EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2026] CSIH 49
A324/24

Lord Malcolm
Lord Clark
Lady Carmichael

OPINION OF THE COURT

delivered by LADY CARMICHAEL

in the Reclaiming Motion

by

AN

Pursuer and Reclaimer

against

RENFREWSHIRE COUNCIL

Defender and Respondent

Pursuer and Reclaimer: Wolffe KC, Blockley; Drummond Miller LLP (for JustRight Scotland, Glasgow)
Defender and Respondent (Renfrewshire Council): Byrne KC, McGowan; Ledingham Chalmers LLP

19 November 2026

Introduction

[1] The reclaimer (appellant) is Vietnamese. She arrived in the United Kingdom on 25 May 2023. On arrival she said that her date of birth was 28 October 2006. Immigration officials considered that her date of birth was 28 October 2000. The respondent, Renfrewshire Council, carried out an age assessment of the reclaimer. The assessment was that her date of birth was 28 October 2000.

[2] The reclaimer raised an action on 10 October 2024. It was directed against Renfrewshire Council, and the Secretary of State for the Home Department. The latter did not enter the process.

[3] The reclaimer submits that she raised an action, rather than a petition for judicial review, consistently with the decision of the Lord Ordinary in *Abdullah* v *Aberdeenshire Council* [2024] CSOH 8; 2024 SLT 143. She initially sought the following orders (1) declarator that her date of birth was 28 October 2006 and (2) declarator that, her date of birth being 28 October 2006, she was entitled to be accommodated by the respondent under section 25 of the Children (Scotland) Act 1995 ("the 1995 Act"). Section 25(1)-(3) provides:

> "**25 Provision of accommodation for children, etc.**
>
> (1) A local authority shall provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision because—
>
> (a) no-one has parental responsibility for him;
>
> (b) he is lost or abandoned; or
>
> (c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.
>
> (2) Without prejudice to subsection (1) above, a local authority may provide accommodation for any child within their area if they consider that to do so would safeguard or promote his welfare.
>
> (3) A local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty-one, if they consider that to do so would safeguard or promote his welfare."

[4] The reclaimer sought a further order, directed at seeking interim remedies. A motion for interim orders was refused on 24 October 2024.

[5] On the reclaimer's own account of her date of birth, she turned 18 on 28 October 2024 and so was no longer a child for the purposes of the 1995 Act. By amendment in the Outer House, the reclaimer added a third conclusion, seeking declarator that, her date of birth

being 28 October 2006, she was entitled to seek support from the respondent under section 25(3) of the 1995 Act.

[6] The case came before the Lord Ordinary for debate on the procedure roll. He dismissed the action and sustained the first to fifth pleas-in-law for the respondent. Those were pleas that the orders sought were academic, that the action was incompetent, and that the reclaimer's averments were irrelevant and lacking in specification. The Lord Ordinary considered that the second and third orders - those directed at the duties of the respondent under the 1995 Act - innovated on the terms of that Act. A declarator that the reclaimer's date of birth was 28 October 2006 was a bare declarator of fact which would have no practical result, and the action was accordingly academic.

[7] The reclaimer amended further to seek to meet the point about innovation on the terms of the 1995 Act. By the time of the reclaiming motion the second conclusion was for declarator that the respondent had power to provide the reclaimer with accommodation if it considered that to do so would safeguard or promote her welfare by virtue of the power provided for in section 25 of the 1995 Act. The third conclusion was amended so as to seek declarator that the reclaimer was entitled to apply for accommodation from the respondent under section 25(3) of the 1995 Act.

[8] On 26 March 2026 solicitors for the respondent wrote to the reclaimer's solicitors in the following terms:

> "We note the amended third conclusion seeks a declarator that the Reclaimer is entitled to apply for accommodation from our clients under Section 25(3) of the Children (Scotland) Act 1995. Such an application has not been made to date, and nor has our client objected to that application being made.
>
> The age assessment undertaken was for the purposes of Section 25(1). It is our view that this section applies to children and the Reclaimer is now, on her own averments, over the age of 18. It is our view that the process under Section 25(1) is now spent.

> Consequently, our clients withdraw, and have withdrawn, the age assessment. It no longer serves any purpose as it was for the purpose of a Section 25(1) assessment, which no longer arises. For the avoidance of any doubt, we confirm that we will not make any reference to the withdrawn age assessment in respect of any future application under Section 25(3)."

[9] The reclaimer's local agents provided that correspondence to the Home Office. On 7 April 2026 a Home Office official responded by email:

> "We note the Council's confirmation that it has withdrawn the age assessment previously relied upon in your client's case.
>
> In light of this development, and in the absence of a subsisting local authority age assessment or a court determination of your client's age, the Home Office position is that it reverts to the Home Office assessed date of birth currently recorded on file 28-10-2000."

[10] Notwithstanding the terms of that email, on 20 April 2026, the Home Office issued a decision refusing the reclaimer's asylum claim in which it referred to the age assessment by the respondent as an authoritative age assessment. The Secretary of State accepted that the reclaimer had been trafficked, but did not accept that she would be at risk of persecution on return to Vietnam, on the basis that there would be sufficient protection from persecution in Vietnam, and that the reclaimer would be able to relocate internally within her country of origin. For the purposes of a claim based on the reclaimer's rights under Article 8 of the European Convention on Human Rights (the right to respect for private and family life) the Secretary of State proceeded on the basis that the reclaimer was over the age of 18 when she arrived in the United Kingdom.

Reclaimer's submissions

[11] The Lord Ordinary had erred in finding that the first conclusion sought a bare declarator which would have no practical result. Age was an aspect of personal status. It was an important aspect of an individual's personal identity, and bore on numerous

matters including the right to marry and to apply for a driving licence. In *Darboe* v *Italy* (2023) 76 EHRR 5, the European Court of Human Rights had held that age assessment procedures engaged Article 8 of the Convention on the basis that:

> "the age of a person is a means of personal identification and that the procedure to assess the age of an individual alleging to be a minor, including its procedural safeguards, is essential in order to guarantee to him or her all the rights deriving from his or her minor status"; paragraph 124.

[12] The proceedings were not academic because they were relevant to a potential future exercise of the local authority's power under section 25(3) of the 1995 Act: *Ahmat* v *Aberdeenshire Council* [2025] CSOH 15; 2025 SLT 735, paras [4] to [8]; *Ibrahimi* v *Glasgow City Council* [2026] CSIH 4, paras [26] to [28]; *R (GE (Eritrea))* v *Home Secretary* [2014] EWCA Civ 1490; [2015] 1 WLR 4123. No application under section 25(3) had been made in *Ahmat* or *Ibrahimi*. The purpose of the present proceedings was to determine authoritatively that the reclaimer was eligible to rely on section 25(3). Eligibility for support under that section depended on an individual being at least 18 but not yet 21 years of age. In the case of dispute, that was a matter of precedent fact to be determined by the court: *R(A)* v *Croydon London Borough Council* [2009] UKSC 8; *Ahmat*, paras [65] and [71].

[13] The reclaimer's accommodation was precarious and provided under section 9 of the Human Trafficking and Exploitation (Scotland) Act 2015. If its provision were not extended by the Scottish Ministers, she would require to apply to the respondent for accommodation.

[14] In *Ibrahimi* the court had acknowledged that the Home Office would be entitled to treat the local authority's age assessment as relevant when determining the asylum claim, and that the First-tier Tribunal would also be entitled to do so. Determination of the reclaimer's age by the court in the present proceedings would continue to be relevant to the exercise by the Home Office of its functions.

[15] Against that background the declarator sought was not a bare declarator of fact. The form of procedure did not affect the substance of the proceedings. If the court considered that the matter had been raised incorrectly by way of action procedure, that could be cured by transfer to judicial review procedure under Rule of Court 58.15.

[16] Senior counsel acknowledged that the court would have to consider whether the reclaiming motion was academic in the light of the respondent's withdrawal of the assessment.

[17] Another issue that might require consideration was whether *QAN* v *South Lanarkshire Council* [2026] CSOH 49; 2026 SLT 646 had been correctly decided. The Lord Ordinary in that case had determined that in assessing the age of an individual for the purposes of section 25 of the 1995 Act, a local authority was necessarily also undertaking an age assessment in terms of section 50 of the Nationality and Borders Act 2022 ("the 2022 Act"). Section 50(3)(b) entrusted the decision-making function to the local authority. Parliament had entrusted the determination of age to the local authority. The Lord Ordinary held that precedent fact was therefore irrelevant to judicial review of an age assessment; the court could not substitute its own conclusions as to the age of the individual, and it followed that it was incompetent to seek a declarator as to the date of birth of the petitioner. Senior counsel submitted that *QAN* had been wrongly decided.

Respondent's submission

[18] The oral argument for the respondent focused almost exclusively on the withdrawal by the respondent of the age assessment. Senior counsel submitted that there was no longer any live issue between the parties such as to require or entitle the court to intervene.

[19] Unlike a decision made under section 50 of the 2022 Act by a designated person, such as the National Age Assessment Board, an age assessment made by a local authority bound only that local authority. The respondent had withdrawn the age assessment. Senior counsel described the correspondence as containing a clear and unequivocal undertaking that no reliance would be placed on the withdrawn assessment if the respondent were asked to provide support under section 25(3). The "decks had been cleared" if the reclaimer were ever to make an application for such support.

[20] It would in any event be wrong, constitutionally, for the court to intervene and to grant a declarator as to the reclaimer's age. The role of assessing the reclaimer's age had been conferred on the respondent by Parliament in the context of its having to determine whether to provide support under section 25(3): *QAN*. Senior counsel invited us to endorse the reasoning in *QAN*, as it supported his submission that the reclaiming motion should be refused.

[21] There could be no competent exercise of the court's jurisdiction where (a) the question of the respondent's powers under section 25(1) was moot, because the reclaimer was on any view aged more than 18 years; (b) the respondent had not made a decision as to whether to exercise its powers under section 25(3) and; (c) no application had been made to it under section 25(3). The reclaimer expressly invoked the supervisory jurisdiction of the court, but there was no decision to review.

[22] It was competent for a pursuer to seek a declarator of fact, but only as a step towards a further conclusion declaratory of his rights: *Gifford* v *Trail* (1829) 7 S 854; *Lyle* v *Balfour* (1830) 9 S 22 at p 23. The reclaimer's choice of procedure was misconceived. Judicial review was the appropriate procedure under which parties should challenge age assessment decisions. The court was exercising a supervisory jurisdiction. The respondent had a power

conferred on it by statute in respect of an individual, and the relationship was a tripartite one of the sort contemplated in *West* v *Secretary of State for Scotland* 1992 SC 385.

Decision

[23] The determination previously made by the respondent bound only the respondent in relation to any statutory responsibilities that the respondent had towards the reclaimer. As a matter of law, it did not bind the Secretary of State for the Home Department, although it was a matter she was entitled to take into account, and to give such weight as she chose, absent any public law error on her part in her approach to it. That is in contrast with a situation in which a local authority refers an age-disputed person to a designated person for an age assessment under section 50 of the Nationality and Borders Act 2022. In that situation the assessment by the designated person binds both the local authority so far as it is exercising functions under relevant children's legislation and on the Secretary of State when exercising immigration functions: see section 50(7). Senior counsel for the reclaimer accepted that the respondent had power to withdraw the assessment that it had made.

[24] Matters have developed since the Lord Ordinary dealt with this case. There was at that time a decision of the respondent as to the reclaimer's date of birth which would obviously have stood in the way of any contention that the respondent had power to provide her with support under section 25(3) of the Children (Scotland) Act 1995. In the light of the respondent's withdrawal of its age assessment, the position is that the age of the reclaimer is something that is not currently the subject of any determination by the respondent. The respondent has undertaken not to rely on the earlier assessment of age in the event that the reclaimer made a further application to it. We regard it as implicit in the respondent's undertaking that they will not provide the withdrawn age assessment to any

decision-maker who is either within the council itself, or part of any other institution. There is no live dispute that the court requires to resolve. It follows that we should refuse the reclaiming motion.

[25] The circumstances of this case are different from those in *Ibrahimi* v *Glasgow City Council* [2026] CSIH 4. In *Ibrahimi* the local authority's offer to withdraw the age assessment was attended by a statement, in terms, that the council did not accept that the petitioner was the age that he said he was, or that it had conducted its age assessment unlawfully. As the court noted, it was unlikely to have engendered much confidence that any future age assessment by the council would be carried out with an open mind.

[26] So far as the Secretary of State is concerned, her stated position in correspondence is that she has reverted to her own assessment of the reclaimer's age, and that there is no longer "a subsisting local authority age assessment". That point can no doubt be made to her in any appeal against the decision to refuse the reclaimer leave to remain.

[27] We readily appreciate that an individual's date of birth has consequences in relation to very many aspects of life. In the course of the debate before us, questions were raised as to what remedy might be open to an individual who wished an authoritative determination of her age, where there was no document vouching that, and outside the context of a particular interaction with a public authority to which her age was relevant. Those questions do not arise in this case. The reclaimer has raised proceedings convening only the respondent and the Home Secretary as defenders, and has done so explicitly in a context where her pleaded concern is as to the power of the respondent to assist her by virtue of their powers under section 25(3) of the 1995 Act.

[28] Although it is not strictly necessary to do so for the disposal of this reclaiming motion, we express the view that the reclaimer in this matter was in substance invoking the

supervisory jurisdiction of the court in relation to the exercise of the powers of the respondent under the 1995 Act. That being so, the matter should have been brought as a judicial review of the age assessment carried out by the respondent.

[29] It is not necessary, or appropriate, for us to express a view as to whether *QAN* v *South Lanarkshire Council* [2026] CSOH 49; 2026 SLT 646 was correctly decided. We were told that there was a reclaiming motion pending in that case, for which a summar roll hearing has been fixed in early 2027. It is in that reclaiming motion that arguments about the Lord Ordinary's decision ought to be made and adjudicated upon.

Postscript

[30] It was clear from the oral submissions of senior counsel for the respondent that the respondent's analysis, at least by the stage of the reclaiming motion, was that a challenge to an age assessment ought to be brought by judicial review. Paragraphs 17 and 18 of the respondent's written argument also contain a submission that judicial review is the appropriate procedure for bringing a challenge to an assessment of age by a local authority.

[31] We appreciate that senior counsel who appeared in the reclaiming motion did not appear at first instance. Generally, where a defender or respondent considers that a petitioner or pursuer has raised a matter as an action that should be brought as a petition for judicial review, or vice versa, the court would expect that analysis to be brought to its attention so that it might consider whether to order a transfer from one form of procedure to another under Rule of Court 58.15 or 58.16.

[32] There may be a superficial attraction to seeking to have an action brought, as a defender sees it, under the "wrong" procedure, dismissed on other grounds, as the respondent did in this case, without resolving the question of the nature of the jurisdiction

that the pursuer seeks to invoke, and the associated question as to the correct procedure. An approach of that sort is, in our view, misplaced in public law proceedings. In many public law cases parties are properly to be regarded as sharing an interest in co-operating to assist the court to achieve the correct result, as the Court of Appeal of England and Wales observed, albeit in a different context, in *E* v *Home Secretary* [2004] EWCA Civ 49; [2004] QB 1044, at paragraph 66. In a case of this sort, a dispute as to procedure is capable of discussion and resolution, under the rules mentioned above.