OUTER HOUSE, COURT OF SESSION

[2025] CSOH 60

P499/24

OPINION OF LORD LAKE

In the Petition of

DUY BACH TAI (FE/LA)

Petitioner

for

Judicial Review

Petitioner: Winter, advocate; Drummond Miller LLP
Respondent: Blair, advocate; Harper Macleod LLP (Edinburgh)

2 July 2025

[1] The petitioner seeks asylum in the United Kingdom. The petition is not concerned with the merits of his application for asylum, however, but with his age. He sought accommodation from the respondent under section 25(1) of the Children (Scotland) Act 1995 on the basis that he was a child. On 28 March 2024 the council carried out an age assessment, concluded that he was older than 18 and refused his application for accommodation accordingly. The petitioner seeks to challenge the respondent's assessment of his age.

[2] The decision of the respondent was set out in their letter dated 28 March 2024 as follows:

> "You have presented to the local authority claiming to be a child aged with a date of birth stated: 15.05.2007

> In accordance with the ruling under *Merton*, that states 'there are cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for a prolonged inquiry' the full assessment of your age is deemed unnecessary.
>
> In this instance, on the basis of a visual assessment of your appearance, demeanour and a brief inquiry with the assistance of an interpreter, it is our opinion that your appearance and demeanour strongly suggest that you are significantly over 18 years of age.
>
> It is not the intention, therefore, of the Local Authority to undertake a full assessment of age and in our opinion you should be treated as an adult. We have informed the immigration officers responsible for your case and they will now be responsible for making arrangements for you."

The respondent lodged in process the notes made by the social workers during their assessment of the petitioner and the report they prepared on the basis of it. While there was initially a dispute as to what use could be made of these notes, both parties were content to rely on them.

[3] The respondent accepted that preceding by way of judicial review was a competent means of challenging the age assessment that had been carried out. I was therefore not required to consider the issued raised in *Abdullah* v *Aberdeenshire Council*, 2024 SLT 143, or any cases which have come after it.

Submissions for the petitioner

[4] There were two principal categories of submission advanced on behalf of the petitioner. The first was to the effect that the reasons in the respondent's decision were inadequate and the second was that relevant matters had not been taken into account. There was inevitably some overlap between these. It was said that the absence of a reference to something in the reasons meant it had not been taken into account or, if it had, the reader was left in substantial doubt as to why the matter in question had been rejected.

[5] In relation to the reliance in the decision on the petitioner's physical appearance, it was said that the respondent had not taken into account that the petitioner had carried out physical work from a young age. It was contended that the work he had done would result in him having a mature physique for his age. Alternatively, if it had been taken into account, the reasons left the reader in real and substantial doubt as to how it had been assessed.

[6] In terms of reliance on his demeanour, in so far as this was based on the conclusion that his answers were "vague and lacking in any detail whatsoever", it was said that the reasons left the reader in doubt as to why this was the case when the notes recorded that he has answered all questions put to him and had in fact provided detail. Alternatively, in reaching this view, it was said that the respondent had not taken into account the fact that the petitioner had been subjected to threats and violence and kidnap during his passage to the United Kingdom or that the reasons stated did not indicate how it had been taken into account. It was also submitted that it was irrational (1) to rely on vagueness when regard was had to the narrative of the petitioner's experiences before coming to the UK and (2) to rely on the petitioner being "unphased" by questions when he had given a detailed account which included kidnap and being subject to threats. It was submitted that in addressing the issue of rationality, the test that the court should apply in the circumstances is more stringent than the *Wednesbury* test.

[7] It was contended that the respondent erred in failing to take into account that memories can be affected by traumatic events as can the ability to take in and recall the experience. In this regard, reference was made to comments by Lady Poole in *PW* v *KM* [2024] CSOH 85 at 7. Alternatively, if this issue had been taken into account, the reasons in the decision were inadequate in that they did not indicate how it had been taken into

account. It was contended that the reasons in the decision letter were inadequate also in that they merely restated the test that the respondent was to apply and were, in effect, simply a repetition of the decision. Reference was made to *R* v *Birmingham City Council ex p B* [1999] ELR 305. When assessing the adequacy of the reasons it was said also that it was necessary to consider the importance of the decision to its subject (*HLW Petitioner*, [2012] CSOH 159, paras [40] - [46]).

Submissions for the respondent

[8] The respondent submitted that the assessment had been carried out in accordance with the decision in *R (B)* v *Merton London Borough Council* [2003] 4 All ER 280. The decision had been made on the basis that, in the opinion of the social workers interviewing the petitioner, there was no doubt that he was significantly over 18. It was therefore not necessary to conduct a prolonged inquiry and it would be wrong to treat the assessment as if it was a court procedure. It was said that there were five subsidiary points that could be taken from *Merton*. The first was that local authorities are under no duty to undertake a prolonged inquiry to make an assessment of age. The second is that the age assessment was not meant to be akin to a formal court procedure. The third was that certain standards of fairness and inquiry are still expected in the procedure. The fourth is that the applicant's credibility may be used as part of the process. Fifthly, there are circumstances in which the appearance of the individual is sufficient of itself to allow a determination to be reached as to their age.

[9] It was submitted that the reasons stated in the letter of 28 March 2024, although brief, were legally adequate. To the extent that the reasons in the decision letter viewed in isolation are seen as being less than adequate, it was permissible to have regard to the

contemporaneous notes. It was submitted that the petitioner's approach was in error in seeking more and more detail as each question was answered. It was said that it would always be possible to pose the question "why" when reasons were given. That was not the appropriate approach.

[10] The respondent produced affidavits from the social workers who had carried out the interview of the petitioner. It was accepted that these produced *ex post facto* and therefore would be treated with caution. It was submitted that nonetheless they indicated that the respondent's social workers had had regard to the narrative that had been provided by the petitioner but that they considered his physical appearance and demeanour justify the conclusion he was significantly over 18.

Analysis and decision

[11] The reasons provided by the respondent are indeed brief. However, they do indicate, as noted above, that the decision was made on the basis that the petitioner's appearance and demeanour strongly suggested that he was significantly over the 18 years of age. Having regard to matters identified in the decision in *Merton*, that is a matter these social workers were entitled to rely upon and it could indicate to them that they did not require to undertake a more detailed age assessment. Although the petitioner asks what it was about his appearance and demeanour that strongly suggested this, that in my submission goes too far in terms of asking for reasons. I agree with the submission for the respondents that it would always be possible to ask for more detailed reasons. If the letter said it was his build, the question might be asked what was it about his build that lead to that conclusion. If the reasons went on to say it was the build of his shoulders, it would be possible to ask what was it about his shoulders. It is necessary to keep in mind that this is an

administrative decision and not one made by qualified lawyers on the basis of competing submissions. As noted in *Merton*, it is appropriate not to over legalise the procedure.

[12] It is correct to say that the petitioner referred in his interview to the fact he had been working for his uncle conducting physical tasks from a young age. It is correct also that there is no mention in the decision letter of that or his account of being threatened and kidnapped. However, it was not necessary that they be mentioned. The decision letter, in order to be adequate, must inform parties who are taken to be aware of the background circumstances how the major issues were dealt with. It need not deal with every single issue that was raised. I do not consider that the decision in *HLW* supports the proposition that what is required by way of reasons is increased having regard to the consequences of the decision for the petitioner. In that case, Lord Kinclaven stated that the nature and extent of reasons required would depend on the circumstances of the case and the decision itself. That is consistent with the rule from *Wordie Property Co Limited* v *Secretary of State for Scotland*, 1984 SLT 345, that the reasons must be sufficient for the informed reader to be aware of what the decision was, why it was reached and what view was taken on the principal matters in dispute. In some cases, the matters in dispute may be broad in scope and more will be required.

[13] Applying the test from *Wordie* to the facts of this case, the letter did not need to deal specifically with the question of what reliance was placed on any threats to which the petitioner had been subject or the work he was previously required to do. What was necessary, was that it indicated the basis on which the decision had been taken that he was clearly over 18. That decision was based on his appearance and demeanour and it was sufficient that this was stated. There is no challenge that it was irrational to have reached this conclusion, and I do not think that any such challenge would have been possible.

[14] In so far as references to the vagueness of the petitioner's account and lack of detail in his answers were concerned, ultimately, as the decision letter indicates, that did not form the basis of decision and that is sufficient to deal with this as a ground of challenge. However, even if this had been the basis of the decision, it is still relevant that the reasons need only deal with the major issues and I do not consider that it would be vitiated simply because it did not expressly take account of the fact that memory may be affected by traumatic events. The warning that the petitioner contends should have been applied is derived from the warning introduced fairly recently in the directions given to juries in criminal cases. I do not consider that it can be said that stating it is a prerequisite to a lawful decision by the respondent. Neither do I consider that there has to be an explanation of why it was considered that answers were lacking in detail. That is another example of simply asking for more detail and the fact that such information *could* be given does not mean that it is required.

[15] While there is no doubt that irrationality - on whatever test falls to be applied - is a basis on which a decision can be set aside, I do not consider that it is possible to challenge the decision as to what matters to take into account on the basis that it was irrational. This could tend towards a review on the merits which is not the function of the court. The decision-maker must take into account all relevant factors and leave out of account any irrelevant ones. Unless it can be said that the factor in question was irrelevant, the decision-maker cannot be faulted for considering it. While there can be a situation in which a decision is flawed because there was a failure to carry out inquiries that any reasonable decision maker would have undertaken (*Secretary of State for Education and Science* v *Tameside Metropolitan Borough Council* [1977] AC 1014), that does not arise in the present case.

[16] I do not think it is correct to say that the respondent's decision merely restates the issue to be decided. The issue for decision was whether or not the petitioner was over 18. The basis on which that decision on that was made was that his appearance and demeanour was such that a view was taken that he was significantly over that age. In *R* v *Birmingham CC ex p B*, referred to by the petitioner, the live issue was whether the child in question lived within the catchment area of a particular school. The decision in question made no reference to that issue or what had been decided in relation to it. That issue was described by the court as the "crucial question" and it is not surprising that a failure to address it at all meant that the reasons were not adequate. Here, on the other hand, the crucial question is the age of the petitioner. The decision letter stated what has been determined in that regard and the basis on which it was so determined. Although "appearance" and "demeanour" referred to in the respondent's letter were identified as relevant factors in *Merton*, they remain reasons for the decision rather than the decision itself. Had the letter simply said that a clear conclusion had been formed that the petitioner was over the age of 18 without stating anything further, that would have been objectionable. Here, however, there is both the decision and the reasons for it.

Disposal

[17] In the circumstances I repel the second, third and fourth pleas-in-law for the petitioner, sustain the first and second pleas-in-law for the respondent and refuse the petition.