



OUTER HOUSE, COURT OF SESSION

[2025] CSOH 89

A324/24

OPINION OF LORD LAKE

In the cause

AN

Pursuer

against

RENFREWSHIRE COUNCIL AND OTHERS

Defender

**Pursuer: Blockley; Drummond Miller LLP
First Defender: McGowan; Ledingham Chalmers**

26 September 2025

Introduction

[1] The pursuer is a national of Vietnam. She arrived in the UK on a “small boat” on 25 May 2023 and, at that time, claimed her date of birth to be 28 October 2006. That would have made her 16 years old. She was assessed initially on behalf of the Home Office as having a date of birth of 28 October 2000 making her 22 years old. She ultimately came to approach the first defender, the local authority, for an age assessment and they concluded that the date identified for the Home Office was correct. The pursuer challenges that.

[2] This is an ordinary action with conclusions for declarators, (1) that the pursuer’s date of birth is 28 October 2006, (2) that this being her date of birth, she is entitled to be

accommodated by the first defender under section 25(3) of the Children (Scotland) Act 1995 and (3) that this being her date of birth, she is entitled to seek support from the first defender under section 25(3) of the Children (Scotland) Act 1995. In addition, she sought a declarator *ad interim* that:

“for the purposes of the first defender’s determination of whether the pursuer is entitled to accommodation under the Children (Scotland) Act 1995 whilst this action is pending before the Court, the pursuer’s date of birth is deemed to be 28th October 2006 and she is entitled to be accommodated under Section 25 of the Children (Scotland) Act 1995”.

Declarator *ad interim* was sought by motion on 23 October 2024 but was refused on the basis it was not competent to grant a declarator at an interim stage. The defenders seek to have the action dismissed on the basis of relevancy and/or competency.

Submissions for the defenders

[3] The defenders do not claim that an ordinary action is *per se* incompetent in relation to the issues raised by section 25(3). They challenge the competency and relevancy of the conclusions as framed in the particular circumstances of this case. There was some overlap in the submissions as to whether the issue of competency or relevancy was being considered. For example, it was argued that the first conclusion was irrelevant in seeking declarator of fact against the world generally (*contra mundum*). It appears to me that this issue is more appropriately dealt with as a question of competency and that is how I approach it below.

[4] The issue of relevancy and specification raised in relation to the second and third conclusions was that they were not consistent with the terms of the Children (Scotland) Act 1995. The second conclusion seeks a finding that the pursuer is entitled to be accommodated, whereas the Act indicates that provision of accommodation is a matter of the defenders’ discretion. It states:

“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.”

The third conclusion seeks a declaration that the pursuer is entitled to seek “support”

whereas the power in subsection 3 is only to provide accommodation. As both conclusions innovate upon the underlying statutory provision, it is said that they are irrelevant.

[5] In relation to competency, the following is a summary of the defenders’ contentions:

- (a) The pursuer seeks a declarator of fact whereas the court may only grant declarators of right. In this regard reference was made to *Gifford v Trail* (1829) 7 S 854, *Lyle v Balfour* (1830) 9 S 22, *Sinclair Lockhart’s Trustees v Central Land Board* 1951 SLT 258, *Imre v Mitchell* 1958 SC 439 and *Keatings v Advocate General for Scotland* 2021 SC 329. These decisions remain good law and they did not appear to have been brought to the attention of the courts in either *Abdullah v Aberdeenshire Council* 2024 SLT 143 or *Ahmat v Aberdeenshire Council* [2025] CSOH 15 where the possibility of declarators of age was considered. It was accepted that the position would be different if the declarator said that as a result of the date of birth being established, the pursuer had some legal right.
- (b) Unlike petition procedure, ordinary procedure by way of summons exists to enable parties to enforce the rights and obligations between themselves. Reference was made to *Hooley v Ganges Jute Private Limited* 2019 SC 632. The conclusions in this case do not limit their effects to the defenders or for the purposes of the application of the 1995 Act. They seek a determination of fact *contra mundum*. As this goes beyond the rights and duties of the pursuer and the defender to affect third parties it is not competent. As noted in *Hooley*,

petition procedure was generally appropriate in such cases. Otherwise, parties who might be affected by the ruling would be unable to challenge it.

- (c) Following from the last point, it was said that as the purpose for which the declarator would apply was not stated, its effects were not known, there were no proper contradictors and that parties who might be affected in future by the decision could have not say in it. This was presented as an argument of relevancy as well as competency.
- (d) For the court to grant such a declarator would usurp the jurisdiction Parliament had conferred on the National Age Assessment Board in the Nationality and Borders Act 2022, section 50, to make a binding determination of age on a reference from a local authority or other public authority.
- (e) In referring to an obligation to provide “support”, the declarator sought in the third conclusion is too imprecise. It does not give fair notice of what is sought. I was referred to *Aberdeen Development Company v Mackie, Ramsay and Taylor*, 1977 SLT 177, where Lord Maxwell considered it was self-evident that, “an action for declarator is incompetent unless the declarator sought is precise and unambiguous in its meaning” (page 181).
- (f) On the basis of the comments in *Clarke v Fennoscandia No. 3* 2005 SLT 511, paras [37] and [42], it was contended the second and third conclusions were incompetent on the basis that, even if granted, they would produce no legal consequences. In relation to the second conclusion, the accommodation the pursuer was currently being provided with is no different from the accommodation she would be provided with under section 25(3). As far as the third conclusion is concerned, it only established an entitlement to seek support

rather than to receive it. Any person, irrespective of their age could *seek* support from the defender, so granting the conclusion would make no difference.

- (g) An anticipatory declarator (or declarator *ab ante*) such as this could only be granted where there was immediately urgency (*Axa General Insurance v Lord Advocate* [2011] CSIH 31, para [128]) and there was no such urgency here.

Although that decision had been overturned on appeal, the dicta in question were not doubted in the Supreme Court.

[6] Further arguments were advanced that the declarators should be refused as they were academic. It was noted that the petitioner was now over 18 and, as that was the cut-off in section 25(1) of the 1994 Act, the obligation to provide accommodation no longer applies. Although there is a discretion conferred on a local authority by section 25(3) to provide accommodation to someone 18 or over but under 21, the issue still remained academic. No application had been made under that subsection. It might be that no application would be made and in that position, the third conclusion did not address a live issue and I was referred to the decision in *Ibrahimi v Glasgow City Council* [2025] CSOH 14. The point in sub-paragraph (f) of the preceding paragraph that even if declarators were granted as sought they would make no practical difference to the pursuer's circumstances was advanced under this heading also. It was submitted by reference to *Keatings v Advocate General for Scotland* [2021] CSIH 25 that the court should not entertain public law actions where the remedy sought would not have any practical effect. It was noted that there was no argument for the pursuer that the accommodation she was currently being provided with was unsatisfactory. Any accommodation she was given in future would be the same. The only difference would be as to the identity of who paid for it.

[7] The defender noted that while this has been raised as an ordinary action, the pursuer avers that this court is exercising its supervisory jurisdiction. It was submitted that that this was incorrect as the supervisory jurisdiction can only competently be invoked by an application by petition made in terms of chapter 58 of the Rules of the Court of Session. It was noted also that it is a prerequisite of an action for judicial review that there is no alternative remedy and that it would be wrong to allow this rule to be circumvented by means of raising the issue in an ordinary action. It was submitted that in her circumstances the pursuer does have an alternative remedy under the Nationality and Borders Act 2022, section 50. It was said that the pursuer could seek to have the defender make a referral to the National Age Assessment Board for a binding decision as to her age. It was said on this basis that the action was premature until the pursuer had sought to compel the council to make such a reference.

[8] In response to the pursuer's submission recorded below that the defenders were bound to act so as to remedy the consequence of having treated her unlawfully in not assuming that she was a child in terms of the Trafficking and Exploitation (Scotland) Act 2015, section 12, the defenders noted that they did not accept that at the relevant time they had reasonable grounds to believe that she had been trafficked. They also submitted that even if the pursuer were correct in her claims in this regard with the result that she had an entitlement to accommodation at that time, as she was now over 18, section 25(3) of the 1995 Act applied and it imposed no obligation to provide accommodation.

Submissions for the pursuer

[9] For the pursuer it was noted that this action had been raised as an ordinary action in light of the decision in *Abdullah* which was issued 2 days after the decision by the first defenders as to the pursuer's age.

[10] It was contended that answers could not be given to the defender's arguments before an inquiry into the facts and reference was made to *Jamieson v Jamieson* 1952 SC (HL) 44. It was accepted that the first conclusion was a bare declarator and that it was sought *contra mundum* but it was submitted that the action was nonetheless competent. It was not an academic issue that was raised and the court was not being asked to consider something frivolous. It was an attempt to determine the pursuer's date of birth with a view to ascertaining what rights and entitlements she had and what support she might be entitled to seek. It therefore had a practical purpose and was not academic. It satisfied the requirement from *Macnaughton v Macnaughton's Trustee* 1953 SC 387 that there was a live practical issue. If a binding decision was obtained against the second defender - the Home Secretary - it would take effect across all government functions. In relation to who would be bound by the decision more generally, the pursuer contended that "it would offend against the principle of legal certainty and the need for consistency were such a declarator were only limited to the first and second defenders."

[11] In relation to whether or not the action was premature, academic or irrelevant, it was submitted that the age assessment was required for the pursuer to know whether it was even possible for her to make an application under section 25(3). It was not true to say that no request had been made as she had gone as far as seeking interim orders under section 25(3) in this process. In relation to the question of whether or not the accommodation she might be given under section 25(3) would be different from that which she currently receives, it

was noted that where an unaccompanied minor is provided with accommodation it is generally treated as more than a matter of simply putting them into a hotel. They are provided with assistance from social work and help in integration. Section 25(3) referred to safeguarding and promoting welfare and it was submitted that this had to be understood by reference to the Social Work (Scotland) Act 1968, section 12. It was submitted that assistance should have been provided to the pursuer in the past.

[12] It was contended that it was not necessary that a declarator dealt only with issues of rights. The question of the pursuer's age was a fact which had to be determined before it was possible to go on to consider what substantive rights she might have. I was referred to the decision in *R(A) v Croydon London Borough Council*, [2009] UKSC 8. The facts in that case were similar to the present. The Supreme Court considered that it was open for the courts in a judicial review to determine the issue of age as a jurisdictional or precedent fact that had to be decided before the issue of the lawfulness of the exercise of the discretion conferred on the local authority arose. This meant that it was not unlawful to seek declarator of fact.

[13] In relation to the defenders' submission that the pursuer had an alternative remedy, it was said that for two reasons this remedy was not available. The first was that under the Nationality and Borders Act 2022, section 50, it was not open to the pursuer to ask, still less to require, the local authority to make a referral to the National Age Assessment Board. The second was that the reference could only be made before the authority carried out an age assessment. As that had been done before the petition was raised, it was not a remedy available to the pursuer.

[14] In relation to the second conclusion, it was accepted that in view of her age, any support provided now to the pursuer would have to be under section 25(3). However, when the summons was drafted and signetted, on the basis of her claimed date of birth she would

have been under 18 and would have had an entitlement to accommodation in terms of section 25(1). Although she was now over 18 and the right to accommodation in section 25(1) no longer applied, it was submitted that the defender nonetheless was obliged to provide accommodation in order to make good their past unlawful conduct. It was noted that the pursuer offered to prove that the defenders had acted unlawfully when carrying out their initial assessment of her. It was claimed that the pursuer was notified of a decision determining that there were reasonable grounds to conclude that she was a victim of modern slavery on 21 November 2023, that the council therefore had reasonable grounds to believe that she was a victim of human trafficking in terms of the Trafficking and Exploitation (Scotland) Act 2015 and that, as they were not sure of her age and had reasonable ground to believe that she might be a child, in terms of section 12 they were obliged to assume that she was a child. Had they done this she would have qualified for provision of accommodation under section 25(1). That provision would have continued. She would have been considered as a “looked after child” for the purposes of other provisions of the 1995 Act. Although action was not taken at the time to enforce the obligations of the council, by reference to *R (GE (Eritrea)) v Secretary of State for the Home Department* [2015] 1 WLR 4123, it was contended that the first should make good the prior unlawful actions. They would do this by providing accommodation and support.

[15] In relation to the third conclusion, it was submitted that the guiding principle of section 25(3) was safeguarding and promoting welfare. That ought to be done in a holistic manner by reference to other discretionary powers granted to the local authority. By way of illustration of those powers, I was referred to section 12(1) and (2) of the Social Work (Scotland) Act 1968 and the decision in *R (M) v London Borough of Hammersmith and Fulham* 2008 UKHL 14.

Decision

[16] At the outset I note that that this is an ordinary action and the supervisory jurisdiction of the Court of Session is not engaged. This affects the tests that I am to apply when considering the arguments made. It also means that there is no requirement on the pursuer to have exhausted other remedies. I return to this below.

[17] Turning to the challenge to the relevancy of the second and third conclusions, when making a declarator as to the existence of a right or obligation, the court must not innovate on the pre-existing position. The terms of the second conclusion do innovate on the terms of section 25(3) by declaring an entitlement to accommodation on the part of the pursuer where the Act only confers a power on the defender to it. If the declarator was granted as sought, it would remove entirely the discretion which Parliament conferred on the local authority.

[18] The decision in *GE (Eritrea)* does not assist the pursuer in overcoming this hurdle. In that case it was common ground that the applicant had reached adulthood. It was argued, however, that if she had been properly regarded a child and received care as such earlier, she would have been a “former relevant child” and this would have an effect on the continuing duties owed to her. As the earlier decision was wrong, it was argued that the council in question were obliged to treat her as a former relevant child even although she did not meet the statutory definition to correct the error. The Court of Appeal considered whether the applicant should be “deemed to have been” a former relevant child or whether she should be treated “as if” she was a former relevant child. The court concluded that it had no power to deem the applicant to be a former relevant child in the face of the statutory definition. It was therefore left with the alternative of treating her as if she was a former relevant child. This distinction appears to be a very narrow one. However, as the court

noted, if she was deemed to be a former relevant child she would have an entitlement to the duties owed to such a person but if she was treated by the court “as if” she was a former relevant child, the local authority had a discretion as to whether to act (paragraph 52).

Christopher Clarke LJ said that in this situation, that the local authority may use its discretionary powers to make good any unlawfulness it had committed in the past (paragraph 54). He recognised that in an extreme case the unfairness to the applicant may be so obvious and the remedy so plain that treating the applicant a former relevant child was the only way in which the discretion could reasonably be exercised. Importantly, however, he went on to say:

“There is no general rule that, wherever it has acted unlawfully, a local authority must undo its past errors to the fullest extent that it can. Much will depend on the circumstances, including whether or not the claimant had sought interim relief and been refused (as here), whether he was guilty of unacceptable delay, and whether and to what extent the authority or the claimant should be regarded as blameworthy. There may be countervailing considerations of public interest which would entitle it to refuse any relief at all. It may be relevant to consider what other remedies are open to the claimant. The matter would be one for the discretion of the local authority, to be determined in the light of whatever application is made and in the circumstances applying when it is invoked.” (paragraph 55)

The pursuer does not aver that the circumstances affecting her were such that providing accommodation under section 25(3) was necessary if the past wrongs were to be corrected.

That being the position, the defender retained a discretion as to whether to provide accommodation and the court cannot grant a declarator that would remove that discretion.

[19] The third declarator seeks to establish an entitlement to seek “support”. As the defender submitted, section 25(3) confers a power to provide accommodation rather than support in general. To the extent that it is claimed that there are other legislative provisions under which support may be provided, it must be noted that the conclusion refers specifically to an entitlement to support under section 25(3). I accept the submission for the

pursuer that the guiding principle of the section is safeguarding and promoting welfare. In terms of section 25(3) that is the issue of which the local authority must satisfy themselves if they are to provide support. It does not follow, however, that the express reference to the power to “provide accommodation” can be overridden to transform it into a power to provide other forms of support. Such powers may be conferred elsewhere and it may be the case that they are commonly or even invariably applied when accommodation is provided to a minor, but the conclusion is clear in stating that the alleged entitlement to support arises under section 25(3). For completeness, I would add that even apart from this, I consider that the declarator sought in the third conclusion is insufficiently specific in stating an entitlement to “support”.

[20] Turning to the submissions of competency, it is necessary to have in mind what the effect will be of decrees pronounced as sought. A number of the submissions for both parties appeared to proceed on the basis that decree in terms of the first conclusion would be good against the world in general. That is not the position. It will bind only the parties to the action. In the event that the pursuer moved to the area of another local authority and an issue arose as to her age, while any declarator granted might carry considerable weight in the decision-making process, it would not be binding. It could found a plea of *res judicata* in future only in respect of parties who have contested the process. This means, as the pursuer submitted, that it would be possible for a situation to arise in which there are inconsistent decisions as to a person’s date of birth. While that is undesirable, it is precisely because it is not possible for all persons who are or might be affected by a decision on the matter to the convened as defenders that this situation arises. It would be possible to develop the provisions in the Nationality and Borders Act 2022 to provide a means of getting a single definitive decision but Parliament has not chosen to do this. In relation to the contention that

the decision would be binding across all central government functions as a result of the Home Secretary being named as a defender, it is of note that this is, “for any interest she may have.” If a decree in absence is taken against her, it would not found a plea of *res judicata* (*Esso Petroleum Company Limited v Law* 1956 SC 33). These factors mean that the defender’s objection that a decision should not given in the absence of proper contradictors carries no weight. However, it also undermines the argument for the pursuer that the action is not academic on the basis that the declarator will determine the matter of the pursuer’s age for other situations in which it might arise.

[21] The defenders are correct to say that the decisions in *Gifford, Lyle, Sinclair Lockhart’s Trustees* and *Imre* have not been overruled. In *Sinclair Lockhart’s Trustees* the court concluded that the court would not declare a legal right unless it was clear it would benefit the pursuer and in all cases it was said that a declarator to have a state of facts declared is not competent without any consequent right flowing from it. There has been some development of the position of bare declarators – particularly in the context of the growth in judicial review.

Hence, in *Keatings* the decision in the Inner House stated:

“Where a bare declarator is sought, it must have a purpose. It must produce a practical result. In so far as this overlaps with title and interest (standing), the result must be one in favour of the person seeking the remedy, although it may also affect others. Whether a person has a sufficient interest depends upon the context (*AXA General Insurance Co Ltd v Lord Advocate*, Lord Reed, para 170).” (paragraph 53)

That decision was, however, one concerning issues of legal right rather than fact. The pursuers had sought declarators that the Scottish Parliament had the power to legislate for the holding of a referendum on the issue of Scottish independence. The court also underlined that it was necessary that the declarator must have a purpose and produce a practical result. Here, the first conclusion does not seek to establish any right as opposed to facts and the pursuer does not point to any practical result. The possibility of disputes as to

her age with different parties in future is immaterial for the reasons considered above. The possibility of disputes with the council is speculative. The decision of the Court of Appeal in *R (SB) v Kensington and Chelsea Royal London Borough Council* [2024] 1 WLR 2613 which I took into account in *Ibrahimi* seems equally applicable here. The mere possibility that a live issue might arise with the council in future is not sufficient to justify granting a declarator now.

[22] The decision in *R (A) v Croydon London Borough Council*, [2009] UKSC 8, does not affect this. The issue of the age of the applicants in that case arose in relation to the same issue of provision as accommodation as arises here. If they were children, there was a right to accommodation but if they were adults there was not. When considering the decision of the Supreme Court it is necessary have in mind the situation which has led to the applications in those cases and what it was that was before the courts. The Court of Appeal had decided that the issue of the age of the applicants was for decision by the council's employees and that the courts could review such decision only on customary grounds for judicial review ([2009] PTSR 1101, paragraphs 25 and 30-31). As such, the jurisdiction of the court was to see that the decision was made lawfully rather than that it was correct. The judgment of the Supreme Court was that the issue of age was one for the court and that the court would determine the issue for itself on a balance of probabilities rather than review the decision of social workers. The Supreme Court also determined that this matter could be determined within a judicial review but that aspect of the judgment is of little direct application in Scotland. The jurisdiction for judicial review in England has a different basis from that in Scotland and has a different scope. Although grounds for review may be interchangeable, the scope of the jurisdiction is different and it does not follow from the fact that something may be the subject of judicial review in England that it is within the

supervisory jurisdiction of the Court of Session. The form of order that might be made was not determined in *R(A)*. Indeed, Lady Hale noted that it was not clear what order the applicant sought and that further submissions would be required on that issue (paragraph 46).

[23] It is apparent that in order to decide whether there is a right to accommodation for a child or an entitlement to be considered for accommodation as a person aged 18-21, it is necessary for the court to determine the applicant's age. This requirement is not, however, inconsistent with the decisions referred to in paragraph 19 above. The decisions recognise that there may be a declarator of fact when it is accompanied by declarator of a consequent right. It would be possible to seek a remedy in terms of which the court determines that the age of the pursuer is, say, 17 and that the defender is therefore obliged to consider whether accommodation should be provided under section 25(3). In some cases, it may be possible to argue that the only rational exercise of that discretion would result in accommodation being provided with the result that there is an obligation that it is made available. This necessity to consider and reach a conclusion as to a person's age in order to decide whether a discretion arises does not amount to usurpation of the function of the National Age Assessment Board. Not only does the decision of the court not have binding effect generally for the reasons given above, the jurisdiction of the NAAB is defined to arise only in specified circumstances. As the pursuer submitted, the position here is such that no referral is possible even if the first defender were minded to make one.

[24] Here, not only is no declarator of right sought, there is nothing to indicate that there would be any practical consequences if the first declarator sought was granted. As the decree does not bind any party other than the defender, they would have to be consequences for the pursuer in her relationship with the defenders. The only issue raised in the pleadings

is provision of accommodation but it is clear that she is being provided with this. It is not said that the accommodation would be in any way different if there was a declarator. While the issue of the pursuer's age may have recently been a live issue, it is not currently a live or practical one as envisaged in *Macnaughton* or *Keatings*. In the former, the Lord Justice Clerk (Thomson) declined to give a definition of what was meant but it is notable that it was contrasted with "hypothetical, premature or academic" questions. The present declarators fall into these latter categories. In the latter, Lord President (Carloway) accepted that there may be certain situations in which the court will decide an academic question but only if there is a good reason such as that it will need to be resolved in the near future (paragraph 51). The pursuer does not offer to provide such circumstances arise here. The fact that there are situations such as section 25(3) where certain benefits will apply to her only if she is a certain age is not sufficient. She can apply for these benefits and the party to whom the application is made will have to reach a view on her age on the basis of the information provided to them.

Conclusion

[25] In view of the foregoing, the pursuer is not entitled to the decrees she seeks both on the basis of relevance and competence and also, if it is a separate ground, on the basis that the orders are academic. I therefore sustain the first to fifth pleas for the first defenders, repel the pleas for the pursuer and dismiss the action.

[26] Most people in this country and the majority of other countries can establish their age quite readily by means of a birth certificate, an identity card or a passport. Where these options are not available, the individual is put in a difficult position. In his judgment in *R(A) v Croydon London Borough Council* in the Court of Appeal, Ward LJ said:

“I am not without sympathy for the plight of young asylum seekers whether they be under 18 or just over 18 years of age. To arrive in this country often in a state of confusion, often traumatised by the events that have caused them to flee their own land, bewildered by what is happening to them, unable to speak the language and often without help must be a daunting ordeal, one which the Children’s Commissioner has highlighted and one which in the paper Better Outcomes: the Way Forward - Improving the Care of Unaccompanied Asylum Seeking Children, the Border and Immigration Agency acknowledge as I describe in para 6 above. It does seem to me that although I have been satisfied that the present procedures comply with article 6, none the less a better system could and in my judgment urgently should be provided and I hope this judgment will add impetus to the need for reform.” (paragraph 91)

It is remarkable that, 17 years after that decision, persons in the pursuer’s position still face a procedural maze and an inability to get a binding determination of their age.