have complied with all its disclosure duties to the applicant, it emerged during evidence on the second day of the fact finding hearing (in particular, during the evidence of Ms Cann and Ms Ali: see below) that there was a range of further relevant materials that had not been disclosed by the respondent. These were disclosed to the applicant's legal team during the proceedings, with only minutes to go before the scheduled closing submissions pursuant to the agreed timetable. Understandably, Ms Benfield was not in a position to consider the potential impact of the late material, which exceeded 100 pages in length. This necessitated the introduction of further delay into the proceedings, as closing submissions were adjourned until 21 November 2019.

14. At the conclusion of the fact finding hearing, I directed the respondent to provide a further explanation for the additional disclosure failings, in the form of a witness statement. Ms Monerville provided a statement dated 28 November 2019, in which she explained that the council faced funding pressures, and that all material in possession of the legal department had been disclosed to the tribunal. It is not necessary for the purposes of my fact finding task to outline the contents of that statement in further depth, other than to observe that the explanations provided in the statement were unsatisfactory. The duty of candour applies to the parties to litigation, not simply their legal representatives. Funding challenges are no excuse for non-compliance with litigation duties. It was readily apparent from a few straightforward questions put to Ms Cann and Ms Ali during cross-examination that there were additional materials that had not been disclosed, such as records of visits to the applicant, and other records on his file. What is less apparent is how the in-house legal team at the council had failed to take steps to elicit such materials during the disclosure exercise. Parties to litigation in this jurisdiction should ensure that systemic failures of this nature are unable to occur. The failings in this case were unacceptable.

THE LAW

15. The Children Act 1989 imposes certain duties upon local authorities in relation to children within their area who are "in need". See, for example, section 17, which imposes a general duty on every local authority to safeguard and promote the welfare of children in within their area who are in need by providing a range and level of services appropriate to those children's needs. Section 20 obliges every local authority to provide accommodation for any child in need within their area who appears to require accommodation as a result of there being no person who has parental responsibility for the child (amongst other factors). A paradigm example of the practical application of these duties arises in the case of unaccompanied asylum seeking children. They have no one else to look after them, nowhere to go, and no way to support themselves. The Children Act 1989 obliges local authorities to act in such cases.

16. Difficulties arise when it is not clear whether a person is a child or not. By section 105(1) of the 1989 Act, "'a child' means… a person under the age of eighteen". The common law has evolved such that the task of determining factual disputes between those who claim to be children and local authorities is to be resolved by an application for judicial review on a precedent fact basis. Applications are brought in the Administrative Court and, by convention, are transferred to the Upper Tribunal.

17. 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 to be made by local authorities when addressing the question as to whether a child is "in need" or not, she said, at [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."

In his concurring opinion, Lord Hope said, at [51]:

> "It seems to me that the question whether or not a person is a child for the purposes of section 20 of the 1989 Act is a question of fact which must ultimately be decided by the court. There is no denying the difficulties that the social worker is likely to face in carrying out an assessment of the question whether an unaccompanied asylum seeker is or is not under the age of 18. Reliable documentary evidence is almost always lacking in such cases. So the process has to be one of assessment. This involves the application of judgment on a variety of factors, as Stanley Burnton J recognised in R (B) v Merton London Borough Council [2003] 4 All ER 280, para 37. But the question is not whether the person can properly be described as a child… The question is whether the person is, or is not, under the age of 18. However difficult it may be to resolve the issue, it admits of only one answer. As it is a question of fact, ultimately this must be a matter for the court."

18. There is no burden of proof in age assessment cases: see R (CJ by his litigation friend SW) v Cardiff City Council [2011] EWCA Civ 1590 at [21] ("…once the court is invited to make a decision upon jurisdictional fact it can do no more than apply the balance of probability to the issue without resorting to the concept of discharge of a burden of proof…"). As this Tribunal held in R (AM) v Solihull Metropolitan Borough Council (AAJR) [2012] UKUT 00118 (IAC) at [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."

19. There can be difficulties in assessing the age of a putative child. In R (B) v London Borough of Merton [2003] EWHC 1689 (Admin), Stanley Burnton J (as he then was) held at [28]:

> "Given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other."

At [37], he said:

> "…except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility."

20. This was developed in R (AM) v Solihull MBC. At [15], the Vice President of the Upper Tribunal (Immigration and Asylum Chamber) said:

> "…almost all evidence of physical characteristics is likely to be of very limited value. That is because, as pointed out by Kenneth Parker J in R (R) v Croydon [2011] EWHC 1473 (Admin) there is no clear relationship between chronological age and physical maturity in respect of most measurable aspects of such maturity."

At [16] he added:

> "…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. So far as we are aware, no, or no sufficient, work has been done to identify what affect such a history might have on their physical maturity at various dates. In particular (although we accept that we are relying more on instinct than anything else) physical maturity may be attained more slowly in conditions of poverty and malnutrition and that on arrival such a person may look less physically mature than his chronological age might suggest. After his arrival it may be that physical changes take place more quickly than they would otherwise do, but it may (or may not) be that a person with such a history is less physically mature than anybody might expect for his age."

21. The Vice President addressed the relevance of mental maturity and demeanour at [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."

22. He continued:

> "So far as demeanour is concerned, it seems to us that there may be value to be obtained from observations of demeanour and interaction with others made over a long period of time by those who have opportunity to observe an individual going about his ordinary life. But we find it difficult to see that any useful observations of demeanour or social interaction or maturity can be made in the course of a short

> interview between an individual and a strange adult. There may of course be cultural difficulties in such an interview but there are the ordinary social difficulties as well."

23. The views of social workers gleaned from formal interactions with an applicant are unlikely to mitigate those difficulties:

> "20. The asserted expertise of a social worker conducting an interview is not in our judgement sufficient to counteract those difficulties. A person such as a teacher or even a family member, who can point to consistent attitudes, and a number of supporting instances over a considerable period of time, is likely to carry weight that observations made in the artificial surroundings of an interview cannot carry."

24. There must be no "predisposition, divorced from information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child…" Physical appearance and demeanour are only likely to be relevant in an "obvious" case, in the absence of compelling evidence to the contrary. See Merton at [38].

25. In an age assessment judicial review application, the role of the Upper Tribunal is to arrive at an assessment of the applicant's age by reference to all material and evidence in the case, applying the balance of probabilities standard of proof. In contrast to conventional judicial review proceedings, the focus of my consideration is not whether the respondent reached a decision which was unlawful on public law grounds, but rather to find, as a matter of fact, what the applicant's age is.

DISCUSSION

26. At the outset of my analysis, it is necessary to recall that this is a case in which the Joint Presidential Guidance Note No. 2 of 2010 is engaged. The applicant is a vulnerable individual who has, on any view, endured a journey to the United Kingdom, which is likely to have been highly stressful, if not traumatic. As well as having agreed with the representatives at the hearing what steps would be necessary during the hearing itself to accommodate the needs of the applicant, I direct myself that it may be necessary to calibrate my assessment of the applicant's evidence by reference to his potential vulnerabilities. In cases involving age assessments, this is particularly important, as the applicant may be a child.

Background materials

27. The respondent has not challenged the applicant's account of how he travelled to Europe via Turkey, or his claimed Eritrean nationality. I see no reason not to accept these aspects of the applicant's narrative for the purposes of my analysis. The focus of my decision will be the events the applicant claims to have taken place in Europe.

Eyes-on assessment

28. The initial "eyes-on" assessment is a brief document. It is the primary decision under challenge in this judicial review application. It records the opinions of the two assessing social workers, Emily Hutton and Gemma Tarrant that the applicant is "significantly" over 18. The handwritten notes produced during the assessment recorded the applicant as having a "short but stocky build", with "thick dark curly hair" and a "heavily lined forehead." It notes the opinion of the unnamed (in this document) custody sergeant that the applicant is "23/24 years" of age. A written summary of the assessment was provided to the applicant which features the following operative wording:

> "It is very clear that you are significantly over the age of 18 years and we have no doubt that the Children Act 1989 has no application here. Even if given the benefit of the doubt the requirements of the Merton age assessment procedure are satisfied by the above statement.
>
> 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 presentation strongly suggests that you are significantly over 18 years of age. The rationale for this judgement is based on the information contained within the eyes on assessment you have also been provided with." (See the letter at tab 27, first bundle)

29. As may be seen, the eyes on assessment was based primarily on the appearance and demeanour of the applicant. As I have set out above, physical appearance and demeanour can be an unreliable guide to the age of an individual. This is especially so where the assessment of physical appearance and demeanour is based only on a very brief impression gained from a short meeting. I also recall that this assessment took place following the applicant's detention in a police cell, after he had been apprehended emerging from his clandestine entry to the United Kingdom. On the applicant's case, he had been living in the most precarious of circumstances in

continental Europe, including most recently in the "jungle" in Calais. That is an experience that, at least in the immediate aftermath of the journey and police detention (even if the lengthy pre-Calais phase of the claimed journey had not taken place), has the potential to give an impression of age which is older than an individual is in reality.

30. In isolation, therefore, the eyes on assessment provides little qualitative assistance in my task of determining the applicant's age.

Full age assessment

31. The full age assessment eventually produced by the respondent extended to 23 pages. Much of the document recites the narrative provided by the applicant across the course of the four meetings conducted with the applicant prior to the report being written, ahead of a "feedback" meeting conducted on 25 September 2019. Some of the meetings had to be aborted as the applicant became upset. The report concludes that the applicant is "significantly over the age of 18 years old", with the date of birth of 23 June 1994.

32. The operative findings of the report are based on (i) the applicant's physical appearance; (ii) the apparent inconsistency between aspects of the applicant's description of his upbringing in Eritrea, Sudan and Ethiopia and the likely cultural context within which he grew up, and (iii) the level of the applicant's independence, which exceeded that of a child.

33. The report considers the applicant's physical attributes place him significantly over his claimed age of 17. It describes his "prominent stubble" on his upper lip, jawline, chin and upper part of his neck. It contrasts these physical attributes with the applicant's account that he has only recently begun shaving, and that he only has "two or three small hairs" on either side of his cheeks. It makes some comments about the likely progress of puberty by that stage.

34. The assessment comments that the applicant's physical build, which is described as "stocky", is consistent with the metabolism rate of adult males over the age of 25

years when compared to the applicant's intake of food, according to NHS sources (unspecified). This, suggests the report, implies that the applicant is over the age of a teenage boy with a large appetite and high metabolism rate. Given the applicant's account of having travelled to the United Kingdom over a long period of time with very little to eat, "his weight gain towards the end of the journey is difficult to explain."

35. As accepted in the Solihull case, assessments of physical appearance and demeanour, especially those conducted by social workers over the course of a limited number of formal interactions with a putative child, are unreliable. Having had the benefit of seeing the applicant give evidence and attend the three days of the hearings before the tribunal, I accept that there is an appearance of maturity about him. To the extent that the age assessment describes the applicant's physical appearance, it appears to do so largely correctly. However, physical appearance is an unreliable guide to the assessment of age. In Merton at [28], the court observed that young people in the age bracket of 16 to 20 can be difficult to assess with any degree of accuracy. Some boys of 16 or 17 do look much older. Others who are much older can look much younger. When one factors in the conditions the applicant claims to have endured during his journey throughout Europe, it is necessary to calibrate the assessment of the applicant's physical appearance yet further. It follows, therefore, that the age assessment's analysis of the physical appearance and demeanour of the applicant, is, in isolation, a factor which attracts only neutral weight. As Stanley Burnton J put it, "it is necessary to take a history from him or her with a view to determining whether it is true."

36. The age assessment's analysis of the applicant's claimed family composition features some weaknesses. It states, at page 20, that the applicant's claimed small family size is "uncommon" for the region. African culture prizes large families and extensive interactions with neighbours and the community, the authors contend. The applicant's case, by contrast, was that he grew up knowing only his aunt and uncle, and his mother. He records no siblings or cousins. The difficulty with this analysis is several fold. The assessment generalises generic "African" culture, without

considering matters – or background evidence – specific to Eritrea, or to Eritrean families living in exile in Sudan and Ethiopia. While I accept that the family unit and extended family are often highly prized and emphasised in "African" culture, it is by no means clear that such generalised assumptions can automatically be applied to the narrative that underpins the applicant's claimed departure from Eritrea, and subsequent residence in Sudan and Ethiopia. There may be many reasons why families only have one child, including their willingness and ability.

37. As the applicant would have been a young child at the times he claimed to have moved to Sudan and then to Eritrea, it is difficult to see how it is "unusual… that [the applicant] does not know this information", as the assessment contends. The respondent's analysis assumes that a young (even on his assessed age), largely uneducated, boy who was the only son to a single mother, would know why his aunt and uncle did not have any children, and why he had no siblings. These are significant expectations to impose on a putative child.

38. The above observations do not lead me necessarily to reject the respondent's analysis in its entirety. Nor do they lead me to accept the applicant's case. I cite these concerns at this stage of my analysis as part of my holistic review of the evidence in the round.

The applicant's account

39. The applicant's account of his age and journey to the United Kingdom has evolved over time. It continued to do so under cross-examination. Of course, when assessing the evidence of someone who may be a child, and who in any event is vulnerable as outlined above, a degree of evolution and some inconsistencies are to be expected. Changes are not necessarily fatal.

40. In his first witness statement, the applicant said that, "for as long as I can remember, I have always known my date of birth and age. I can't remember the first time I was told my date of birth, but I think it must have been my parents." He described celebrating his birthday every year with his family, stating that his mother and aunts (plural) would bake bread (para 5). That statement was dated 16 April 2019, around

two months after the eyes on age assessment. During the course of the brief discussion conducted as part of that process, the applicant said that he was "four years old" when he was told his age. Plainly, there is an inconsistency between the two answers. In cross-examination, the applicant provided a further account. He said that he had never been asked that question, but when his statement was put to him, he accepted that he had said that. He was unable to provide much by way of further details as to his childhood. He said he could not remember his life in Eritrea, as he was a child then. Similarly, when asked whether he was able to look after himself, dress himself and keep clean for himself while he was in Eritrea and Sudan, he said that he could not remember, again because he was a child.

41. The applicant was able to recall attending school in Eritrea, from, he says, the ages of four to five, at a mainstream school. See page 9 of the age assessment. As the age assessment later states at page 21, school only becomes compulsory in Eritrea from the age of seven; schooling at an earlier stage would have to be privately arranged and funded. The applicant did not provide background information to counter that assertion. The applicant's case is that he attended a "mainstream" school, which suggests that it was not a private or specialist school. This presents a credibility concern. Quite apart from the fact the applicant's narrative is at odds with the age at which schooling commences in Eritrea (pursuant to the unchallenged country information at page 21 of the report), his family circumstances were such that his attendance at private school is likely to have been difficult if he was the son of a single mother who, on his case, was shortly to flee the country due to the death of his father.

42. The age the applicant purports to have been when he attended school in Eritrea is a significant factor in my overall assessment; one feature of this case is that there are few "anchor" events in the applicant's narrative. His recollection of his time in Eritrea onwards during the age assessment interviews was characterised by his inability to recall specific details, and the provision of answers which did not address the questions asked. The interviewing social workers record how, when asked probing questions, the applicant would become emotional and would often get

upset, leading to two of the interviews being stopped and resumed on later dates. Yet the applicant claims to have attended school, from the ages of four to five. If he attended at that age, that would support his version of events. If, by contrast, he was seven when he attended school, that would have meant that he was eight, not five, when he left Eritrea in 2007, with the ensuing significant consequential impact on my assessment of his date of birth.

43. The applicant could remember some details of his life in Eritrea, Sudan and Ethiopia in his age assessment; at page 12, he remembered that his mother attempted to register him for school in Ethiopia when he was "10 or 11." Under cross-examination, he clarified this, saying he meant that his mother *attempted* to register him at school when he was nearly 11. She made only a single attempt, he said, and they stayed in the country for a total of five years before they left when he was 13 years old. There are clear discrepancies in the timings presented by the applicant; his case was that he arrived in the country when he was aged nine, and that he stayed there for five years. That would put him at age 14 upon his departure. Yet he claims to have been 13 years old when he left. In cross-examination, the applicant claimed that what he actually said was that he was "nearly 14", however there is no support for that account in the age assessment, or the accompanying contemporaneous notes. He did add in the age assessment, however, that he would round ages up or down, which may explain any inconsistencies as to dates. The applicant said in the age assessment that he left Ethiopia for Sudan aged 13, and remained there for approximately 12 to 13 days, before his mother told him that he had to travel to Turkey with an unnamed man, pursuant to arrangements made by his aunt and uncle. This would have been in 2016, on the applicant's account: see paragraph 13 of his first witness statement.

44. It is the applicant's case that he travelled to Turkey on documents provided by the agent, the Sudanese man through whom his aunt and uncle arrange to travel. The applicant claims that he was detained in Turkey for around 15 days, along with a number of other people. He said that he was asked for his name in the detention camp but was not asked for fingerprints.

45. The applicant has provided a vague and partially inconsistent account of finding out how his mother died. He claimed to have found out by telephone while in Turkey. In the age assessment, he said he gave his mother's telephone number to the agent he was travelling with, who made a call on his behalf, and informed him that his mother was dead. In cross-examination, the applicant said that he was allowed to use the phone himself. He then distanced himself from the description of the person as an "agent", claiming that it was simply a man he lived with, and that he did not live with just "a man", as there were so many. He lost the number, he said in cross-examination, when he was at sea in an accident.

46. The applicant described travelling from Turkey to Greece (Lesbos) by boat. He said the conditions were horrific. Some boats attempting the crossing at the same time did not make it. He saw people drown. He was soaked up to his waist at one stage. Upon arrival in Greece, there were riots. He struggled with his asthma from the smoke from the riots and was treated in an ambulance.

47. The main difficulties with the applicant's narrative from Turkey onwards arise from the lack of detail in his age assessment interview, which compounds the concerns raised by the respondent in relation to his account of what happened from that point. I direct myself that one should always be careful when assessing accounts by reference to the assumed inherent likelihood of claimed events having taken place, or their assumed probability; as a Judge of the Upper Tribunal, my experience is so far removed from those in this applicant's position that I should be careful when addressing the plausibility of his account. On the other hand, the authorities concerning the difficulties with assessing the inherent likelihood of matters which are said to have taken place in a very different cultural context are in the context of protection appeals, and the lower standard of proof – reasonable likelihood – which applies to such proceedings. The lower standard of proof is capable of admitting matters which seem inherently unlikely. The balance of probabilities standard to which my findings are subject is a higher standard of proof which, by definition, requires more evidence to justify findings.

48. Against that background, I have concerns at the lack of depth in the accounts the applicant has provided of the period in excess of two years for which he claimed to be living in Greece (see paragraph 15 of his first statement, "…two and a half or three years…").

49. The applicant claims to have slept rough in Lesbos with a number of other migrants as they sought to travel to Athens. In Lesbos, the applicant says that he and an unspecified number of other migrants were able to survive day to day because "church people" and charities would provide food for them. This stopped when the migrants started to attack the aid providers. He then claims that he ran off into the mountains as so many riots were taking place. His account of living in the mountains does not feature in his witness statements, nor how long he was there for, and nor does he address how he was able to survive without the claimed handouts from the church. The narrative does not explain how the applicant made his way back from the mountains – or why – in order to be moved onto Athens.

50. I turn to Athens. The applicant provides no details as to how he arranged the travel by boat which took him. He did not know who the people were who facilitated his travel, although did not think they were "aid people", as the police were present. It is the applicant's case that he lived in a church house in Athens for at least two years, and that he was given all he needed to eat and wear. He provides no details of any reception processes in Athens, or further interactions with the authorities, other than to say he was fingerprinted at one point. This part of the applicant's narrative is characterised by a lack of detail. I have credibility concerns with the suggestion that the applicant, as a claimed child, was able to live undocumented and on handouts from undetailed churches and unspecified charities for such a long period of time, having been put on another boat by persons wearing some form of official uniform for the relatively lengthy crossing over the Aegean Sea. The suggestion that aid agencies would have engaged with him, as a child, yet done nothing to provide him with longer term assistance or support is not credible. On the applicant's case, he would have been much younger when he arrived in Greece. That further compounds my concerns with this aspect of his account. When pressed for further

details in his age assessment interview concerning the details of his crossings and his accommodation and experiences in Greece, the applicant found it difficult to talk about them, necessitating the interview to be suspended. Although the applicant claims to have endured great hardship during his journey to the United Kingdom, and he is a vulnerable individual, the pattern that seems to emerge in his interviews was that whenever difficult questions requiring a specific answer about a key aspect of his chronology were put to him, he was unable to give a specific answer.

51. I have additional concerns arising from the applicant's claim that the unspecified church leaders and his supporters in Athens provided the funds and documents to facilitate his onward flight to Belgium. His case is that he was taken to the airport, able to navigate immigration and customs checks despite people around him being turned back, and collected at the airport in Belgium, to be taken to – and left in – a park. There is an inconsistency between what the applicant claims took place in Greece – where the applicant claims he was housed for two years, provided documents and tickets – and his arrival in Belgium, where he claims he was taken to a park, and left to fend for himself. Irregular migration over international borders is expensive. If it were the case that his Greek benefactors were arranging and funding his travelling this way, I do not consider it to be credible that the assistance provided would stop such an abrupt manner, had it been provided as he claims, or even that they would enable a child to be treated in this way.

52. Under cross-examination, the applicant appeared to minimise the amount of money that he was found to have in his possession upon his arrival in this, €390. In his age assessment, he had said that he was given some money for "*tea and coffee*" in Greece and Belgium. He additionally maintained that he had no reason to spend the money that he had been provided with; he did not buy a train ticket for his journey to Calais, and when he was in the "jungle", there was no way to spend the money that he had. As I will outline, those who know the applicant in this country all comment on his ability to manage his financial affairs well, to budget, and to save money, all independently. It is not consistent with the clear financial prudence the applicant has demonstrated while living here for him to suggest that he did not have a lot of

money on him upon his arrest in this country. In cross-examination, he sought to deflect questions on this basis ("*How do you mean a lot of money?*"). In my view, taken with the wider credibility concerns arising from the account the applicant has provided concerning his living and financial arrangements in Greece, I do not consider he has revealed the full picture arising from his journey from Sudan to mainland Europe and onto this country. This presents wider credibility concerns to which I will return.

Social workers' evidence

53. Ms Cann has been the applicant's social worker since 30 May 2019. Her statement describes the circumstances in which the applicant came to the attention of Milton Keynes social services, and outlines the applicant's health, education, emotional and behavioural development, family information, social relationships and presentation and self-care skills of the applicant. Ms Cann's statement appears to be a summary of the different entries in the respondent's records concerning the applicant, which did not necessarily involve Ms Cann, as well as recording some of her own observations from the two statutory visits she conducted.

54. Ms Cann's written evidence describes a number of her colleagues forming the view that the applicant is an adult. She notes the conclusions of the two social workers who conducted the "eyes-on" assessment on 19 February 2019. She notes that a childcare review meeting conducted on 17 June 2019 was attended by an independent reviewing officer and a different social worker, Ashley Edwards. Mr Edwards is recorded as having said that, "in my professional opinion [the applicant] presented as significantly over the age of 18."

55. At paragraph 9.2 of her statement, Ms Cann writes:

> "I have carried out two statutory visits to see [the applicant]. His body language and demeanour is in my opinion that of somebody who is confident. [His] facial features are in my opinion that [sic] of an adult. It is my assessment that he is significantly older than 18 years of age. An age assessment is underway which will explore [his] background journey, journey to the UK and gather other relevant information to form a conclusion on his age."

56. In cross-examination, there were some details concerning the applicant's case that Ms Cann was unable to recall. She noted that the details would be "on the file" but was unable to remember specific details and declined to attempt to reconstruct what had happened on the basis of her memory alone. I make no criticism of her for this, especially given the failure of the respondent to put her on notice that she was required to give evidence; she was one of the witnesses who had not been informed she needed to attend, and consequently attended the hearing at the minute, seemingly having dropped everything in order to do so, without having had the chance to consult her notes beforehand.

57. Ms Cann could not remember the dates of her statutory visits to the applicant, nor the content of those visits. She was able to recall that the applicant had had to move accommodation since being under the respondent's care but could not recall when. She could not remember how many "other" children lived with the applicant in his current "semi-independent" accommodation. She did not know whether the accommodation was specifically for 17 to 18 year olds. Ms Cann accepted that such accommodation would normally not be for people over the age of 18. She did not know who else was living at the accommodation, although did know that he gets on well with his current housemates, that he gets on well with staff, and that there had been no reported concerns with his behaviour, conduct or ability to respect boundaries. Ms Cann recalled that the feedback from the accommodation was that the applicant demonstrated a high level of independence, and only needed assistance in securing a bus pass to travel locally.

58. The overall opinion of Ms Cann as to the age of the applicant appeared primarily to be based upon his appearance, demeanour, and her summary of the views of her colleagues, in particular the two social workers who conducted the eyes-an assessment, and Mr Edwards.

59. I find that Ms Cann's evidence is largely neutral as regards my assessment of the applicant's age. While, as I have set out above, I have no reason to doubt her sincerity or credibility, it is plain that she could recall only basic details about the applicant's living arrangements and interactions with those around him, and was unable to

recall many details about the statutory visits she paid to him. She did, in fairness, remember that his room seemed a little untidy, but the depth of her evidence appeared to be hampered by virtue of the fact she had not been able to refresh her memory from the file. In addition to this, I note that Ms Cann had only paid two statutory visits to the applicant. When asked whether the applicant demonstrated a level of independence and overall behaviour which could be consistent with that of a 17-year-old, Ms Cann said that such behaviour can vary. She accepted that his overall behaviour is consistent with that of the 17 year old but added that her personal opinion was that he is older. When pressed in relation to the applicant's independence, she candidly accepted that that was not a question that she had considered. She had not spoken to the accommodation provider about the applicant's age, but did not support, in general terms, that the fact he gets on well with people who are aged 16 to 17 does not necessarily support the contention that that is the age bracket within which his age sits. Rapport is not reflective of age, she added.

60. As noted in the Solihull case, it is unlikely that observations of demeanour and behaviour made in the course of two short visits such as that can be reliable indicators of an individual's age. Ms Cann clearly has broad experience of working with adults and young people. She explained that, prior to becoming a social worker, she used to work as a probation officer with the youth offending team and has received formal training in the conduct of age assessments. She has a range of experience which I do not wish to dismiss lightly. However, it is clear that the recollection of the individual meetings that she had conducted with the applicant was limited, and her operative reasoning leading her to conclude that the applicant was significantly over 18 was based extensively on the unreliable indicators of demeanour and behaviour.

61. Huma Ali was one of the two social workers who conducted the full age assessment interviews and drafted the report. She provided two witness statements. In her first statement, she wrote that one of the sources of information she relied upon in order to reach her considered view that the applicant was an adult was the personal

opinion of Collin Ocaya, the appropriate adult assigned to represent the applicant's interests in the age assessment process. Ms Ali said at paragraph 6:

> "Collin Ocaya (Refugee Council) informed me that his personal view was that he felt [the applicant] was an adult and not the stating years. Mr Ocaya had asked for his views not to be included in the age assessment."

62. Mr Ocaya denied having informed Ms Ali that he said anything of the sort. He asked her for an earlier, draft, version of the age assessment to omit any references to his views. This dispute led to a satellite issue in the proceedings, whereby both Mr Ocaya and Ms Ali were invited to make written statements on the topic of the disputed conversation and were directed to attend to be cross-examined on the point. It is necessary for me to avoid the temptation to become side-tracked with a peripheral issue. But, given the dispute between the parties on a potentially material piece of evidence, it is necessary that I resolve whether or not Mr Ocaya did express his personal views to Ms Ali.

63. I find that Mr Ocaya did confide in Ms Ali privately that his personal view was that the applicant was over the age of 18. However, taken at its highest, I do not consider that Mr Ocaya's personal views attract weight. My reasons for this are as follows.

64. Ms Ali gave a clear and detailed account of a conversation she held with Mr Ocaya in the margins of the final age assessment meeting with the applicant, which was what she termed a "clarification meeting". It took place on 24 September 2019. Her evidence was that as she escorted Mr Ocaya out of the building and the two of them were alone, he confided in her that his view was the applicant was over the age of 18. Ms Ali gave a clear and compelling account of Mr Ocaya saying that age assessment cases potentially raise safeguarding issues, and that he added that, as the father of daughters, these matters were of particular concern to him. In her second statement, dated 24 October 2019, Ms Ali describes Mr Ocaya having approached her with the request that his views be removed from the report. This Ms Ali did, although her initial statement for these proceedings records that she took his view into account.

65. Mr Ocaya gave a statement dated 29 October 2019 in which he denied having ever revealed his views to Ms Ali. At paragraph 4, Mr Ocaya said that, although he had

been asked by Ms Ali for his views, he refused to reveal them, as it was not compatible with his role of being present as an independent adult. In cross-examination, Mr Ocaya maintained this approach. He was adamant that on 25 September 2019, he emailed Ms Ali denying that he had ever revealed his personal views, saying that he specifically pointed out that he had not said that his view was that the applicant was an adult. Mr Ocaya did not provide a copy of that email himself, but it was one of the documents which was disclosed in the batch of materials provided shortly before closing submissions.

66. The email is consistent with Ms Ali's evidence and undermines what Mr Ocaya wrote in his statement and said under cross-examination. Mr Ocaya wrote:

> "I have gone through [the draft age assessment] and I am happy [sic] that in paragraph 14 I am quoted as saying that my views were that BT was not a minor.
>
> I would like to advise that the views mentioned were my personal views and should not be included in the report.
>
> So can I request that the statement be deleted from the report.
>
> I can also remember mentioning that whatever views I had cannot and should not be included in the report.
>
> Please let me know when it has been done…"

67. Plainly, Mr Ocaya's email supports the evidence of Ms Ali that he did make the personal observation that he considers the applicant to be significantly over the age of 18. There appears to be a mistake in Mr Ocaya's first sentence, in that he appeared to have been anything but "happy" for his personal views to be recorded in the age assessment. There must be a missing "not". However, it is clear that his view was that the applicant was not a minor, and that his main concern was that his personal view was not relevant for inclusion in the report: see the second sentence. Mr Ocaya must, at the very least, have been mistaken in his recollection of the conversation when he prepared his witness statement and in cross-examination. Certainly, his evidence was vague at times, and in marked contrast to the clarity and force with which Ms Ali gave her account of the conversation. I find that Mr Ocaya did confirm to Ms Ali that his personal views were that the applicant was not a child.

68. Turning to the impact of Mr Ocaya's views, I find they attract only marginal weight. His presence at the age assessment interviews was the full extent of his interactions with the applicant, although it appears from the age assessment (e.g. page 12) that he spent some of the applicant's breaks with him, meaning that he has had the benefit of spending time with the applicant alone outside the formal interviews, rather than exclusively within the context of the interviews themselves. I have noted above how the views of the assessing social workers as to the applicant's demeanour, physical presentation, and narrative are likely to be limited by the constraints inherent to the circumstances in which their assessment was taking place: see the Solihull case. It follows that, although Mr Ocaya revealed his personal views to Ms Ali, and although those views were that the applicant was over the age of 18, they attract only marginal weight, given the limited number of interactions he had with the applicant, and the absence of any insight or reasoning accompanying his views. Mr Ocaya's evidence, therefore, adds little to my overall analysis (but little weight is not no weight, and I do not suggest that Mr Ocaya's personal views are completely devoid of merit for the purposes of this analysis).

69. The final witness I heard from was Ola Oloyd. He is the applicant's support worker at the semi-independent accommodation where the applicant lives. In his statement dated 18 September 2019, Mr Oloyd writes that, having known the applicant for three months at that stage, he had no opinion as to his age (para 9). He said the applicant acts like a baby sometimes (para 10), and described the applicant becoming emotional when thinking about his mother or his journey to the United Kingdom. Under cross-examination, Mr Oloyd was consistent with his written evidence, and gave little additional amplification. He said that the applicant does not talk about his age, and that any references to the applicant's age in case notes he had completed were to his claimed date of birth, which the social workers had revealed to him. On one occasion, the applicant became upset about his age and Mr Oloyd advised him to calm down and assured him "everything will be fine".

70. Although being one of the best-placed witnesses to assess the demeanour and behaviour of the applicant, given he sees the applicant at the applicant's home, Mr

Oloyd purported to have no opinion as to his age. Under cross-examination, Mr Oloyd said that he had not been trained in age assessments and was reluctant to offer a view as to the applicant's age. Mr Oloyd was not being asked under cross-examination for a formal, considered view, expressed against a background of appropriate training. He was simply being asked for his own personal opinion. I have some doubts that a support worker at a children's residential home would not form a personal view as to the age of a resident. While one may expect someone in Mr Oloyd's position to have formed a personal, private view, he maintains that he had not. The evidence of Mr Oloyd is neutral in the overall balance.

71. The applicant was referred to the Home Office to make a claim for asylum shortly after he was arrested. An initial screening interview took place on 20 February 2019. He awaits a substantive asylum interview. Significantly for present purposes, the screening interview record ("the SCR") completed by the Home Office featured the date of birth of "01/01/2001", with the handwritten annotation that it had been "provided by social services". I am aware that 1 January is often used as a generic date of birth when the actual day and month within a year is not known. What is significant, is that the year given was 2001. Mr Underwood for the respondent contends that that date was not provided by Milton Keynes, and its provenance is unknown. However, it must have come from somewhere. Given the respondent's difficulties with disclosure in this case, it is hard to have a significant degree of confidence in the respondent's contentions that the date did not originate with it, especially given the form has been competed on the basis that the date of birth was, "given by social services." There is an additional suggestion that a "BP7" form was signed. Neither party were able to assist me with what a "BP7" form may have been.

72. The potential significance of the date of birth on the SCR is as follows. The applicant claims to have been born on 23 June 2002, giving him an age of 16 upon his arrival in February 2019. However, if the *year* assigned by the SCR is correct, or closer to the truth, it may provide me with a degree of assistance. This is because it is clear from use of 1 January as the day and month that it was a notional date, as is common where dates of birth are not otherwise known. The applicant was not cross-

examined as to the point in the year at which he celebrated his birthday; the respondent did not challenge his allocation of a June date. Indeed, pursuant to the respondent's own analysis, the applicant's day and month of birth was 23 June. It is common ground, therefore, between the parties that the applicant was born on 23 June. Adopting the inquisitorial approach I am required to adopt in these proceedings, I see no reason to depart from the common ground between the parties on the issue of the in-year timing of the applicant's day and month of birth.

73. Of course, simply because the SCR assigned the applicant the year of birth 2001 does not mean that there is any accuracy in that assignment. The provenance of the assignment is not clear. I have set out above the credibility concerns arising from the applicant's account of his journey to this country: the confusion over whether he did, in fact, reveal to the social workers when he first learned of his date of birth and age; the lack of clarity concerning what happened in Turkey, Greece, Belgium and France; the inconsistencies between the applicant's claimed poverty existence during his travels, and the large sum of money on his person upon his arrival in this country; and the incredibility of the suggestion that he was housed, paid, and had his journey facilitated by unspecified churches and other charitable persons, in relation to whom the applicant has provided no details whatsoever. The applicant's account of hearing of his mother's death lacks detail and featured degrees of internal inconsistency. The only assessments of the applicant's physical appearance and demeanour I have been provided with have been from people who have considered him to be significantly over the age of 18. Mr Oloyd, the only person who has seen the applicant at length on a number of occasions, had no view on his age. Mr Underwood described the applicant's ability to look after himself as "unchildlike".

74. The question for my consideration, therefore, is whether the credibility concerns I have outlined above are such that, put simply, I cannot believe a word of what the applicant has said, or alternatively whether - as is common in many different areas of litigation, especially litigation in this jurisdiction – he has overlooked, misremembered or even exaggerated his account, but that at its heart lies a kernel of truth. As noted by Stanley Burnton J in Merton at [28], lies are not necessarily

indicative of an applicant not being a child, as they may be told for a variety of reasons.

75. I recall that, for the purposes of these proceedings, there is no dispute concerning the broad thrust of chronology of the applicant's departure from Eritrea to Ethiopia and Sudan. The respondent has highlighted the inconsistencies in the ages provided by the appellant for when he moved to from Sudan to Ethiopia, and I have outlined these at paragraph 43, above.

76. As Ms Benfield pointed out in her closing submissions, the operative reasoning of the age assessment is based primarily on the physical characteristics and demeanour of the applicant, and such considerations can be unreliable when based on limited interactions with a person of a very different culture, in the formal and artificial setting of an age assessment interview. The material disclosed concerning Ms Cann's visits to the applicant reveal that no discussion took place about his background, claimed age, journey to the United Kingdom, or family.

77. I reject Mr Underwood's submissions that Mr Ocaya's unguarded remarks, which he later claimed not to have made, attract significant weight. There is no evidence that he spent any more time with the applicant than the assessing social workers, still less that he sought to engage with the applicant's history and narrative. His evidence, which featured a signed statement of truth, was clearly inaccurate. He was at the very least confused as to what he had said to Ms Ali. I do not know what made him think that the applicant was over the age of 18.

78. There is one individual who met the applicant outside the confines of the formal age assessment process who did not consider the applicant necessarily to be an adult. Giles Matthews is the drop-in manager of the Harbour Project, a Swindon-based refugee project. In a letter dated 18 April 2019, he writes that the applicant arrived at the Harbour Project on 3 April 2019. His letter states:

> "I am aware that Milton Keynes Council has assessed [the applicant] as clearly and obviously over 18. Since his arrival, he has attended every day and from my point of view, I would not say that it is clear and obvious, from his appearance and behaviour that he is over 18."

Mr Matthews' letter, which was written 15 days after he had first met the applicant, does not say *why* he concludes that he would "not say that it is clear and obvious" that the applicant is an adult. Mr Matthews does not state that he considers the applicant to be a child, but simply states that it is "not… clear and obvious" that the applicant is an adult. His view lends some support to the applicant's case. It is, of course, not "clear and obvious" that the applicant is a child, or an adult: that is why the Administrative Court granted permission to bring judicial review proceedings.

79. I find that the assignment of the year 2001 as the applicant's year of birth on the SCR attracts some weight. It was the formal basis upon which the Home Office began to process the applicant's asylum claim. Whatever the provenance of the date of birth within the respondent's organisation, the fact that the Home Office recorded the date of birth as being in 2001 sheds some light on my analysis. It was a date and year of birth which rendered the applicant an adult for the purposes of his asylum claim, but only just. When the "common ground" month and day of birth – June 23 – is factored into the assigned date of birth, that gives the applicant a date of birth of 23 June 2001.

80. If I were to prefer the respondent's approach to the likely date of the applicant, it would be necessary for me to place a significant degree of reliance on the very factors which the authorities suggest are unreliable, namely demeanour and physical appearance. I accept that there are a range of significant credibility concerns arising from the applicant's claimed journey to this country, following his departure from Sudan. I take those into account. Considering all factors in the case, in the round, to the balance of possibilities standard, I find that the concerns I have outlined above do not operate to deprive the applicant of all credibility. He may have been mistaken in aspects of his recollection of his history. However, he has not given me a credible account of what took place in and from Greece onwards. It is not credible that a child could exist for such a period of time in those conditions.

81. The fact that the respondent social services and the Home Office were willing, in principle, to proceed on the basis that the applicant was born in 2001 is a factor of

some significance. In my view, 2001 is closer to reality than 1994 as assigned by the respondent.

82. I return to my analysis of the chronology provided by the applicant. His recollection in re-examination of how he knew how old he was when he attended school in Eritrea is that his mother told him how old he had been, when he used to sit at her feet while she talked to him. As set out above, the unchallenged background position summarised in the age assessment is that compulsory school commences at seven years of age in Eritrea. The applicant has consistently said that he was at school for a year before he left Eritrea. That would mean that, in 2007 when he claims to have moved to Sudan, he would have been eight, assuming he attended the "mainstream" school he described in the age assessment, meaning he was born in 1999. That is closer to the date that the SCR records social services as having been willing to assign to him when facilitating his initial asylum claim.

83. The chronology provided by the applicant of how old he was when moving from Sudan to Ethiopia and back again featured inaccuracies. I consider these inaccuracies arise from the fact the applicant is attempting to claim that he was younger than he was at those stages. I accept that the applicant moved to a new country when he said he did; namely that he left Eritrea in 2007 for Sudan, that in 2011 he moved to Ethiopia, and that in 2016 he left for Turkey. I will return to the significance of those findings shortly.

84. I place little weight on the account provided by the applicant of his journey through Europe. At key junctures, when probed for further information in the age assessment, he declined to provide it, becoming upset and requiring the interview to be suspended. I recall that the applicant is a vulnerable individual, even if not a child. On any view, he has had a traumatic experience. However, his assertions are not supported by anything approaching the level of detail that it would be reasonable to expect the applicant to provide, even allowing for his vulnerability. I accept that he travelled through Turkey, Greece, Belgium and France. I do not accept that he was in Athens for "two and a half or three years" (first witness statement, at [15]) from the age of 14, nor that he was provided with the support that he claims

from the unspecified churches and charities, despite (as he claims was the case in Lesbos: see page 14 of the age assessment) the fact that the "refugees" set fire to the aid vehicles. He could not remember which season of the year it was when he left Athens (age assessment, page 15), stating that he did know the difference between summer and winter clothing, and that he did not have a choice about what he wore, as everything was provided for him – despite, on his case, the same benefactors giving him the relatively significant sum of €390. The applicant's explanation for this when pressed was that what he meant to say was that he did not know the difference between summer clothes and winter clothes. That is hard to believe, given the intense heat of Greek summers, coupled with the temperature drop over the winters. The picture that emerges from the applicant's evidence is of one who was not the young child he claimed to be upon his arrival in Greece, given he claimed to be around 13 to 14 years old. I accept that the applicant spent as long in Greece as he claims, but not that he was as young as he claims to have been when he lived there. He may have been on the threshold of the age of majority upon his arrival there. That the applicant cannot remember the seasons, or account even for the clothes he wore at different times of the year, is significant. The account he has provided is not credible, for the reasons outlined above. He was not, as he claims, some years away from the age of 18 upon his initial arrival in Greece. He has sought to cover up for the gap in his evidence through vague assertions and evasiveness concerning his lengthy period there. He arrived in Greece when he was nearly 18 and stayed there for two and a half to three years, attaining the age of 18 before he arrived in this country.

85. I consider that the applicant was fully aware of the significance of having €390 upon being found in this country, given the financial prudence and independence he has demonstrated since his arrival. Precisely because he was aware of the significance of that sum, and the need to ensure his narrative was consistent with his case that he was a child living off handouts from unspecified church leaders and charities, in his age assessment he said that it was for "tea and coffee", and sought to minimise the amount under cross-examination. I find that the applicant in his narrative has exaggerated his account of being a young child fending for himself in Greece. I find

that he was not as young as he claims to have been when he arrived in Europe. For the reasons set out above, I find the cursory allocation of a year of birth in the SCR to be closer to the truth. While Mr Matthews states that it is "not… clear and obvious" that the applicant is an adult, when assessed to the balance of probabilities standard, I find that he is an adult, and was when he arrived here in February 2019.

86. Having considered all the evidence in the case in the round, to the balance of probabilities standard, doing the best I can, I find that the applicant was born on 23 June 1999. He attended school aged 7 in Eritrea for a year, before leaving in 2007 aged 8. He moved to Sudan, where he stayed from the ages of 8 to 12, before moving to Ethiopia in 2011, where he stayed for another five years, before setting off for the United Kingdom via Europe in 2016. Upon his arrival here in February 2019, the applicant was 19 years of age.

SUMMARY OF DECISION

87. It is determined that the applicant's date of birth is 23 June 1999 so that on arrival in the United Kingdom on 18 February 2019, he was 19 years of age.

Signed *Stephen H Smith* Date 23 January 2020

Upper Tribunal Judge Stephen Smith

Upper Tribunal
Immigration and Asylum Chamber

JR/3432/2019

Judicial Review Decision

The Queen on the application of

BT (ANONYMITY DIRECTION MADE)

versus

MILTON KEYNES COUNCIL

BEFORE UPPER TRIBUNAL JUDGE STEPHEN SMITH
SITTING AT Field House, 15 Breams Buildings, London, EC4A 1DZ

ON 23 JANUARY 2020

UPON HEARING Ms A Benfield, Counsel for the applicant and Mr A Underwood, QC, for the respondent on 8, 11 and 21 November 2019;

AND UPON the Tribunal having heard oral evidence from the applicant, Nicola Cann, Huma Ali, Collin Ocaya and Ola Oloyd, and the Tribunal having read the witness statements and evidence contained in the Judicial Review Bundle;

AND UPON Upper Tribunal Judge Coker awarding the applicant the costs of his application dated 11 September 2019 and the costs of the attendance of the applicant's solicitor and counsel at the hearing on 16 September 2019 on an indemnity basis, on 18 September 2019;

AND UPON Upper Tribunal Judge Stephen Smith ordering that the respondent pays the applicant's costs of making the application of 20 November 2019, to be assessed if not agreed, on 20 November 2019;

AND UPON the applicant and respondent having made written submissions in relation to costs upon sight of a draft, embargoed copy of the judgment;

AND UPON THE TRIBUNAL handing down judgment on 23 January 2020 and there being no appearance by or on behalf of the applicant and the respondent when judgment was handed down;

IT IS DECLARED THAT

1. **The applicant's date of birth is 23 June 1999, and that on his arrival in the United Kingdom on 18 February 2019 he was 19 years of age**

Costs

1. **The costs orders made by Judge Coker and Judge Stephen Smith on 18 September 2019 and 20 November 2019 respectively remain in force;**
2. **The applicant be awarded his reasonable costs incurred between 11 November 2019 and 21 November 2019, to be assessed if not agreed;**

3. I make no order as to costs for the respondent's costs.

REASONS

1. The events set out at [10] to [14] of the substantive judgment of the Upper Tribunal highlight the procedural difficulties encountered in this application due to the unsatisfactory conduct of the respondent. The respondent's failure to disclose relevant material in its possession until the afternoon of the second (and final) day of the fact finding hearing on 11 November 2019 necessitated reconvening the Tribunal to hear closing submissions on 21 November 2019. All costs incurred by the applicant in connection with the reconvened hearing are directly attributable to the respondent's failure to make disclosure in a timely manner, against a background of prior disclosure failings on the part of the respondent.

2. While the applicant would had to have considered the late disclosure materials in any event, had disclosure taken place on a timely basis in accordance with the directions of the Tribunal, such consideration would have taken place in the context of the applicant's overall preparation for the fact-finding hearing. Timely disclosure would undoubtedly have enabled the applicant's consideration of the late disclosure materials to have been more efficient, and taken less time, than the additional time taken to consider those same matters after the fact finding hearing. A significant amount of additional costs had to be incurred due to the conduct of the respondent.

3. I have considered whether it is possible to reduce the amount recoverable by the applicant from 11 November onwards to reflect the fact that at least some of the costs then incurred would have been incurred prior to the fact-finding hearing, and thus would not have been recoverable under normal costs principles. I do not consider that that would be practicable, nor would doing so be proportionate to the judicial time that would inevitably be required in the event of a dispute.

4. In light of the respondent's overall conduct of the case, as outlined at [10] to [14] of the substantive judgment, I do not consider that an order for costs in favour of the respondent is appropriate. As such, I disallow the respondent's costs, as I consider that it is consistent with the overriding objective of the Upper Tribunal to do so.

PERMISSION TO APPEAL

There was no application for permission to appeal to the Court of Appeal and accordingly I refuse permission. There is no arguable case that I have erred in law or there is some other reason that requires consideration by the Court of Appeal.

Stephen H Smith

Upper Tribunal Judge Stephen Smith

23 January 2020

Applicant's solicitors:
Respondent's solicitors:
Home Office Ref:
Decision(s) sent to above parties on:

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 question 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).