OUTER HOUSE, COURT OF SESSION

[2026] CSOH 49

P614/25

OPINION OF LADY ROSS

in Petition of

QAN

Petitioner

for

Judicial Review

Petitioner: Halliday; Drummond Miller LLP
Respondent: Blockley; Ledingham Chalmers LLP

2 June 2026

Introduction

[1] The petitioner contends that he is a national of Vietnam and that his date of birth is 14 June 2008. It is not disputed that he arrived in the United Kingdom on 17 January 2025. On that date, two Home Office members of staff decided that the petitioner's physical appearance and demeanour very strongly suggested that he was over 18 years of age. At a screening interview carried out the following day in order to record his claim for asylum, the petitioner said that he had no documents to prove his identity. Home Office officials allocated to the petitioner a date of birth of 14 June 2001. The Home Office provided him with hotel accommodation in England. In late January or early February 2025, the petitioner travelled to Scotland. He stayed in hotel accommodation in East Kilbride provided by the

Home Office. The respondent is South Lanarkshire Council. East Kilbride is within the respondent's local authority area.

[2] In March 2025, the petitioner sought support and accommodation from the respondent on the basis that he was an unaccompanied asylum seeking child. On 11 March 2025, two social workers employed by the respondent, Rachel Marchbank and Mark Kolek, visited the petitioner at the hotel to carry out a welfare check. Ms Marchbank and Mr Kolek met the petitioner at the hotel for a second time, on 24 March 2025, and carried out an interview. An appropriate adult was present. The petitioner had assistance, by telephone, from an interpreter. In affidavit evidence, Ms Marchbank stated that the interview lasted for approximately 90 minutes. There were two breaks. Following the interview, the respondent issued a Brief Enquiry Decision. The Brief Enquiry Decision was signed by Ms Marchbank and Mr Kolek on 2 April 2025 and it was endorsed and signed by Alex Morrison, a manager / team leader, on 4 April 2025.

[3] The Brief Enquiry Decision is a three-page document setting out (i) information about procedural steps and welfare-related measures prior to and during the interview, and observations made about aspects of the petitioner's conduct during the interview; (ii) a brief summary of information provided by the petitioner about his age, identification documents and his journey to the United Kingdom; (iii) observations about the petitioner's physical appearance and presentation; and (iv) a note of additional sources of information taken into consideration, in particular a support worker at the hotel. The conclusion is provided in a two-question pro-forma. The questions are:

- Do you consider this person to be under the age of 18?
- Do you consider their stated age to be accurate?

In each case, the answer is "no".

In the final section, there is a further question:

- Is a full age assessment required?

Again, the answer is "no".

[4] On 5 May 2025, through solicitors, the petitioner submitted a request to the respondent to reconsider the Brief Enquiry Decision. That request contained detailed written submissions relating to both facts and law. In an email sent by Mr Morrison to the petitioner's solicitors on 14 May 2025, the respondent stated that the decision and "the information around the enquiry" had been reviewed, and that:

> "[the respondent maintains] the position that there is nothing in your request for review that significantly would change the outcome of the enquiry therefore a full age assessment is not required."

[5] The petitioner's pleadings and productions disclose that in the period from his arrival in East Kilbride in February 2025 he has received support from, among others, the East Kilbride Integration Network, the Scottish Refugee Council and the Refugee Support section of the British Red Cross. The petitioner has lodged affidavit evidence from four deponents, two volunteers from the East Kilbride Integration Network, an employee of the Scottish Refugee Council and an independent child trafficking guardian at Guardianship Scotland, to whom the petitioner was referred by the respondent.

[6] In these judicial review proceedings, which were raised on 20 June 2025, the petitioner seeks the following principal orders, in terms of statement 4 of the petition:

(i) Declarator that the petitioner's date of birth is 14 June 2008.

(ii) Reduction of the Brief Enquiry Decision.

(iii) An order under section 45(b) of the Court of Session Act 1988 for specific performance of the respondent's duty under section 25(1) of the Children (Scotland) Act 1995.

In terms of statement 4(iv) of the petition, the petitioner also sought an order *ad interim* for specific performance of the respondent's duty under section 25(1) of the 1995 Act, requiring accommodation to be provided to the petitioner as soon as reasonably practicable and to continue providing such accommodation whilst this cause is depending before the court. On 25 July 2025, on the opposed motion of the petitioner, the Lord Ordinary granted interim orders in the terms sought. The petitioner currently resides in accommodation provided by the respondent.

[7] At the outset of these proceedings, the petitioner's grounds of review included a challenge to the procedural fairness of the respondent's process but, ultimately, the petitioner did not insist on that ground. The primary dispute between the parties concerns the competency of the orders sought by the petitioner. In short, the petitioner contended that judicial review is the proper procedure, that in making the Brief Enquiry Decision the respondent did not correctly apply the law, that the decision is unlawful and should be reduced, and that the court can and should pronounce a declarator in respect of the petitioner's date of birth. The petitioner also advanced an argument based on Article 8 of the European Convention on Human Rights, to the effect that the respondent's Brief Enquiry Decision deprived him of certain rights associated with the status of a child. However, counsel for the petitioner recognised that the Convention argument did not add to the principal argument in any substantial way and that point was not pressed.

[8] The respondent agreed that judicial review is the correct procedure, albeit for different reasons. However, the respondent contended that the order sought in paragraph 4(i) of the petition, for declarator of age, is incompetent, and that the court should only be concerned with the question of whether the Brief Enquiry Decision was taken lawfully.

[9] Following discussion at a procedural hearing, which covered, among other things, the question of at what stage, if at all, the court should hear evidence, it was decided that the purpose of the substantive hearing would be to consider the legal arguments. If, after the outcome of that hearing, it was necessary for the court to engage with questions of fact, that exercise would take place at a further hearing. In advance of the substantive hearing, parties helpfully agreed a joint statement of issues. In essence, the court is asked to consider:

- The legal basis for the respondent undertaking the Brief Enquiry Decision.
- The nature of the exercise undertaken by the respondent, and the consequences in the context of judicial review.
- The competency of the order sought by the petitioner for declarator of his date of birth, and whether the court can determine the petitioner's age for itself as a matter of precedent fact.
- Whether the respondent made an error of law in the Brief Enquiry Decision, and whether any error of law found to exist justifies reduction of that decision.

Relevant statutory provisions

[10] Local authorities have obligations to accommodate children in their area, in certain circumstances. Section 25(1) of the 1995 Act provides:

> "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."

[11] For the purposes of section 25, "child" means a person under the age of 18 years: section 93(2) of the 1995 Act.

[12] A local authority may have difficulty in exercising its functions because it cannot readily ascertain whether a person is a child, and that is recognised in section 50 of the Nationality and Borders Act 2022. Section 49(1) of the 2022 Act defines "age-disputed person" as a person

> "(a) who requires leave to enter or remain in the United Kingdom (whether or not such leave has been given), and
>
> (b) in relation to whom –
> (i) a local authority,
> (ii) a public authority specified in regulations under section 50(1)(b), or
> (iii) the Secretary of State,
> has insufficient evidence to be sure of their age."

[13] Section 50 of the 2022 Act provides:

> "(1) The following authorities may refer an age-disputed person to a designated person for an age assessment under this section –
> (a) a local authority;
> (b) a public authority specified in regulations made by the Secretary of State.
>
> (2) Subsections (3) and (4) apply where –
> (a) a local authority needs to know the age of an age-disputed person for the purposes of deciding whether or how to exercise any of its functions under relevant children's legislation in relation to the person, or
> (b) the Secretary of State notifies a local authority in writing that the Secretary of State doubts that an age-disputed person in relation to whom a local authority has exercised or may exercise functions under relevant children's legislation is the age that they claim (or are claimed) to be.
>
> (3) The local authority must –
> (a) refer the age-disputed person to a designated person for an age assessment under this section,
> (b) conduct an age assessment on the age-disputed person itself and inform the Secretary of State in writing of the result of its assessment, or
> (c) inform the Secretary of State in writing that it is satisfied that the person is the age they claim (or are claimed) to be, without the need for an age assessment.

(4) Where a local authority –
(a) conducts an age assessment itself, or
(b) informs the Secretary of State that it is satisfied that an age-disputed person is the age they claim (or are claimed) to be,
it must, on request from the Secretary of State, provide the Secretary of State with such evidence as the Secretary of State reasonably requires for the Secretary of State to consider the local authority's decision under subsection (3)(b) or (c).

(5) Where a local authority refers an age-disputed person to a designated person for an age assessment under subsection (1) or (3)(a), the local authority must provide any assistance that the designated person reasonably requires from the authority for the purposes of conducting that assessment.

(6) The standard of proof for an age assessment under this section is the balance of probabilities.

(7) An age assessment of an age-disputed person conducted by a designated person following a referral from a local authority under subsection (1) or (3)(a) is binding –
(a) on the Secretary of State and immigration officers when exercising immigration functions, and
(b) on a local authority that –
(i) has exercised or may exercise functions under relevant children's legislation in relation to the age-disputed person, and
(ii) is aware of the age assessment conducted by the designated person.
But this is subject to section 54(5) (decision of Tribunal to be binding on Secretary of State and local authorities) and section 56 (new information following age assessment or appeal).

(8) […]"

[14] The National Age Assessment Board (NAAB) has been established to conduct age assessments and that, or its officials, are a "designated person" in terms of section 49(2) of the 2022 Act and for the purposes of sections 50 and 51 of that Act.

The petitioner's submissions

[15] The petitioner's position was that judicial review is the proper procedure, although his pleadings disclosed some anxiety about whether that was correct, given the divergence of views on competency in *Abdullah* v *Aberdeenshire Council* [2024] CSOH 8; 2024 SLT 143

and *Ahmat* v *Aberdeenshire Council* [2025] CSOH 15; 2025 SLT 735. In accordance with the observations of the Lord Ordinary in *Ahmat* at para [64], the petitioner's approach was that judicial review is competent and, further, that the court can and should consider the question of age as a matter of precedent fact, and issue a declarator of the petitioner's date of birth.

[16] The petitioner characterised the decision taken on 2 April 2025 as a decision to decline to provide accommodation to him under section 25 of the 1995 Act. This was not an age assessment under section 50 of the 2022 Act. There is a distinction between a "brief enquiry", for which provision is made in section 49, and an age assessment, provided for in section 50 of the 2022 Act. On this analysis, the court would be required to determine age as a matter of fact.

[17] Even if the respondent's Brief Enquiry Decision was in exercise of a function under section 50 of the 2022 Act, the petitioner submitted that it would be competent for the court to issue a declarator of his age. It is necessary to consider the nature of the power conferred on the respondent, and determination of the petitioner's age has not been entrusted to it in the sense described in *West* v *Secretary of State for Scotland* 1992 SC 385. Section 50(3)(b) empowers but does not require the respondent to conduct an age assessment. The respondent's decision as to age is not binding on the Secretary of State or on any other body which may need that information. This is in contrast to an age assessment carried out by the NAAB.

[18] The petitioner relied on the rule referred to by Lord Hope in *R (A)* v *Croydon LBC* [2009] 1 WLR 2557 at paragraph 52, that:

> "where the exercise of executive power depends upon the precedent establishment of an objective fact, the courts will, if called upon to do so in a case of dispute, decide whether the requirement has been satisfied".

Relying on *West*, and the view expressed by Lord Hope in that case that "there is no substantial difference between English law and Scots law as to the grounds on which the process of decision-making may be open to review", counsel for the petitioner argued that the doctrine of precedent fact is available as a ground of judicial review in Scotland where (i) the decision requires a factual basis (rather than an evaluative assessment), and (ii) determination of that factual basis had not been entrusted to the person whose decision is being reviewed. It was said that, whereas decisions about accommodation required evaluative judgement, the question of whether or not a person is a child is a matter of objective fact. It was for the court to determine the petitioner's age and a further hearing ought to be fixed to allow that matter to be determined.

[19] Separately, it was argued on behalf of the petitioner that the respondent had failed to apply the correct legal test. It was said, referring to *R (B)* v *Merton LBC* [2003] 4 All ER 280, at paragraph 27, that the respondent was required to determine whether it was very obvious that the petitioner was over 18, such that there was no need for prolonged inquiry. The terms of the respondent's decision were not consistent with this requirement. There was nothing to suggest that the respondent's officials had applied their minds to this question. It was also argued that this was in breach of the petitioner's Convention rights under Article 8 ECHR, although this point was not pressed.

The respondent's submissions

[20] The respondent was also of the view that judicial review is the correct procedure in this case, although that was for different reasons to those put forward by the petitioner. The respondent's position was that the coming into force of section 50 of the 2022 Act means that the conclusions of the Lord Ordinary in *Abdullah* have been superseded. It was also

submitted that the change in the statutory position affects the way in which the decision of the Supreme Court in *R(A)* should be considered.

[21] The respondent's argument was that it was exercising statutory functions in determining both the age of the petitioner under section 50 of the 2022 Act and his entitlement to support under section 25 of the 1995 Act. The Brief Enquiry Decision was taken pursuant to the 2022 Act. As a result, the respondent has jurisdiction to decide the age of the petitioner, and the manner in which that decision is taken may be brought under review in exercise of the court's supervisory jurisdiction. The court should not substitute its own opinion in place of that of the respondent. The respondent contended that it would not be competent for the court to issue a declarator of age.

[22] Counsel for the respondent did not resist the idea that, as a matter of principle, a court exercising its supervisory jurisdiction may have to consider "precedent facts" and make factual findings. She referred, as an example, to *Napier* v *Scottish Ministers* 2005 1 SC 229. Whether or not there had been a breach of Article 3 ECHR could be understood as involving a decision on precedent facts, although they had not been expressly described as such in that case. In this case, though, the doctrine of precedent fact did not arise. It was for the respondent to determine both the petitioner's age and whether or not support should be provided for him under section 25 of the 1995 Act, and neither decision could be brought under review on its merits.

[23] The respondent did not accept that it had failed to apply the correct legal test. In terms of section 50(6), the standard of proof for an age assessment under section 50 is the balance of probabilities. In any event, following the meeting between the petitioner and the respondent's officials, they formed the view that he was clearly and obviously over the age

of 18, and that was a decision which they were entitled to reach under section 50(3)(b) of the 2022 Act.

What is the legal basis for the respondent undertaking the Brief Enquiry Decision?

[24] Section 25 of the 1995 Act comes within the definition of "relevant children's legislation" in terms of section 49(3)(b) of the 2022 Act. The provision of accommodation corresponds to a function conferred on a local authority in England under Part 3 of the Children Act 1989. Section 25 of the 1995 Act and sections 49 and 50 of the 2022 Act require to be read together.

[25] The petitioner contended that the respondent's decision was taken under section 25 of the 1995 Act, but not under section 50 of the 2022 Act. However, given that it needed to know the age of the petitioner, the respondent could not take a decision under section 25 without having first undertaken a section 50 age assessment. The effect of section 50(2) and (3) is that these processes are bound together.

[26] On the petitioner's argument, in carrying out the brief enquiry, the respondent was going no further than considering whether he was an "age-disputed person" within the meaning of section 49(1), and that that was not itself an age assessment. That would suggest that there is a two-stage process, with stage 1 being for the local authority to decide whether a person is an age-disputed person, and stage 2 being an age assessment. That is a strained construction of sections 49 and 50. Section 49 is an interpretation section. It does not prescribe any particular process for establishing whether or not there is a dispute about age. Rather, it takes as a starting point the existence of uncertainty about age. Where a person, such as the petitioner, with the immigration status referred to in section 49(1)(a), presents to a local authority holding no official paperwork and where the local authority has no other

way to check that person's age, then it will be readily apparent that the local authority "has insufficient evidence to be sure of their age". It does not need an enquiry, let alone a 90 minute meeting, for the local authority to determine whether or not it has sufficient evidence. For a person to be an age-disputed person, there does not even need to be a dispute, in the sense of an assertion being put forward which is not accepted; all that is needed is insufficient evidence. If a person meets the section 49 criteria, which the petitioner did, the section 50 process takes place.

[27] An age assessment carried out under section 50 is not necessarily a one-step event. There may be more than one stage. It may be that a brief enquiry is enough, or there may be a need for a full age assessment. The extent of the investigation will depend on the circumstances of the case. That was recognised in more general terms in *R (B)* v *Merton LBC* [2003] EWHC 1689 (Admin); [2003] 4 All ER 280, and more recently by Swift J in *R (HAM)* v *Brent LBC* [2022] EWHC 1924 (Admin). The decision in *HAM* predated the coming into force of sections 49 and 50, but the principle remains sound. Indeed, the terms of section 50(3)(c) countenance the possibility that a local authority might, on a brief enquiry, be satisfied that a person is their claimed age, without further assessment. Section 50(3)(c) is not redundant, as the petitioner claimed it would be if the respondent's argument is correct. Rather, it reflects the reality that the extent of an age assessment will depend on the circumstances of the case.

[28] If the petitioner were correct in his contention that the respondent had gone no further than a decision under section 49 to the effect that the petitioner was an age-disputed person, then the decision to decline to provide him with accommodation under section 25 of the 1995 Act would be flawed because the respondent had not carried out any age assessment at all. That was no part of the petitioner's argument. Instead, the petitioner

accepted that the respondent undertook some form of assessment, but sought to characterise this as being for the purposes of section 49 rather than section 50.

[29] The petitioner's analysis is complicated and contradictory. There is a clearer way to categorise what the respondent did, and it is consistent with the structure of the legislation. In this case, the respondent plainly had insufficient evidence to be sure of the petitioner's age and he met the criteria in section 49(1). That was the starting point. The petitioner was an age-disputed person and the exercise in which the respondent was engaged was an age assessment in terms of section 50 of the 2022 Act. That it was "brief" rather than "full" does not take away from it being an age assessment. As the Inner House held recently in *Ibrahimi* v *Glasgow City Council* [2026] CSIH 4, referring to *Merton*, "[w]here it is very obvious that an individual is over 18, there is no need for a prolonged inquiry."

The nature of the exercise undertaken by the respondent, and the consequences in the context of judicial review

[30] The petitioner argued that, if the exercise had been conducted by the respondent under section 50 of the 2022 Act, it had not been entrusted to it in the sense described in *West*. In support of that, counsel for the petitioner drew attention to the non-exclusive and non-binding nature of an age assessment made by a local authority. The respondent's position was that this was an exercise of a statutory power, that *West* applies and that it is not competent for the court to review the decision on its merits. The submission by counsel for the respondent was that that is unaffected by the question of whether the decision was binding or made on an exclusive basis.

[31] Where a local authority needs to know the age of an age-disputed person, and where that necessitates an age assessment, section 50 requires that local authority to do one of two

things. It may refer the age-disputed person to the NAAB under section 50(3)(a), or it may conduct the age assessment itself under section 50(3)(b). An age assessment conducted by the NAAB is binding on the Secretary of State and immigration officers when exercising immigration functions, and on a local authority exercising functions under relevant children's legislation: section 50(7). Although there is no express provision to this effect, a decision taken by a local authority under section 50(3)(b) would not bind either the Secretary of State or another local authority, were an age-disputed person to move to a different area and make a new claim for assistance under relevant children's legislation. The Secretary of State may consider the local authority's decision under section 50(3)(b), and section 50(4) requires the local authority to provide evidence to the Secretary of State if that is requested, but, by implication, it would be open to the Secretary of State to reach a different conclusion when exercising immigration functions.

[32] The existence of a choice within the statutory scheme does not mean that the power to decide has not been entrusted to the local authority, in the event that the local authority chooses the section 50(3)(b) option. The statute does entrust that power to the local authority. The fact that there is provision for an alternative process and for a different body to make the age assessment decision, if the local authority so chooses, does not take away from the fact that the local authority is exercising a power conferred on it by statute. A local authority age assessment under section 50(3)(b) is carried out for a particular purpose, that being to inform the local authority as to whether it must exercise any of its functions under relevant children's legislation, and, if so, how. For that purpose, this is a complete process.

[33] Counsel for the petitioner sought to draw from certain references in *West* that it was important that a matter be entrusted to a public body alone, for example the principle articulated at page 397:

> "There is here an affirmation of the principle which defines the limits of the supervisory jurisdiction of the court. On the one hand there is no jurisdiction to review the judgment of the inferior tribunal or jurisdiction on the merits of the question, which has been entrusted to them alone. On the other hand the court has authority to see that the decision-taking body – the inferior tribunal or jurisdiction – keep within the limits of their duty and do not exceed the authority which has been given to them by the enabling power."

[34] In that passage, which is part of an analysis of earlier authorities, the court is emphasising that the merits are for the decision-taking body and not for the court. It is not concerned with a situation in which the statute gives authority to one or, alternatively, another body to make a decision. To say that a power to make a decision on the merits is entrusted to a body exclusively means that the court may not engage in a review of the merits. In this case, section 50(3)(b) plainly does entrust the decision-making function to the local authority, and that is not undermined by section 50(3)(a) and the option for the local authority to make a referral to another body.

[35] Counsel for the petitioner sought to develop a related but distinct argument based on the non-binding nature of an age assessment decision made by a local authority under section 50(3)(b). He did so by referring to *Crocket* v *Tantallon Golf Club* 2005 SLT 663 and, in particular, to what was said in that case about the members of the club being bound by the acts of the members forming the club council. At para [41], Lord Reed described the way in which the respondent golf club decisions were taken:

> "[…] each of [the decision-taking situations] involves the exercise of a limited power, to take a decision affecting the rights or interests of the member in question, by a body on whom that power has been conferred; each of them results in the taking of a decision with which the court cannot interfere, provided the power is exercised lawfully within the limits by which it is circumscribed; and each of them results in the taking of a decision which is *ex facie* binding upon the members, unless set aside by the court."

[36] That does not assist the petitioner in this case. The court in *Crocket* required to address an argument about the decision-making powers of the club, by reference to the

club's own rules, and specifically concerning the nature of the relationships amongst the members themselves. No question arose, or could arise, in that case about the impact of any decision by the club on any other body.

[37] In the present case, it is important that section 50 of the 2022 Act and section 25 of the 2025 Act are considered in sequence. The respondent does not undertake the statutory age assessment in terms of section 50(3)(b) in a vacuum. That exercise is for a specific purpose, that being to allow the local authority to make decisions in respect of its functions under section 25. In that sense, the decision is binding on the respondent. If the respondent carries out an age assessment and concludes that an age-disputed person is under 18, certain specific legal consequences must follow, in terms of section 25. The respondent's determination in relation to age does not bind the Secretary of State for immigration purposes, but that is irrelevant. There may be thought to be an asymmetry in the legislation, insofar as a determination made by the NAAB under section 50(3)(a) would bind the respondent, or any other local authority, in terms of section 50(7), but that is not an anomaly. Unless a local authority refers an age-disputed person to the NAAB, that local authority takes responsibility for its own decision for its own purposes, and it binds itself. The fact that a decision taken by the national body, the NAAB, would bind any local authority which is aware of that decision does not take away from the status of a decision taken by the local authority under section 50(3)(b).

[38] In any event, there is an interaction between the decisions made by the local authority and the Secretary of State. Although a decision made by a local authority under section 50(3)(b) does not absolutely bind the Secretary of State, it is not open to the Secretary of State to ignore that decision. Section 51 of the 2022 Act makes provision for the NAAB to conduct an age assessment for the purposes of deciding whether or how the Secretary of

State or an immigration officer should exercise any immigration functions in relation to an age-disputed person, but the circumstances in which that sort of age-assessment can be carried out are limited. Such an age assessment may be conducted where section 50(3) and (4) do not apply, or, where those subsections do apply, only at a time before a local authority has taken any of the section 50(3) steps, or if the Secretary of State has reason to doubt a local authority's decision under section 50(3)(b) or (c).

[39] Within the overall context of sections 49 to 51 of the 2022 Act, an age-assessment conducted by a local authority serves an important purpose. A local authority exercises a power conferred by legislation, and that can readily be seen as fitting within the tripartite relationship explained in *West*. Even if the paradigm tripartite relationship is one in which the decision-making power is conferred on one body only, the concept admits of some flexibility, a point recognised by the court in *Crocket* at para [40].

[40] The assessment of the petitioner's age was a matter for the respondent, as the local authority exercising a statutory power under section 50(3)(b). That is the decision subject to review by the court exercising its supervisory jurisdiction and, as is well understood following *West*, that is not a review of the merits of the decision.

The competency of the order sought by the petitioner for declarator of his date of birth, and whether the court can determine the petitioner's age for itself as a matter of precedent fact

[41] It is consistent with the foregoing analysis that the order sought by the petitioner for declarator of his date of birth is not competent. It is not for the court to arrive at its own view on age as a question of fact. The coming into force of section 50 of the 2022 Act means that matters have moved on since the decision in *Abdullah*. In subsequent cases, *Ahmat*

and *AN* [2025] CSOH 89; 2025 SLT 1322, the procedural route was an action for declarator, and questions of competency and precedent fact were not live issues in *Ibrahimi*.

[42] Counsel for the petitioner emphasised the distinction between two different kinds of questions, and by reference to the approach taken by Baroness Hale in *R (A)* at paras [26] and [27]. On the one hand, there are questions which demand an evaluative response, such as whether a child is in need, or what sort of practical provision should be made for a child. On the other, the question of whether a person is a child admits of a right or a wrong answer. At para [51], Lord Hope expressed the matter in this way:

> "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."

Further, at para [53]:

> "But the definition of 'child' in section 105(1) applies to the [Children Act 1989] as a whole, without qualification or exception. The question whether the child is 'in need' is for the social worker to determine. But the question whether the person is or is not a child depends entirely upon the person's age, which is an objective fact. The scheme of the Act shows that it was not Parliament's intention to leave this matter to the judgment of the local authority."

[43] Since the decision in *R (A)*, the statutory scheme has changed. The equivalent children's legislation in Scotland is, of course, the 1995 Act, but the overall scheme now encompasses section 50 of the 2022 Act and it is clear from that that Parliament did intend the determination of age, in this specific context, to be a matter for the judgment of the local authority.

[44] I agree with the submission made on behalf of the respondent that whether or not the doctrine of precedent fact is part of Scots law, it is irrelevant to the determination of the central question in this petition. It does not apply in this case. It is sufficient to consider the wording of the 2022 Act. That confers the power on the local authority to consider all the

available evidence and to make a determination in respect of the age-disputed person, and the court cannot substitute its own factual assessment. That is an application of the principle in *West*.

[45] Counsel for the petitioner drew my attention to a recent decision of the Court of Appeal, *R (on the application of UYR)* v *Derby City Council* [2025] EWCA Civ 1648, submitting that there was no suggestion in that case of any change in the approach of the English courts and that the position he advanced on behalf of the petitioner was consistent with that in England. However, that case is concerned with the availability of interim relief in the context of judicial review proceedings challenging an age assessment and there is no reference to the provisions of the 2022 Act. It does not provide substantial assistance.

[46] Even if I were prepared to accept, which I am not, the petitioner's argument that it is competent for the court to issue a declarator in respect of his date of birth, I would have significant concerns about the basis on which that might be achieved. The main focus of the petition is that the respondent erred in its approach to the age assessment, rather than a positive case to support a finding in respect of a specific date of birth. The difficulties which a court is likely to encounter when assessing witness evidence and physical evidence in a case of this kind are well illustrated in *Ahmat*. Towards the end of his oral argument, counsel for the petitioner submitted that all the court would need to do would be to decide whether or not the petitioner is a child, and that the question was not whether he had a particular date of birth. That is not consistent with the order specifically sought in the petition. More importantly, it is ultimately of only partial assistance both to him and to the respondent. As counsel for the respondent submitted, that limited factual finding would be obviously insufficient. It is not enough for a local authority to know that a person is a child as at the date on which the court issues a decision, and that it must accommodate that child

accordingly. It is important for the local authority to know at what point he stops being a child, and when its duties under the 1995 Act change or come to an end. For that, a date of birth is critical.

Whether the respondent made an error of law in the Brief Enquiry Decision, and whether any error of law found to exist justifies reduction of that decision

[47] These proceedings are properly raised as an application to the supervisory jurisdiction. It is not for the court to substitute its own view on the merits, and there is no need for the further hearing sought by the petitioner, but it is necessary to consider whether there was any error of law in the respondent's Brief Enquiry Decision. The petitioner argued that the respondent did not apply the correct legal test because it was required to consider whether the petitioner's age was clear and obvious, such that no further assessment beyond a brief enquiry was necessary, and that it did not do that. The petitioner accepted that where age is very obvious, what is required by way of reasonable enquiry may be brief, but maintained that in other cases further investigation will be needed. He criticised the terms of the Brief Enquiry Decision and the fact that there was no reference to an absence of doubt, or an explanation as to why there was no need for a prolonged enquiry.

[48] The respondent did not accept that the test that must be applied is whether age is clear and obvious. It relied on the terms of section 50(6), which provides that the standard of proof for an age assessment under section 50 is the balance of probabilities. Even if the petitioner is correct in relation to the legal test, the respondent's position was that, considering the terms of the Brief Enquiry Decision, it can be reasonably inferred that there was no doubt about the decision and that it was clear and obvious to the respondent's

members of staff that the petitioner was over 18. The respondent submitted that if there was an error in not setting out the terms of the test, that error was immaterial.

[49] As explained above, an age assessment carried out in terms of section 50 may be brief or it may be more in depth, or prolonged. Section 50 does not itself prescribe any particular procedure; the duration and depth of the enquiry are matters for the local authority. It may have two stages, those being a brief enquiry followed by a full age assessment, or it may be that a single stage brief enquiry is sufficient to allow the local authority to reach a conclusion. For the reasons given above, a single stage brief enquiry is an age assessment within the meaning of section 50. Whilst recognising that there may be one stage or two stages, it would be a mistake to see this as a completely rigid process. As Swift J explained in *HAM* at paragraph 31:

> "The supposed distinction between a full, *Merton*-compliant age assessment and short-form age assessment is legally irrelevant. As Bennathan J put it in his judgment in *SB* [2022] EWHC 308 (Admin) at [32] 'the depth of enquiry required of a local authority is not binary'. In other words, the approach is neither 'one size fits all', nor 'two sizes fit all'."

The process requires to be flexible.

[50] What is the consequence of the balance of probabilities provision in section 50(6)? On one view, the effect is that it sweeps away the need for a local authority which has carried out a brief age assessment to ask itself whether the answer is clear and obvious or whether a more in-depth, full age assessment is required. If, after a brief enquiry, it is able to conclude that it is more likely than not that the individual is an adult, then that is the decision and nothing more is required. It is not inherently unfair to reach a decision, following a brief enquiry, on the balance of probabilities. The civil standard of proof is routinely applied in decision-making of all kinds. In terms of section 50(6), that is the test.

[51] However, there is an alternative, more nuanced and, I consider, preferable view. The investigation and the process used to get to the point of decision-making must be reasonable and fair. Reasonableness and fairness will depend on the circumstances of the case. The legislative scheme confers discretion on the local authority as to the extent of the enquiry, and that discretion must be exercised fairly. Ultimately, the test is that set in terms of section 50(6), but in order to reach that point, fairness will normally require that, unless age is clear and obvious, a full age assessment should be conducted. The process follows a sequence before a conclusion can be reached and all steps in that sequence must be fair. For that reason, and consistently with *Merton* and subsequent authority, in carrying out the internal process for the purposes of the statutory age assessment, the local authority which has carried out a brief enquiry should ask itself whether a full enquiry is needed. In answering that question, it should consider whether the brief enquiry has yielded a clear and obvious answer.

[52] If the brief enquiry has yielded such an answer, then the decision maker can be satisfied on the balance of probabilities in relation to age. That would be a fair outcome. If, after a brief enquiry, there is not a clear and obvious answer, then it follows that either further information or further scrutiny, or both, are required, in other words a full age assessment, and that is what must be done before the local authority determines the question of age, on the balance of probabilities.

[53] It is not helpful to set up two alternative tests which the local authority must apply simultaneously at the time of completing a brief enquiry, the first being whether age is clear and obvious, resulting in there being no need for a full enquiry, and the second being an assessment of age on the balance of probabilities. It is not self-evident that these are necessarily different standards, but there may be room for confusion. The proper and fair

course is for the local authority to approach the steps in the assessment in the way set out above..

[54] In the present case, the document recording the age assessment, the Brief Enquiry Decision dated 2 April 2025, does not explicitly refer either to the age of the petitioner being "clear and obvious", or an equivalent formulation, or to being satisfied as to age on the balance of probabilities. The absence of any such express reference does not of itself demonstrate a procedural failure or an error of law. The answer given to the question "is a full age assessment required?" is "no". It may reasonably be inferred that in coming to that conclusion, the social workers employed by the respondent were satisfied such an assessment would not be required because they considered the petitioner's age to be clear. In drawing that inference, there is support from the information contained in the document as a whole.

[55] The Brief Enquiry Decision records that, in summary, the respondent had regard to (i) the petitioner's facial features, skin and facial structure; (ii) the petitioner's demeanour, and the way in which it changed over the course of the interview, including increased assertiveness; and (iii) the discrepancy between the account provided by the petitioner about his use of time and fearfulness of other residents and the information provided by the support worker about his level of engagement. In at least one respect, Ms Marchbank and Mr Kolek had doubts in relation to the petitioner's credibility, noting that they were "not confident about the sincerity and genuineness" of certain behaviour. It is not part of the petitioner's case that it was unreasonable for the respondent to consider these matters. The petitioner contended that, had the respondent conducted a more prolonged enquiry, it would have uncovered relevant information such as that contained in four letters written in support of the petitioner by representatives of the organisations providing assistance to him.

The writers of these letters also referred to the petitioner's appearance and demeanour and provided their own view of his age, but they did not provide information of a substantially different kind. Two of these letters were considered by the respondent at the reconsideration stage; the third was dated shortly before these proceedings were raised and the fourth is dated 2 December 2025.

[56] Contrary to the petitioner's submission, the respondent has provided adequate reasons. These are expressed in brief terms. It would have been possible, and preferable, for more expansive reasons to be provided, but these meet the adequacy threshold. To the extent that the respondent erred in not making express reference to the assessment being clear and obvious, or a similar set of words, that error was not material.

[57] There is reference in the respondent's note of argument to the social workers' contemporaneous notes, which were lodged in process. These handwritten notes are consistent with the typed Brief Enquiry Decision.

[58] I am not satisfied that the petitioner's challenge in relation to the application of the correct legal test is well-founded. It is implicit that the respondent considered whether the petitioner's age was clear and obvious, such that no full age assessment was required. Nor am I satisfied that the reasons provided by the respondent were inadequate. In both respects, there are criticisms which can be made, but these do not lead to the conclusion that there was a material error.

[59] For all of these reasons, I sustain the respondent's third, fourth, fifth and eighth pleas-in-law. The petition is refused.