OUTER HOUSE, COURT OF SESSION

[2012] CSOH 134

P1221/10

OPINION OF LORD STEWART

in the Petition of

ISA

Petitioner;

for Judicial Review of a decision by Angus Council dated 16 September 2010 that the petitioner ISA is over the age of 16 years and of a decision consequent thereon to transfer the petitioner to Glasgow

and Answers for

Angus Council

Respondents:

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Petitioner: Ms Stirling, advocate; Drummond Miller LLP

Respondents: A Smith QC; Tods Murray LLP

24 August 2012

[1] This is an application for a fact-finding, age assessment judicial review presented by a young Nigerian male visa-overstayer, petitioner ISA. On or about 9 April 2010 petitioner ISA and another young Nigerian male stated to be his brother, petitioner ALA, also a visa-overstayer, came into the *de facto* care of the respondents' Social Work Department in circumstances that I shall describe below. At that time petitioner ISA claimed to be 11 years old. He was in possession of a birth certificate bearing to show his date of birth as 6 November 1998. The United Kingdom Border Agency [UKBA] visa application record shows that when the application was made the petitioner held a genuine Nigerian passport giving his date of birth as 6 November 1993. The birth certificate would make him 13 years old at today's date and the passport would make him 18.

[2] The respondents are a local government authority with responsibilities for children in need under the Children (Scotland) Act 1995. In terms of the 1995 Act a "child" is "a person under the age of 18". On 16 September 2010 the respondents carried out an age assessment. They assessed petitioner ISA's age at "sixteen years plus". In context the clear meaning of this assessment is that petitioner ISA was accepted by the respondents as being a "child" within the meaning of the Children (Scotland) Act 1995, namely "a person under the age of 18".

[3] Petitioner ISA's application seeks (a) declarator that the respondents' age assessment is "wrong as a matter of fact" and that the age assessment was procedurally unfair; (b) reduction of the age assessment; (c) declarator that the petitioner is a child for the purposes

of chapter 1 of Part II of the Children (Scotland) Act 1995, being a person under the age of 18 years and that he was born on 6 November 1998, or 5 December 1996 or on 6 November 1996 or (after amendment) on such date after 6 November 1993 as the court thinks fit; (d) declarator that the respondents' decision to transfer the petitioner to the YMCA Glasgow is unlawful; (e) reduction of the decision to transfer the petitioner; and various ancillary orders. Petitioner ALA also seeks judicial review of the respondents' assessment of his age. The applications have been heard together.

[4] Having heard proof followed by counsel's submissions culminating on 28 October 2011 I made *avizandum*. I have now decided to refuse the petition for petitioner ISA. The respondents' decision to transfer the petitioner to Glasgow in the autumn of 2010 has been completely overtaken by events; and Ms Stirling, counsel for the petitioner, made very limited submissions about that matter. The *Wednesbury* attack on the fairness of the respondents' age assessment process been not insisted on. The respondents' age assessment found petitioner ISA to be a child i.e. to be under 18 years of age. My own view on the information put before me is that petitioner ISA was probably about 151/2 years old at the time of the respondents' assessment which found the petitioner to be "16 +". The difference is not material, so far as the issues raised in these proceedings are concerned, and does not justify declaring the respondents' assessment "wrong as a matter of fact" in a situation where better evidence may yet become available.

[5] There is no known technique or combination of techniques for determining age at a particular moment in time [T Smith and L Brownlees, *Age Assessment Practices: a Literature Review and Annotated Bibliography*, UNICEF Discussion Paper (New York, 2011)]. Margins of *at least* plus or minus two years are routinely quoted. In 1999, the Royal College of

Paediatrics and Child Health (RCPCH) issued the following guidance for paediatricians [*Assessment of the Age of Refugee Children* (RCPCH, London, 1999)]:

> "In practice, age determination is extremely difficult to do with certainty and no single approach to this can be relied upon. Moreover for young people aged 15 - 19, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side. Assessments of age measure maturity, not chronological age. However, in making an assessment of age, the following issues should be taken into account..."

[6] The guidance just quoted addresses the issues of "spot" assessments at a particular moment in time. Unusually, in the present cases, there have been successive paediatric assessments. The most useful pieces of information available to me are the finding of Dr Birch, paediatrician, about the petitioners' growth over a six month period and the opinion of Professor Cole, medical statistician, as to the petitioners' likely ages derived from the fact and rate of growth. As a rule human males have stopped growing by the age of 18, the age at which they become statutory adults. I am told that, if there is growth, it is likely that the subject is not an adult. It is for consideration whether asylum seekers claiming to be children should have their height measured on arrival or presentation and at six-month intervals thereafter [see also *AM, R (on the application of)* v *Solihull Metropolitan Borough Council* (AAJR) (Rev 1) [2012] UKUT 118 (IAC) (14 June 2012), § 17].

[7] The story of the petitioners is worth telling in some detail for the way it illustrates the challenges that can face asylum seekers claiming to be children without reliable age documentation, the challenges that face the public authorities who have to deal with them and the challenges that face judicial decision makers when required to undertake fact-

finding age assessment judicial reviews. These challenges are connected with the Secretary of State's policy of granting unaccompanied asylum-seeking children [UASCs] so-called discretionary leave to remain until they are adults. By the time they are adults, or are, should I say, definitively determined to be adults, such claimants may hope to have acquired ECHR Article 8 (family and private life) rights in the United Kingdom which prevent their removal even if their asylum claims have no merit. The other advantage of being found to be a UASC and of being accommodated by a local authority as a child in need is that formerly "looked after" children are entitled to local authority after-care services and support until the age of 25.

Age assessment judicial reviews

[8] Fact-finding judicial reviews for age assessment purposes are authorised by the decision of the Supreme Court in *R(A)* v *Croydon London Borough Council* [2009] 1 WLR 2557. This is a decision on the Children Act 1989, a statute which does not extend to Scotland. In terms of section 20(1) of the 1989 Act, the threshold qualification for obtaining accommodation from a local authority in England & Wales is that the applicant is "a child", meaning "a person under the age of eighteen". As I understand *R(A)* v *Croydon London Borough Council*, the question "child or not?" is a pseudo-jurisdictional issue that has to be resolved before the local authority can be seised of the question whether, in relation to the applicant, it is bound to exercise its power to provide accommodation. If the local authority's assessment of age is disputed, the question whether the applicant is a child is an issue of fact to be determined by the court. Baroness Hale of Richmond JSC said, at paragraph 46:

> "... if live issues remain about the age of a person seeking accommodation under section 20(1) of the 1989 Act, then the court will have to determine where the truth lies on the evidence available."

Lord Hope of Craighead DPSC said, at paragraph 51: "It seems to me that the question whether or not a person is a child for the purposes of section 20 of the 1989 Act is a question of fact which must ultimately be decided by the court." The Supreme Court ruled that the remedy should be sought by way of judicial review in the Administrative Court, the review procedure being adapted to determine disputed questions of fact [Lady Hale at § 33 with whom the other Justices agreed].

[9] How does this work in practice? The Court of Appeal of England & Wales has reacted to the Supreme Court's ruling first by indicating that applications ought to be transferred from Administrative Court to the tribunal system and then by ruling that: "No court should in future decide a case on the basis of evidence from Dr Birch." Dr Diana Birch - whom in a previous opinion I mistakenly called Dr "Ruth" Birch - is the paediatrician without whose expert report the application of A would probably never have got to the Supreme Court and who is currently the paediatric expert of choice for age assessment claimants [*A* v *London Borough of Croydon* [2009] EWHC 939 (Admin) (08 May 2009); *R (FZ)* v *London Borough of Croydon* [2011] EWCA Civ 59 at §§ 4, 16 and 31; *R (FM)* v *Secretary of State for the Home Department and Anr*, Court of Appeal, Civil Division, C4/2011/1274, *per* Sir Richard Buxton (9 August 2011); *L* v *Angus Council* 2012 SLT 304 at § 133].

[10] It has emerged that there is a question mark over the jurisdictional competence of the Upper Tribunal to resolve all the issues which can arise [*R (on the application of JS) and R (on*

the application of YK) v *Birmingham City Council* (AAJR) [2011] UKUT 505 (IAC) (08 February 2012) at §§ 7-14]. One of the reasons why the Court of Appeal thought it appropriate to transfer age assessment reviews to the tribunal system was "because the judges there have experience of assessing the ages of children from abroad in the context of disputed asylum claims". Now it appears that the judicial review jurisdiction to make age assessments exercised by the Upper Tribunal involves different principles from the asylum jurisdiction to make age determinations, different principles as to the burden of proof and the standard of proof [*Rawofi (age assessment - standard of proof) Afghanistan* [2012] UKUT 197 (IAC) (18 June 2012) at §§ 9-14]. The Upper Tribunal has observed that not only is there no effective filter and a minimal hurdle for claimants to overcome at the permission stage, there is, in light of the Court of Appeal's ruling on burden of proof, no hurdle at all for claimants at the substantive hearing. "The implications for the resources of local authorities remain to be explored" [*R (on the application of CJ)* v *Cardiff City Council* [2011] EWCA Civ 1590 (20 December 2011); *AM, R (on the application of)* v *Solihull Metropolitan Borough Council* (AAJR) (Rev 1) [2012] UKUT 118 (IAC) (14 June 2012), §§ 9-13].

Competency of this application for judicial review

[11] The decision of the Supreme Court is a decision on the meaning and effect of the Children Act 1989: the decision is not binding as to the construction of the Children (Scotland) Act 1995; and there have to be reservations, with respect, as to whether the reasoning of the Supreme Court is persuasive in relation to the differently-worded Scots statute. The application in Scotland of *R(A)* v *Croydon London Borough Council* is discussed in

my Opinion in *L* v *Angus Council* 2012 SLT 304 at §§ 115-164. I incline to the view that the question whether an individual without reliable birth documentation is a child at a particular moment in time is a question of judgment rather than a question of fact; that this is recognised in the wording of the Children (Scotland) Act 1995; and that Scottish local authority age assessments are amenable to judicial review only on traditional *Wednesbury* grounds. *Wednesbury* review was the only remedy in England & Wales until the decision of the Supreme Court in *R(A)* v *Croydon London Borough Council*.

[12] Questions raised at the First Hearing in the *L* v *Angus Council* case included whether the Court of Session has power in the exercise of its supervisory jurisdiction to conduct fact-finding reviews and whether it is competent to pronounce a declarator of status or age in judicial review proceedings as opposed to in an ordinary action of declarator. During the adjournment between the first and second parts of the proof in the present proceedings, Mr Smith QC, senior counsel for the respondents in the present proceedings, sat in court to hear the submissions in *L* v *Angus Council*, although he did not learn the result before making his closing submissions in the present proceedings [*L* v *Angus Council* 2012 SLT 304 at §§ 25, 29, 58-71].

[13] The respondents' closing submissions in the present proceedings raise the issue of competency. The matter is introduced as follows in Mr Smith's written submissions [§ 1.2]:

> "... the petitions [*of this petitioner and his co-petitioner*] are incompetent. They do not seek to invoke the supervisory jurisdiction of the court, and the more appropriate method of determination of the issue is by an action of declarator. It is acknowledged that the pleadings as presented by the respondents do not in fact raise and issue of competency and, indeed, invite the court to determine the issue of age. However, it is

> submitted that, notwithstanding the position adopted in the pleadings, the court should rule that the application is incompetent."

As Mr Smith's Written Submissions acknowledge, the respondents' pleadings positively invite the court to determine the issue of age. Proof on the issue of age was allowed by the interlocutor of the Outer House administrative judge dated 18 March 2011. The interlocutor, as I understand matters, represents the wishes of both parties.

[14] Parties have agreed to join issue on the basis that fact-finding judicial review is competent; I have heard eight days of evidence and submissions with reference to volumes of documents including 28 affidavits; and the respondents have no plea to the competency of the procedure. The competency issue, as now formulated by Mr Smith QC for the respondents, is about the form of the proceedings. Mr Smith QC does not contest the power of the court, properly invoked, to pronounce declarators as to status or age. He submits that the proper vehicle is an ordinary action of declarator. The issue of competency is linked to the question whether the declarator sought is intended to be *in rem*. That is something I discuss below. It is sufficient at this juncture to say that Ms Stirling for the petitioner does not contend that the declarator sought in the present proceedings should be good against the whole world. In these circumstances, I judge that it would be wrong to supersede the allowance of proof and to decide the matter as one of competency. I am unwilling to entertain the competency issue at this late stage.

[15] For completeness I have to mention that although the written submissions for the respondents bear to give notice of a motion to amend the answers to the petition by inserting a plea to the competency, Mr Smith QC did not actually make a motion to amend.

Relevancy of this application for judicial review

[16] Making the assumption, then, without deciding, that the remedy sought is not one beyond the power of the court to grant in judicial review proceedings, the next question is whether the petitioner presents the kind of case that justifies the remedy. Accepting for the sake of argument that the Supreme Court decision should be followed in construing the Children (Scotland) Act 1995, which is Ms Stirling's submission, I think - without necessarily concluding that the application should fail on this basis - that the petition falls short in two respects. Both of these matters shade in to the question of competency. The first issue is about the petitioner's age as assessed by the respondents. The *dicta* of Lady Hale and Lord Hope quoted above make it plain, I would have thought, that the *ratio* of *R (A)* v *Croydon London Borough Council* applies where an applicant for accommodation under the relevant section is assessed by the local authority to be an adult rather than a child, that is where he or she is assessed to be eighteen years of age or more.

[17] In the present case the respondents assessed the petitioner to be a child of "16 +". What the petitioner now seeks is to have it declared that he is a younger child, ideally from his point of view, a child of "11+" rather than "16+" (at the date of the assessment). Not only does the *ratio* of *R (A)* v *Croydon London Borough Council* not apply, the situation in the present case gives further cause, with respect, to be sceptical about the solution offered by the

Supreme Court in relation to the situation in which that decision is supposed to apply. As I understand *R (A)* v *Croydon London Borough Council*, a dissatisfied applicant who is assessed to be, say, 18 years and 1 month old can apply for a fact-finding judicial review whereas a dissatisfied applicant who is assessed to be, say, 17 years and 11 months old cannot. The latter has to make do with review on traditional *Wednesbury* grounds. This is because it is only in the former situation that the pseudo-jurisdictional issue "child or not?" arises [*R (CJ by his litigation friend SW)* v *Cardiff City Council* [2011] EWCA Civ 1590.]

[18] The second deficiency in this application is a related one about the purpose of the respondents' age assessment. On the *ratio* of *R (A)* v *Croydon London Borough Council* fact-finding judicial reviews are authorised where age status has to be determined as a fact precedent to the exercise of local authority accommodation powers for children in need. The powers in question are powers to provide accommodation in terms of the Children Act 1989 s. 20. The equivalent provision for Scotland is section 25 of the Children (Scotland) Act 1995. Accepting, as I say, for the sake of argument that the same approach should be followed in Scotland, I should require to be satisfied that the respondents' assessment was undertaken for section 25 purposes. I am not satisfied that the age assessment which the petitioner seeks to bring under review was an assessment for the purposes of the Children (Scotland) Act section 25 or even broadly for the purpose of making a decision about accommodating the petitioner. There is nothing in the Petition about the purpose of the assessment; and the evidence led at the proof points to the assessment having been undertaken for immigration purposes.

[19] At the time of the assessment the petitioner had no complaint about the accommodation provided for him by the respondents. The oral evidence establishes that the age assessment

was "requested by the petitioner's solicitors" who maintained that the petitioner had a right to be age-assessed. At the time the solicitors were in the course of making a claim for asylum for the petitioner and an application for discretionary leave to remain on the ground of the petitioner's age. In the latter connection the solicitors were attempting to resolve the discrepancy between the passport on the one hand and on the other hand the birth certificate, which had apparently been (erroneously) authenticated by the Nigerian High Commission in London. On 29 June 2010 the solicitors wrote to UKBA enclosing a copy of the authenticated birth certificate and further stating:

> "... I am also investigating whether a medical age assessment can be undertaken within Scotland if this is required.
>
> In the meantime and given the enclosed authenticated document, I would request that the benefit of the doubt is given in this case and that my client is treated as 11 years old..."

[20] On 3 September 2010 the petitioner's solicitors submitted a Statement of Evidence Form to UKBA in support of the asylum claim. The basis of claim was that the petitioner was a victim of human trafficking. The covering letter stated:

> "Our client is furthermore eligible for a grant of discretionary leave pursuant to the UKBA policy on unaccompanied minors returning to Nigeria given that there are inadequate reception facilities."

The letter continued:

> "... We note that our client's age is disputed by your offices as you hold a copy Nigerian passport noting his date of birth to be 6 November 1993.
>
> Please note that we have instructed investigations to be carried out in Nigeria regarding the age of our client. These investigations are still continuing. We have also requested Angus Council to carry out an age assessment..."

An age assessment for the purpose of supporting an application for discretionary leave is not an age assessment to establish a fact precedent in relation to the exercise of the respondents' function in terms of section 25 of the Children (Scotland) Act 1995.

[21] The distinction is important. First, the decision in *R (A)* v *Croydon London Borough Council* derives from a particular construction of a specific statute, the Children Act 1989, and is not expressed to have application to age assessments generally. Secondly, an assessment of age for discretionary leave purposes in the immigration context is not the determination of a precedent fact issue: it is, as I understand it, a decision about the sole determining fact. To entertain the present fact-finding application as to the merits of such a decision would be to engage in a pure "merits review", something which the court is not empowered to do in the exercise of its supervisory jurisdiction [*West* v *Secretary of State for Scotland* 1992 SC 385 *per* the Lord President (Hope) at 412-413, approved by the Supreme Court in *Eba* v *Advocate General for Scotland* [2011] UKSC 29 (2 June 2011)]. Provided there is no error of law, decision-makers are entitled to be wrong; and being wrong is not an error of law [*Eba* v *Advocate General for Scotland* [2010] CSIH 78 at § 41 *per* Lord President; [2011] UKSC 29 (22 June 2011) at § 32 *per* Lord Hope DPSC citing *Anisminic Ltd* v *Foreign Compensation Commission* [1969] 2 AC 147, at 171 *per* Lord Reid].

[22] This analysis cannot be pushed too far. Arguably the respondents' assessment was not a "decision" at all: it was no more than an age advisory for the purpose of someone else's decision, namely the determination by UKBA of the application for discretionary leave, if it was even that - the petitioner's solicitors objected to the fact that a copy of the assessment had been sent direct to UKBA without their client's approval.

[23] In any event, the points about the petitioner's assessed age and about the purpose of the assessment, important though they may be, have not been taken by the respondents and have not been the subject of submissions. It would not be right to dismiss or refuse the petition without making an assessment of some kind. For completeness, by letter dated 5 October 2010 UKBA rejected the petitioner's child-trafficking claim. The witness Alexis Wright told me that it is intended to apply for judicial review of UKBA's decision.

[24] Since the proof, in answer to a request from me for further information, parties have agreed that:

> "on 22 April 2010 Angus Council social worker Lynn Sandeman told Pauline Donald UK Border Agency Immigration officer that the respondents would arrange for an age assessment to be done."

This says nothing about the reasons for the assessment. Parties have also agreed that I can look at two additional documents bearing on the reason for the age assessment. The first is a UKBA file note of 6 August 2010 recording: "Social worker advised to produce an age assessment/ Merton report." This was in the context of the fact that the petitioner was "age

disputed" for immigration purposes. The second document is an Angus Council, Social Work Department, Throughcare/Aftercare [TC/AC] Team file note recording that on 24 August 2010 the petitioner's solicitor asked the social work department to undertake a "Merton Compliant Age Assessment". The contents of the note, so far as unredacted, do make reference to both "appropriate education" and "appropriate placement/ independent living depending on [*the petitioners'*] ages": but it remains I think unproved that the respondents intended the assessment to be for the purpose of section 25 of the Children (Scotland) Act 1995.

Status or age?

[25] What is the question raised by this petition: is it "what is the petitioner's age?"; or is it "is the petitioner a child?" The answer is "both", what might be called "age status". The petitioner asks the court to declare that petitioner ISA is [i.e. now] a child, being a person under the age of 18 years and in addition to declare the petitioner's date of birth. In submissions Ms Stirling invites me to make a determination of the petitioner's age at the date he was first provided with accommodation by the respondents. That date was 9 April 2010. The date-of-birth options given in article 3 (c) of the petition are: 6 November 1998 [*as per birth certificate*], 5 December 1996 [*as per Dr Birch, Second Report*], 6 November 1996 [*as per K Ambat/ R Palmer Report*] or "such date after 6 November 1993 [*the passport date of birth*] as the court thinks fit". Ms Stirling explains in oral submissions that initially the petitioner sought only the first part of the declarator, that is to the effect that the petitioner ISA is a child. At some stage the respondents made the averment now found in answer 3: "If the

local authority's assessment is challenged on relevant grounds, the court must determine the date of birth". It is in response to that averment that the declarator of a precise birth date is sought by the petitioner. Answer 3 for the respondents cites three cases as authority for the proposition that "the Court must determine the date of birth", namely *R(A)* v *Croydon London Borough Council* [2009] 1 WLR 2557, *R (F)* v *Lewisham London Borough Council* [2009] EWHC 3542 (Admin) and *R (FZ) v Croydon London Borough Council* [2011] EWCA Civ 59. In the last-mentioned decision the Court of Appeal stated [at § 2] that:

> "Not only may it be necessary to determine whether the person is a child, but also to determine his actual age or date of birth. The authorities will thus be able to know when the various obligations to children will come to an end."

It is correct that literal implementation of certain obligations in the Children Act 1990 and in its Scottish counterpart the Children (Scotland) Act 1995, Part II, may well imply that the exact date of birth has to be known: but that is not the same as saying that assigning a date of birth is a proper exercise of the court's supervisory jurisdiction where the question addressed by the local authority is simply whether or not a person is a child within the meaning of the statutory definition being "a person under the age of eighteen".

[26] I respectfully disagree with the reasoning of Holman J in *R (F)* v *Lewisham London Borough Council* [2009] EWHC 3542 (Admin) at paragraph 9 to the effect that assigning a date of birth is authorised by the decision of the Supreme Court in *R(A)* v *Croydon London Borough Council.* On my reading, the language of the learned Justices of the Supreme Court does not bear that interpretation; the expressions "birthday", "birth date", "date of birth" and "precise age" or similar are not employed; and there is nowhere in the judgments even the slightest

indication that the learned Justices had in view the various age thresholds in the Children Act 1989. I rather think, with respect, that had the matter been focused the Supreme Court might have been less ready to make the decision which it did make.

[27] Undeniably, the tendency of the subsequent jurisprudence of England & Wales is to assign a date of birth. In a recent case HH Judge Anthony Thornton QC sitting as a deputy judge of the High Court said:

> "Once the case reaches the court, it is necessary for the court to determine the precise age of the claimant, it is not sufficient for it merely to determine that the claimant is currently a child" [*R (on the application of S)* v *Croydon London Borough Council* [2011] EWHC 2091 (Admin) (25 October 2011) at § 23].

It is not clear to me why determination of the precise age has to wait until the case gets to court. If the precise age has to be determined on a proper construction of the Children Act 1989 then presumably the local authority would be bound to make an attempt. As I have suggested in a previous opinion, if it were the case that the legislature intended a precise age to be determined in the absence of immediately available and reliable data, you would expect the legislature to have given local authorities power to make investigations, including, in appropriate cases, investigations abroad [*L v Angus Council* 2012 SLT 304 at §§ 153-154].

[28] Be that as it may, the learned deputy judge in *R (on the application of S)* pursued his logic to the conclusion that a determination of the claimant's precise age in a fact finding, age assessment judicial review must be a judgment *in rem*, good against the whole world for all purposes. He held, at paragraph 20, that the Children Act 1989 s. 20:

> "provides the Administrative Court by necessary implication with the jurisdiction to determine as a judgment *in rem* the claimant's age and his status as a child".

He also held, at paragraph 62, that the public interest test for granting an *in rem* judgment is satisfied:

> "There is a clear public interest in the judgment being an *in rem* judgment and not merely an *in personam* judgment. It would be contrary to the best interests of this child defendant, whose best interests the state and the courts are by law required to take account of and promote, to be subject to further and possibly different age assessments. The fact that the UK Border Agency has entered into a protocol with the various local authority agencies to the effect that it will accept and apply a local authority age assessment, and hence a court determination following that age assessment, under section 20 of the [*Children Act 1989*], shows that it is in the public interest for the claimant's date of birth to be expressed as a judgment that binds everybody and is not merely one that binds the defendant."

I understand that the "Age Assessment: Joint Working Protocol Between Immigration and Nationality Directorate of the Home Office (IND) and Association of Directors of Social Services (ADSS)" (latest version 17 July 2011) does not apply in Scotland: but whether or not the protocol applies is probably not decisive.

[29] To my mind there is something deeply counter-intuitive about making definitive rulings, particularly in the known absence of the best evidence, on the age status of persons whose presence in the United Kingdom is provisional if not precarious. Interestingly, the *in rem* question recently came before the Court of Appeal and the Court of Appeal on that occasion found it unnecessary to decide the point [*R (on the application of CJ)* v *Cardiff City*

Council [2011] EWCA Civ 1590 at § 22]. The Court of Appeal has of course indicated that applications should normally be transferred to the Upper Tribunal in terms of the transfer powers conferred by the Tribunals, Courts and Enforcement Act 2007. The first decision of the Upper Tribunal on a transferred application has thrown up the problem that it may well not be within the jurisdictional competence of the Upper Tribunal to make judicial review age rulings binding on the Secretary of State for the Home Department for immigration purposes [*R (on the application of JS) and R (on the application of YK)* v *Birmingham City Council* (AAJR) [2011] UKUT 505 (IAC)]. In the domestic arena "the whole world" consists of, in the first rank, the applicant, the local authority and the Secretary of State for the Home Department. What is not immediately obvious is how an age determination can bind all three where different rules as to burden of proof and standard of proof apply for Children Act and immigration purposes [*Rawofi (age assessment - standard of proof) Afghanistan* [2012] UKUT 197 (IAC) (20 June 2012), §§ 9,10, 13-15]. The more general question - whether the Upper Tribunal has power to pronounce *in rem* judgments - has yet to be addressed.

[30] I also wonder whether it looks quite right to have the Upper Tribunal (Immigration and Asylum Chamber) quashing decisions of local authorities on the applicability of the Children Act 1989. In *L* v *Angus Council* 2012 SLT 304 parties were of one mind to the effect that the Court of Session does not have power under the Scottish provisions of the Tribunals, Courts and Enforcement Act 2007 to transfer age assessment judicial reviews to the Upper Tribunal. One of the reasons is that the functions of Scottish local authorities in relation to child care constitute "a devolved Scottish matter", such matters being non-transferrable. The question of transfer is not raised in the present proceedings.

[31] Thinking specifically about the Scottish child-care legislation, namely the Children (Scotland) Act 1995, and coming back to the *in rem* question, I have difficulty in being persuaded that the legislature, which by section 47 conferred an express power on children's hearings to make age determinations, should be thought to have conferred a power to make age determinations merely by implication for section 25 purposes "good against the whole world". The difficulty is the greater by virtue of the fact that determinations made in exercise of the express section 47 power "shall, for the purposes of this part of this Act, be deemed to be the true age of that person". Section 25 is one of the provisions of "this Part of this Act". My own view is that in the absence of clear statutory warrant it is not within the power of the Court of Session to manufacture birthdays.

[32] I pause here to note that Mr Justice Stanley Burnton in the seminal *Merton* case considered the significance of various statutory age-deeming provisions. He referred to section 99 of the Children and Young Persons Act 1933, section 152 of the Magistrates' Courts Act 1980 and section 1(6) of the Criminal Justice Act 1982. His Lordship said: "The wording of these provisions is indicative of the difficulty of precise and objective determination of age in the absence of reliable documentary evidence" [*R on the application of B* v *London Borough of Merton* [2003] EWHC 1689 (Admin) (14 July 2003) at § 31]. In the same way, in considering the effect of section 47 of the Children (Scotland) Act, I said in *L* v *Angus Council* [2012 SLT 304 at § 135]:

> "Two inferences can be drawn. First, the legislature recognised that age is not necessarily certain, that is, I would say, not necessarily an "objective fact" in the sense posited by the Supreme Court. It might reasonably be said that the legislature recognised a distinction between "age", a working hypothesis, and "correct age", an objective fact which may or may not be subsequently provable."

[33] Returning to the question of birthdays, in oral submissions Ms Stirling for the petitioner accepts that the decision of the Supreme Court in *R(A)* v *Croydon London Borough Council* is not authority for declaring a date of birth in fact-finding, age assessment reviews and agrees that there is no statutory warrant for assigning dates of birth. She also submits that any declarator made by me in the present proceedings to the effect that the petitioner ISA is a child is binding only on the parties in the present proceedings and only in relation to the point at issue. She suggests, sensibly, that it is open to the court, if the evidence allows it, to make an incidental finding as to the precise age of the petitioner or his date of birth.
Mr Smith's written submissions for the respondents make clear that the respondents "desire the matter of age to be adjudicated upon". In the present state of affairs they are uncertain what services, if any, they should provide for the petitioner. In oral submissions Mr Smith submits that it would be helpful for the court to declare a specific age but it is not essential.

Onus of proof and standard of proof

[34] The consensus in England & Wales is that once the stage of assigning birthdays is reached, questions about the onus and standard of proof are superseded - it is simply a matter of the court plumping for a date somewhere within the likely range which might span two, three, four or five years. The date selected for an applicant "almost certainly will not be his actual date of birth" [*MC* v *Liverpool City Council* [2010] EWHC 2211 (Admin) (16 July 2010) at §19]; and in *R (on the application of N)* on the same basis Deputy High Court

Judge Neil Garnham, QC assigned April Fool's Day 1995 [*R (N)* v *Croydon LBC* [2011] EWHC 862 (Admin) (16 March 2011) at §§ 8 and 9]. This is an arbitrary exercise. Can the court make its own determination regardless of the evidence? This is what Ms Stirling's written submissions argue. In oral submissions Ms Stirling reformulates the point, stating that the court is not bound to accept the position on age put forward by either party and may make its own assessment within the range supported by the evidence. She further submits, if I understand her correctly, that a birth date assigned in the middle of the range would stand the best chance of not being appealed. I suppose this is true.

[35] The question of burden of proof remains for what is logically the first stage issue raised by the categorical assertion that the local authority's age assessment "is wrong as a matter of fact". In my view, the burden is on the applicant to satisfy the court that the local authority has erred and has thereby failed in its statutory duty to him or her to provide accommodation or whatever. It is also for the applicant to satisfy the court in relation to any supporting assertions of fact such as that, in this case, the petitioner's passport bio-data page is wrong. This is correct as a matter of principle. In *Associated Provincial Picture Houses Limited* v *Wednesbury Corporation* [1948] 1 KB 223 at 228, the Master of the Rolls, Lord Greene, said: "It is for those who assert that the local authority has contravened the law to establish that proposition." There is support for this approach in relation to age-assessment challenges in the case of *R (on the application of CJ)* referred to by Ms Stirling and in subsequent decisions that have drawn on it [*R (on the application of CJ)* v *Cardiff County Council* [2011] EWHC 23 (Admin) 6, 81, 82, 126-131; *R (on the application of Y)* v *Hillingdon LBC* [2011] EWHC 1477 (Admin) at §§ 11-13; *R (on the application of KN)* v *Barnett LBC* [2011] EWHC 2019 (Admin) at §§ 9-24].

[36] *R (on the application of CJ)* has since been reversed on the burden of proof point in the Court of Appeal [*R (on the application of CJ)* v *Cardiff County Council* [2011] EWCA Civ 1590 (20 December 2011)]. The Court of Appeal held that the concept of a burden on one party or the other is not apposite where the issue is the establishment of a jurisdictional or precedent fact, namely, in this sort of case, the age status of the applicant. This conclusion may be problematic: it is not entirely clear that the Supreme Court decided *R (A)* v *Croydon London Borough Council* on the basis of the jurisdictional or precedent fact doctrine. Lady Hale, with whom the other Justices agreed, said at paragraph 29 that she reached her conclusion on the basis of the wording of the Children Act 1989 and "without recourse to the additional argument that 'child' is a question of jurisdictional or precedent fact." But see also paragraph 32. My own view, as explained in *L* v *Angus Council* 2012 SLT 304 is that the precedent fact doctrine may well not apply in cases under the Scots legislation. Even if the doctrine does apply, there is of course no precedent fact issue in the present case since the respondents have decided the precedent fact issue in the petitioner's favour by assessing him to be a child; and, as I understand it, Ms Stirling accepts the burden although, she says, onus of proof will be determinative only in exceptional cases. She says this is not an exceptional case.

[37] There is a different though related question about the evaluation of the evidence. In *R (on the application of CJ)* in the Court of Appeal, Pitchford LJ, with whom the other members of the court concurred, said at paragraph 21:

> "... In my view, a distinction needs to be made between a legal burden of proof, on the one hand, and the sympathetic assessment of evidence on the other. I accept that in evaluating the evidence it may well be inappropriate to expect from the claimant

> conclusive evidence of age in circumstances in which he has arrived unattended and without original identity documents. The nature of the evaluation of evidence will depend upon the particular facts of the case."

I respectfully agree. In the present case, of course, the petitioner arrived apparently accompanied by his father carrying an original identity document.

How the age status dispute arose in the case of petitioners ISA and ALA

[38] The applications of petitioner ISA and petitioner ALA have been remitted for proof together. Parties are agreed that the evidence is to be shared. Since the application is one for judicial review I have felt entitled to look at all the documents produced even though not spoken to in oral evidence or formally agreed. The respondents' age assessments which are under attack were substantially based on information gathered from a number of informants who have provided affidavits which are produced. The documents produced by the petitioners are referenced in the independent age assessment reports instructed on the petitioners' behalf. The evidence of the skilled witnesses is not understandable without looking at other documents. For the purpose of understanding the evidence of Dr Birch, Dr Stern and Professor Cole I have read Dr Birch's book *Asylum seeking Children including Adolescent Development and the Assessment of Age* (Youth Support Publications, London, 2010). The book has been produced and is referred to expressly and by implication in the reports and evidence of those witnesses. See, for example, the report of Professor Tim Cole dated 14 April 2011 at paragraphs 9-12, 29, 32, 38 and 43. I have also searched the internet for the

names of the principal characters, finding one hit of interest, for the petitioners' claimed school and for the postcode of the London address where the petitioners may have stayed on their arrival in the United Kingdom. The results of the internet searches have not influenced my assessment of the petitioners' ages. I have put together the following account of how the petitioners came to be age-assessed from the oral witness testimony, the 28 witness affidavits and other documents produced by the parties.

[39] The petitioners, petitioner ISA and petitioner ALA, arrived at Heathrow Airport on a direct flight from Lagos, Nigeria, on 11 April 2008. They were granted entry on accompanied-child, limited-stay tourist visas. The visas had been issued by the British Deputy High Commission, Ikoyi, Lagos, on 29 October 2007 and were valid for five years. At the date of application the requested length of stay was one week and the proposed travel date was 20 December 2007. Elsewhere it is said that the requested length of stay on this occasion was three weeks. The visas were stated to be valid "only if accompanied by [*passport numbers*] A****820 and/ or A****283A", presumably parents. Petitioner ISA travelled on Nigerian passport number A*****028 showing his date of birth as "06/11/1993". Petitioner ALA travelled on Nigerian passport number A*****031 showing his date of birth as "05/06/1991". According to the petitioners they came to the United Kingdom with their father and another "boy", whom they did not know and who was passed off as their father's son. That individual is recorded by UKBA as "linked application" BA, Nigerian passport number A*****032, date of birth "04/01/1988". The interest of the passport number is that it is the next in sequence number to petitioner ALA's, supporting the story of a simultaneous application.

[40] The petitioners' visa application record in each case has a not fully intelligible note:

> "Doubts about their intention to return - children state that they are the CEO of the Farm - the father is funding the trip and has £11,000 in bank - on balance and due to family travel history bal issue."

[41] I deduce that this was an "on balance" decision to issue visas. It seems that questions were asked directly of "the children": but I have been offered no intelligible insight into what the questions and answers were. The "travel history" appears to be a reference to the father's frequent travel to and from the United Kingdom previously. The local address given in the application "7 ******* ******** Street, Yaba, Lagos, Nigeria" may have been false.

[42] According to UKBA records the petitioners arrived at Heathrow with their father JOA, their stepmother FAA and their stepbrother BA. As at 3 March 2009 UKBA believed the stepmother and stepbrother to have remained in the United Kingdom, address unknown. The consistent story of the petitioners is that they went with their father and the "stepbrother" to stay with their father's friend in a "tall, brown house" at an unidentified address in London. They make no mention of the stepmother. In June or July 2008 the father left, stating that he had urgent business elsewhere, otherwise reported as "an urgent family matter", but that he would come back for the petitioners. In about August 2008 the petitioners were collected by either a female or a male - accounts differ - whom they did not know and taken by bus to Dundee where, they were told, they were going to stay with their aunties. Petitioner ISA was taken to stay with JA, 28 D*** Street, and petitioner ALA was taken to stay with NA, 87D F*********. These addresses seem to be council flats. The petitioners state that they were unaware that they had family in the United Kingdom. They subsequently stated that they do not believe that JA and NA are relatives. On meeting, JA

introduced herself as the petitioners' aunt and NA introduced herself as the petitioners' cousin.

[43] NA (35) (non-witness) subsequently told officials that JA (non-witness) is the sister of JOA and that she, NA, is the daughter of FA, brother of JOA. Their relationship with the petitioners was stated to be that of, respectively, aunt and cousin. Their relationship with each other was that of aunt and niece. It emerged or was later alleged that both had been subject to deportation or removal orders in the Republic of Ireland. The different family names, A***** and A*******, have not been explained. NA's identity was subsequently stated by UKBA to be OIJ, date of birth 21 June 1976. JA and NA stated that they worked as carers. Each had a daughter aged three or four years old. When they worked nightshifts, which seems to have been routine, the petitioners were left to look after the daughters. NA is recorded as being a practising Christian.

[44] On 27 August 2008 petitioner ALA was taken to Ninewells Hospital, Dundee, by NA and admitted via casualty to ward 24 complaining of abdominal pains. Petitioner ALA was admitted under the care of Consultant Paediatrician Donald Macgregor. The consultant's affidavit evidence is discussed below. Petitioner ALA was discharged on the same day after observation on the ward. The discharge letter is addressed to East Ham Medical Centre, 1 Clements Road, London E6 2DS. I assume the general practitioner contact details were provided by NA. The paediatric liaison health visitor Pam McKenzie (non-witness) was contacted by the ward because of concerns, in view of petitioner ALA's declared age, about~~,~~ the fact that his carer NA worked nights and the fact that he did not appear to be at school. On 28 August Ms McKenzie made a referral to the Dundee City Council School Community Support Service.

[45] On 29 August two education resource workers, Donna Dingwall (47) and Darren Brome (non-witness), the latter said to be an Afro-Caribbean, made a home visit to NA. They learned that school placing requests had already been made for the petitioners. This was confirmed by the School Placing Request Team. Later the same day a home visit was made to JA by education resource workers Donna Dingwall and Evonne Holder (38). The petitioners were in due course placed. A place was confirmed for petitioner ISA at Clepington Primary School, year P6, on 11 September 2008. Petitioner ALA started at Dens Road Primary School, year P7, on 29 September 2008. Another home visit was made to JA on 26 September 2008. On that occasion support workers Donna Dingwall and Evonne Holder followed up earlier discussions about JA applying for a larger house and about general practitioner registration for the petitioners.

[46] Donna Dingwall thought the petitioners were of primary school age. She depones that "one of the boys had shorts on and I remember Fiona [*Scanlon*] (non-witness) commenting to me that he had very hairy legs". The only comment Ms Dingwall herself made was that the petitioners were tall, but "this was quickly dismissed by my colleague", presumably Darren Brome. John Lannon (see below) depones that there was some debate in the office about the petitioners' ages because they were tall. He continues: "Darren Brome [...] stated that this was not unusual for Nigerian/Afro-Caribbean boys...". Evonne Holder (36) saw the petitioners "directly" four or five times. She thought the petitioners looked older than 10 and 11. She depones: "They didn't speak like 10 and 11 year olds - when they spoke to me, they were very forthright, direct, polite and didn't hesitate." At the point she was involved with the petitioners in August and September 2008 she estimated that petitioner ISA was 13 years old and petitioner ALA was 14 years old.

[47] Meanwhile on 16 September 2008 Tayside Police received two anonymous telephone calls about alleged child trafficking in Dundee. The information led by a circuitous route to NA. Detective Sergeant John McInally (51) established in due course that there were two "children" involved, petitioner ISA and petitioner ALA. Having made enquiries of the Education Department DS McInally formed the initial view that the petitioners had been brought to the United Kingdom for educational reasons and that the typical signs of trafficking were absent. On 8 October 2008 DS McInally interviewed NA. He learned that the petitioners had been brought to the United Kingdom by their father AS [apparently an alternative name for JOA] and had stayed at 18 ********** Way, East London. (The postal district is E6, the same as the East Ham Medical Practice referred to above). He was told that a text had been received from the petitioners' father stating that the father had been involved in a motor cycle accident. The father intended to return for the petitioners at Christmas 2008 and had asked NA to look after the petitioners meantime.

[48] On 30 October 2008 an inter-agency meeting was held about the case involving DS McInally representing the police with representatives of the Social Work Department and the Education Department. According to DS McInally the petitioners "were described as lovely boys by both schools". It was also discussed "that they appeared more mature than the ages that had been given for them". In his "Statement of Evidence" dated 2 September 2009, petitioner ISA suggests, on my reading, that the trafficking allegation might have been made to the police by JA's Scottish boyfriend.

[49] On 12 November 2008 DS McInally interviewed JA. He gathered that the petitioners' passports were probably with their father in Lagos. He formed the view that JA and NA were genuine and that they were simply looking after two members of their extended family

who needed help. On the same day DS McInally received a telephone call purporting to be from the petitioners' father in Lagos. DS McInally was unable to make out most of the conversation but he did note an apparent address on Lagos Island given by the caller. (The address has not been put in evidence.) On 29 December NA contacted DS McInally to express concern that the petitioners' father had given no indication when he would return. She wanted to register petitioner ALA with the National Health Service but had no documentation. DS McInally contacted UKBA to make further enquiries about how the petitioners came to be in the United Kingdom.

[50] Gillian Craigie (55) is employed by Dundee City Council as principal teacher, Bilingual Support Services. She was notified of the school placing request for petitioner ISA and called in, she says, NA and petitioner ISA for interview. (I suspect that she may have called in JA rather than NA.) She depones: "The aunt did all the talking for him." She continues:

> "I asked if [*petitioner ISA*] could use the Hausa language. [*NA*] said he understood it, but couldn't use it. This is typical for Nigerians [...] There are many different cultures. It is also common for people from a different culture to not make eye contact. Some people would be offended, but it doesn't phase me [...] When I found out [*petitioner ISA's*] strongest and only language was English, my role became more about indirect support. I would only have had direct involvement with [*petitioner ISA*] if he was bilingual. Most Nigerians who only use English use what we call 'Nigerian-English'. I made the teachers aware that any vocabulary that was used should be checked in order to make sure that the lesson was understood by [*petitioner ISA*]."

Clearly Ms Craigie has benefited from diversity awareness training. All other evidence about ethnic/linguistic background points to petitioner ISA being Yoruba (Lagos area) rather than Hausa (northern Nigeria).

[51] On the other hand petitioner ISA is recorded by Ms Craigie as being Muslim, non-observant. The same information is recorded of both petitioners in the Social Work child and family initial assessment reports of 3 March 2009, referred to below. Ms Craigie states that she would have guessed that petitioner ISA was 11 or 12 if she had not been told that he was 10. She was told that he had attended school for five years in Nigeria. Ms Craigie found the aunt to be "not forthcoming". She found this unusual: "usually people from different backgrounds are happy to tell me about their roots." She told the school office that she did not like the sound of the background and depones that the head teacher noted her concerns. Ms Craigie did not meet petitioner ALA.

[52] Petitioner ISA's class teacher in primary 6 at Clepington Primary School was James Webb (33). Mr Webb had experience as a church youth worker. He found petitioner ISA to be polite, well-mannered and thoughtful, always well-dressed and clean. Petitioner ISA was a good influence in the class. Petitioner ISA's height made an immediate impression on Mr Webb: but, Mr Webb depones, he never had reason to doubt the petitioner's age. Since becoming aware of the age dispute Mr Webb has formed the view that petitioner ISA could have been one or two years older than his claimed age, but not five years older.

[53] Edith Maude (62) was head teacher at Dens Road Primary School while petitioner ALA was a pupil there. She never suspected that petitioner ALA was older than he said he was. Mrs Maude depones that she was "appalled" that petitioner ALA was afterwards removed to Craigie High School. Mrs Maude did not teach petitioner ALA. She believes a 17-year old would have been noticed in primary 7. Petitioner ALA's class teacher was Michelle Munro (33). She depones that petitioner ALA fitted in well and was a good influence on discipline in the class. He was always clean and well-presented. Ms Munro became aware of the age

dispute. She did not think that petitioner ALA could have been older than 13 when he was in her class.

[54] The deputy head teacher at Dens Road, Isabel Doogan (61), was also the designated child protection officer for the school. On 23 October 2008 she attended an informal meeting at Clepington Primary School to discuss the petitioners. Others in attendance were John Lannon, Dundee City Council Education Department Child Protection Team, and the head teacher of Clepington Primary School. The purpose of the meeting seems to have been to alert the two primary schools to the petitioners' immigration status and to the issue of possible child trafficking following the anonymous telephone calls to the police. Ms Doogan recalls petitioner ALA as very polite and a delightful pupil. She depones that her reaction to the subsequent suggestion that petitioner ALA was 17 years old at the time was one of shock and disbelief.

[55] At some point during the 2008-2009 season, the petitioners started playing football for Dundee Galaxy FC under-12 team. Fiona Geekie (45) has a son who played during that season for Saints Boys FC under-12s. Her son's team played against the petitioners' team. She depones that the Saints' parents on the touchline did not accept that the petitioners were under-12. (In oral testimony Joanna Wilson, referred to below, told me that the footballing parents' concern about the petitioners' ages had been expressed in letters to the local press.) Ms Geekie is a support worker with the Angus Council Social Work and Health Department Throughcare/Aftercare Team and later came into contact with the petitioners in her professional capacity.

[56] On 13 January 2009 separate and simultaneous visits were made to JA and NA by UKBA and the police. JA was not at home. Both petitioners were found at NA's house. NA consented to a search of the property. No documentation was found. Arrangements were made by UKBA to interview NA at police headquarters on 19 January 2009. Later on 13 January NA telephoned DS McInally to say that JA had left both petitioners in NA's care and that she, NA, could not cope. NA stated that she "had contacted the hospital in Nigeria and spoke to a doctor who confirmed that [*the petitioners'*] dad was still a patient in the hospital and unable to travel". The child and family initial assessment report dated 3 March 2009 records NA as stating that she assumed care for both petitioners in November 2008. This was at the time of DS McInally's trafficking investigation when he reportedly informed JA that he would have to report her presence in Dundee to UKBA. I deduce that JA and her daughter left Dundee in order to escape the attentions of UKBA.

[57] DS McInally and a social worker agreed to visit NA's house together on 16 January 2009. This is recorded on the child and family initial assessment report for each petitioner as the first home visit by the Social Work Department. I have not found a separate record of this first home visit but it appears to have raised no welfare concerns. The same social worker, Heather Wilkie (44), made another home visit with a UKBA officer on 13 February 2009 (see below). The findings are recorded in the formal child and family initial assessment reports dated 3 March 2009.

[58] On 29 January 2009 a Network Meeting was convened by DS McInally to share information and to discuss the provision of additional services to NA's family. Representatives of Dundee City Council Health, Education and Social Work Departments attended along with representatives of Tayside Police Public Protection Unit and of UKBA.

Ms Doogan was present in her capacity as child protection officer for Dens Road Primary School. Also present was Mrs Elaine Taylor (non-witness), the child protection officer for Clepington Road Nursery where NA's daughter was enrolled. The Border Agency exhibited copies of the passports from which it appeared that the petitioners were 16 and 18 years old respectively at the date of entry into the United Kingdom. The Education Department advised that the petitioners had been enrolled for primary school on the basis of their birth certificates. The Border Agency advised that handwritten Nigerian birth certificates were easily forged. Ms Doogan made it clear that she had no reason to think that petitioner ALA was older than his class mates.

[59] Ms Doogan's recollection is that "the social worker" at the meeting also believed that the petitioners were older than they claimed, expressed concern that they were attending primary school and advised that they should be removed immediately. It was felt that if a medical age assessment were necessary the assessment could be carried out with the assistance of Joy Myers, lead clinician child health (non-witness). After the meeting, one of the social workers present, Heather Wilkie, advised Gordon Frew (non-witness) of the Council's Children's Rights and Independent Advocacy Service about the case. DS McInally appears to have formed a concluded view by this stage that there were no signs of trafficking and that no further police involvement was required. DS McInally never spoke to the petitioners directly. He depones that at the time he dealt with the petitioners he formed the view, based on appearances, that petitioner ISA was 12 or 13 years of age and that petitioner ALA was about 15 years old. He thought that petitioner ALA had facial hair and that his voice had broken.

[60] The Network Meeting of 29 January was attended by social worker Heather Wilkie. On 13 February 2009, Ms Wilkie made a collaborative visit to NA's home address with Michael Thomas (non-witness) of UKBA. While Ms Wilkie spoke with the petitioners, Mr Thomas spoke with NA and vice versa. NA maintained that she had known the petitioners since birth and that they were 10 and 11 years old. She did not know why UKBA should say that the petitioners were five or six years older. NA told Ms Wilkie that in the summer of 2008 she had received a phone call from the petitioners when they were in London pleading for her to care for them. The petitioners told Heather Wilkie that they were collected by a female unknown to them and brought to Dundee. (The petitioners are recorded elsewhere as stating that they were brought to Dundee by an unknown male). NA stated that she had agreed with the petitioners' father to look after the petitioners until December 2008 when he meant to return to the United Kingdom to take the petitioners home. It was reported to Ms Wilkie that the hospital doctors in Lagos had discovered a "serious illness" while the petitioners' father was recuperating from a motor cycle accident. Ms Wilkie noted that the father was said to have telephoned the petitioners on Christmas Day 2008 from hospital in Lagos. Elsewhere the petitioners describe a telephone call supposedly from their father and state they do not believe it was their father calling.

[61] The petitioners stated to Ms Wilkie that their father is a businessman, business unspecified. NA stated that her father FA was poorer than his brother JOA, the petitioners' father. JOA did not share his wealth with others. She made a request for money to pay for her GCSEs, which JOA refused. Ms Wilkie recorded: "[*The petitioners*] miss their father, and appear disappointed at his actions, but state they have good care and parenting from NA." The petitioners expressed a wish to remain in the United Kingdom and did not wish to

return to Lagos. Both petitioners reported having been verbally abused and slapped by their stepmother. Petitioner ALA reported that his father was often not around to support them but that he did not abuse them.

[62] Ms Wilkie recorded that petitioner ALA presented as agitated and childlike when he recalled his stepmother, fidgeting and "talking with a small voice". Her observation was that "both boys appear traumatized young people and have clearly been affected by their stepmother's actions". Ms Wilkie thought that the petitioners were fearful that they might be returned to their stepmother's care. Their life was also better in material terms in Dundee than it had been in Lagos and they appeared "notably anxious, wide eyed with concern" regarding the outcome of the UKBA investigation. Her discussion with the petitioners about their home circumstances in Nigeria appeared to Ms Wilkie to be genuine. She did not feel she received genuine answers about their entry into the United Kingdom or about their education.

[63] As regards age, Ms Wilkie noted that the petitioners stated that they were 10 and 11 years old but gave it as her professional view "that the boys present as older children in height, size, maturity, and ability and use of language." Ms Wilkie noted that the petitioners were reported by their schools to be "big boys" in height and size, and "tower over their peers". She depones that the petitioners appeared to be shocked at the older ages that were being stated by UKBA. She further depones that she told the petitioners that she did not think they were acting like 10 and 11 years olds. Heather Wilkie suspected that the petitioners were in their mid-teens.

[64] Ms Wilkie concluded that there were no welfare or care concerns and that NA made appropriate child care arrangements including when she was absent from home visiting London. When NA was in London the petitioners were reportedly looked after by DW (non-witness), a friend of NA and by someone called SS (non-witness). Whether either of these men is the same as the owner of a Jamaican shop in Hilltown, Dundee, who is also said to have looked after the petitioners I do not know. Importantly, it was recorded that NA supported herself, her daughter and the petitioners independently, meaning, I think, without assistance from public funds or from JOA. Ms Wilkie reported to DS McInally that the petitioners were happy and that NA appeared able to cope with the assistance of friends. DS McInally also understood that Michael Thomas had advised NA that she could not work legally in the United Kingdom. DS McInally's impression was that the petitioners were in the United Kingdom to be educated. The School Community Support Service monitored the petitioners' attendance at school for a period. Attendance was 100 per cent.

[65] John Lannon (48) is employed by Dundee City Council as principal officer of the School Community Support Service. He first became involved with the petitioners' cases when the referral was made from Ninewells Hospital on 28 August 2008. Thereafter he was in contact with the Tayside Police Family Protection Unit, with DS John McInally of the Community Protection Unit and with UKBA. Mr Lannon depones that his main concern was "to get the boys into school so that we knew where they were". In due course the information provided by UKBA persuaded Mr Lannon, Jim Collins (non-witness), Director of Education and Jim Gibson (non-witness), Head of Support for Learning, that the petitioners "should not be placed in a primary 6 and primary 7 class for both their own safety and the safety of other children in the class". Mr Lannon depones:

> "We agreed to place [*petitioner ISA*] and [*petitioner ALA*] in Craigie High School at the beginning of March 2009 in the Support for Learning Base to assess their learning needs."

[66] Donna Dingwall and Fiona Scanlon made a home visit on 2 March 2009 to NA. The petitioners were present. The resource workers spoke to NA about the decision to transfer the petitioners to Craigie High School. Donna Dingwall returned later the same day with Anne Souter (57), a fellow resource worker. The petitioners were very upset and asked: "Why? Why is this happening?" They stated that they were 10 and 11 years old. NA was very vociferous and contacted her local member of parliament, Stewart Hosie MP. After a lot of persuasion the petitioners consented to attend the High School. It was agreed that Anne Souter would take the petitioners to their new school on 3 March and escort them daily thereafter. She was also to arrange free school meals, bus passes, etc. Anne Souter depones:

> "I picked them from home up at 8.30 am and they were always ready on time and polite. They were very well mannered to all adults, considering what they were going through. Their aunt co-operated well with me and only wanted to do what was best for the boys."

It seems that Ms Souter also brought the petitioners home at the end of the school day. To begin with the petitioners were frightened: but after a week they decided that they wanted to go to school on their own. In due course the petitioners were placed in specific year-group classes. Anne Souter was satisfied with the home conditions. She discussed money with NA.

NA stated that she had enough money, by implication, to provide and care for the petitioners and if she were in need she would get in touch with Ms Souter. There is no information that NA ever asked the Social Work Department in Dundee for financial assistance.

[67] Heather Wilkie made another home visit on 3 March 2009. She discussed the contents of her assessment report and explained that following the assessment, which was satisfactory, the Social Work Department would no longer be involved. She advised NA that if the family needed food parcels, for example, NA should contact the department. Ms Wilkie depones that on that occasion, which was the petitioners' first day at Craigie High School, the petitioners were not happy about changing schools overnight. She further states in this context that NA informed John Lannon that the petitioners were not 10 and 11 but were 11 and 12. Ms Wilkie informed Gordon Frew of the Council's Children's Rights and Independent Advocacy Service that her assessment was complete and he then made a home visit. I am not told what transpired.

[68] Ms Souter maintained phone contact with NA who constantly spoke about the petitioners being in the wrong school. One of the petitioners - Ms Souter does not say which - continued to claim that he should not be in Craigie High School and that he was not coping. Ms Souter spoke with the petitioners' guidance teacher and seems to have been reassured. NA then claimed that the petitioners were being bullied at school. John Lannon depones that Anne Souter investigated the matter with the petitioners and that the petitioners confirmed that this was not the case. Mr Lannon and Ms Souter state that the petitioners formed good relationships with their teachers, were accepted by their peers and made friends easily. I have looked at petitioner ISA's school report dated 1 May 2009. It is

positive throughout. Petitioner ISA was then in class S1. Ms Souter's "End of Term Summary" for petitioner ISA dated 3 July 2009 states:

> "[*Petitioner ISA*] has however settled at his new school without any major problems and says he is enjoying his time there. He is in the school's football and basketball team and is a well behaved pupil who is liked by all staff working with him. I have kept contact with NA on a weekly basis and to date she has had no letters from the authorities and says that [*petitioner ISA*] is happy and settled."

[69] There is an entry in what I take to be a photocopy of the school health service clinical record card for petitioner ALA dated 23 April 2009 recording a comment by the guidance teacher, Hazel Lusby (non-witness): "no concerns in school - lovely boys - attendance good." The previous day the clinician had unsuccessfully attempted to contact Ms Lusby and recorded: "D/W [*discussed with*] Evie Durham [...] Evie did highlight that [*petitioner ALA*] does look much older that [*sic*] 12 years old." I deduce that Ms Durham (non-witness) was a physical education teacher at Craigie High School. John Lannon depones: "[*The petitioners*] were perceived to be mature in terms of their body hair and also their ability in sport was perceived to be mature."

[70] Ms Souter expresses no opinion about the ages of the petitioners. On an unspecified date NA told Ms Souter that she had received a letter from UKBA saying that "the petitioners had to return to Nigeria because of their dates of birth". NA insisted that the birth certificates were true. She said that if the petitioners had to leave, she would leave too. On 30 July 2009 Michael Thomas of UKBA telephoned Heather Wilkie to inform her that the petitioners' passport dates of birth had been confirmed by officials in Lagos, that NA was

pregnant and that it was proposed to remove NA, her daughter MA and the petitioners from the United Kingdom as a family unit.

[71] The family refused the offer of Assisted Voluntary Return [AVR] on flights departing the United Kingdom on 8 August 2009. On 12 August UKBA informed Heather Wilkie that NA had threatened to hang herself. At 4.40 am on 13 August NA was reportedly found in the middle of the road in London apparently intending to put herself under a bus. On 21 August 2009 UKBA detained NA, her daughter MA and petitioner ISA in Dundee and removed them to Dungavel Immigration Removal Centre. Deponent Edith Maude had arranged for MA to be brought from her nursery class at Dens Road School to a pre-arranged meeting point with UKBA. At some stage these three persons were apparently taken to Cardiff but I am not told for what purpose or for how long. The Border Agency unsuccessfully attempted to remove the detainees from the United Kingdom on 27 August 2009. My understanding from the affidavits is that by the end of August NA, her daughter MA and petitioner ISA had returned to Dundee. There is a suggestion that NA made an asylum application. I have no other information about the removal process and why it was unsuccessful.

[72] John Lannon depones that petitioner ALA was in the park playing football and was told to come back, I assume by UKBA officials, but instead ran away. He avoided detention. Petitioner ALA apparently made his way to the home of a football contact, RG (non-witness). RG and his girlfriend looked after petitioner ALA until NA's return to Dundee. When NA returned to Dundee she contacted the School Community Support Service about schooling for the petitioners. A similar approach was made by the Social Work Department.

[73] John Lannon discussed the placing options. If the petitioners were 15 and 17 years old they would require to be schooled in S4 and S6 classes respectively. They had been performing around P5 and P6 levels and were not suited to the upper secondary year groups. NA stated that petitioner ALA was 11 and should not go into secondary sixth year. In September 2009 John Lannon met NA and petitioner ISA to discuss the possibility of petitioner ISA attending Dundee College for a progressions course to test his aptitudes and to allow him to decide whether college work was to his liking. He had already got agreement from the college in principle. This was the first time Mr Lannon had met NA and petitioner ISA. Mr Lannon thought that petitioner ISA was 15 years old based on his physical appearance. NA was adamant the petitioner ISA was not going to college. John Lannon made the offer of the college course. At some stage following the meeting NA told Anne Souter "that she had decided not to take up the offer".

[74] Part of the interest of the episode is that the question of going to college and NA's attitude was addressed in the petitioners' statement of evidence forms which were submitted in support of their asylum applications on 3 September 2010. The primary basis for the claims was that the petitioners were victims of trafficking. Petitioner ISA's statement contained the following:

> "Aunty [*NA*] thought it was a good thing that immigration thought we were older than we were. She was trying to make me start college because she said she would get money if I did this. Anyway she could get money out of us she would do it..."

As previously stated, there is no evidence that NA took up the offers of financial support made to her by the Dundee Council Social Work Department.

[75] I have no record of contact between the authorities, on one side, and, on the other, NA and the petitioners in the period from October 2009 to February 2010. I have no information about what the petitioners were doing during this time. At some stage the family moved from Dundee to live in a house belonging to RG at Letham in the area of Angus Council, the respondents to this petition. In about March 2010 NA telephoned Angus Council Social Work and Health Department and spoke with family support worker Nicola Jane Simpson (28) of the Social Work Intake Team. NA told Ms Simpson that she was about to move to England and was concerned that she might get into trouble if she left the petitioners behind. NA stated that the petitioner ISA was 16 and petitioner ALA was 18. NA continued to maintain that she was a relative of the petitioners. She stated that she wanted advice: her partner had left and petitioner ALA was displaying threatening behaviour towards her. She was worried about leaving her daughter alone with the petitioners.

[76] Some time before 9 April 2010 Tayside Police contacted Angus Council Social Work and Health Department with information that "two boys" had been abandoned at 2 **** ******* Place, Letham, Angus, with no food and no money. Apparently petitioner ALA had dialled 999 and when the police arrived he showed them the birth certificates. Social workers Lynn Sandeman (50) and Rinku Sharma (non-witness) of the Intake Team made an unannounced home visit and met the petitioners who stated that they had been living with their aunt, NA. NA had gone to England. The petitioners thought she would return but she had not done so and the petitioners had run out of food. Petitioner ISA subsequently stated that NA had given birth to a baby boy and had gone with her two children to stay with her

boyfriend in England. He also stated that NA told petitioner ALA during a telephone call on or about 9 April 2010 that he, petitioner ISA, must "dump" the mobile phone that NA had given him. Petitioner ISA did this.

[77] On 9 April 2010, the social workers inspected the house which they found to be clean and tidy. They gave the petitioners food parcels and returned to the office to discuss the situation with their manager, Alison Leuchars (49), team manager. The next day NA telephoned Lynn Sandeman stating that petitioner ALA had telephoned her, NA, (presumably about the Social Work Department visit). NA gave an explanation similar to that previously given as to how the petitioners had come to be with her. She stated that her aunt or cousin JA had gone on holiday to the Highlands and had not returned. She stated that when she had last telephoned the hospital in Nigeria, she was told that the injury to the petitioners' father's foot was more serious than had been thought and that an amputation might be required.

[78] NA stated that she did not intend to return to Scotland, other than possibly to collect her clothing, and that she did not want anything more to do with the petitioners as they had brought her nothing but trouble. Her boyfriend had asked her to make a choice between him and the petitioners. She had chosen her boyfriend. NA stated that the petitioners were older than they claimed and had false birth certificates. She stated that her daughter MA had made an allegation that the petitioners had been touching her "on the bum and boobs". She also alleged that the petitioners had been aggressive towards her and were putting pressure on her to come back and look after them. In his statement of evidence in support of his asylum claim dated 2 September 2010 petitioner ISA states that "Aunty [*NA*] told Social Work that we were older [...] so that we would be put out of the country and would not

cause trouble for her". In his statement petitioner ALA states that NA warned him to say nothing about what had happened to him and petitioner ISA: "I think she thought that we would quickly be sent back to Africa because people think we are 16 and 19 and no-body would ask us any questions."

[79] Alison Leuchars and Lynn Sandeman visited the address where they met the petitioners and the football coach of the Dundee Galaxy under-13 team, DMcK (non-witness). DMcK echoed the petitioners' claims that they were 11 and 12 years of age. The landlord RG arrived. He was another football contact. Initially RG appeared very sympathetic towards the petitioners. He said that the petitioners had been badly treated by their family and by Dundee City Council Education Department. The social workers knew from the police of the age discrepancy and raised a concern about the petitioners playing for the under-13 team. On 9 April 2010 the landlord demanded that the petitioners be removed from his property. He claimed to have been owed thousands of pounds in rent. With the assistance of Susan Travis (48), tenancy support officer, Angus Council Social Work Department, arrangements were made to move the petitioners with their belongings to self-catering homeless accommodation at 6 ***** Road, Montrose. Lynn Sandeman and Nicola Simpson had to use two cars to transport the petitioners and their belongings.

[80] Susan Travis was concerned that the petitioners were being treated for accommodation purposes as being 16 and 18 years of age, as she thought. Her impression was that they were no more than 11 or 12. Because of her concerns she returned to see the petitioners in the evening, bringing her husband Peter Travis (non-witness), a social worker with 30 years experience of working with children and families. Mrs Travis depones that her husband formed the same impression as she had about the petitioners' ages. Mr and Mrs Travis have

a son of their own aged 23. Mrs Travis was concerned to the extent that the next day, which was a Saturday, she contacted Alison Paton (non-witness), Housing Department assessment officer. Mrs Travis and Ms Paton visited the petitioners. Ms Paton reportedly formed the impression that the petitioners were "young boys" and she was not happy about leaving them in temporary accommodation unsupervised. Ms Paton immediately advised Sheila Ferguson (non-witness), Housing Department service manager, of her concerns. That night an accommodation assistant based at the Guthriehill Homeless Unit, Arbroath, Rae Adam (non-witness), went to check on the petitioners. He made a report to Fiona Ferguson (non-witness), team leader at Guthriehill.

[81] On Sunday 11 April 2010 the petitioners were moved to supported accommodation provided by Angus Council Homeless Support Service in Arbroath "directly across from" the homeless unit. Members of staff at the homeless unit were alerted to check the petitioners regularly. On an unspecified dated in April 2010 Alison Leuchars attended a meeting with the assistant director of the Social Work and Health Department, a council solicitor and two immigration officers. Her understanding at the end of the meeting was that UKBA would contact Angus Council to discuss a possible placement for the petitioners in Glasgow where, the social workers reasoned, there would be more "supports" for them. She also understood that one of the immigration officers would meet the petitioners to discuss Assisted Voluntary Return [AVR] to Nigeria. On 22 April 2010 Pauline Donald (43), immigration officer, UKBA, Aberdeen, visited Angus to meet with the petitioners and their social worker Lynn Sandeman. Ms Donald had been asked by her department to discuss AVR with the petitioners. Ms Donald formed the impression that the petitioners were under 18, approximately 15 or 16 years of age.

[82] During this time Donna Marie Ross (42) was a social worker with the Support to Families Team of Angus Council Social Work and Health Department. Ms Ross was enlisted by Ms Sandeman to support the petitioners in independent living in their new surroundings. The petitioners presented to Ms Ross as clean, tidy and very well mannered. Ms Ross saw the petitioners several days a week while they were at the supported accommodation. She showed them round the area. She cooked with them and showed them how to clean the kitchen. She observed that they knew how to use the washing machine. She prompted them to do their domestic tasks. She found the petitioners guarded about their past. She depones that on one occasion she asked petitioner ALA the name of his school (in Nigeria). Petitioner ALA said that he could not remember. The next day he came back to Ms Ross and said that he had been to "Dantes School". Ms Ross continued to see the petitioners for a period when they moved to live with the Dunphy family. Altogether she was involved with them for about three months. She certainly did not think they were 11 and 12 years old. Overall she thought that petitioner ISA was 16 years old and petitioner ALA 18 years old based on their physical demeanour, their self-care skills, their management of their home, their football skills and ability.

[83] During the period when the Intake Team was responsible for the petitioners, social worker Lynn Sandeman and support worker Nicola Simpson had regular contact with the petitioners. They met the petitioners once a week during May 2010 and fortnightly in June and July 2010. Team leader Alison Leuchars also continued to have overall responsibility for the petitioners. Her initial impression was that the petitioners spoke with unnaturally high voices and she thought that they were 16 and 17 years old. At the same time Ms Leuchars felt the petitioners were vulnerable (to negative influences, I take it) at the accommodation

in Arbroath. She contacted a former colleague Kim Marr (non-witness) who was involved with youth work through St Andrew's Church in Arbroath. Ms Marr also worked part-time with Angus Council Social Work Department as a family support worker. Ms Leuchars asked if the petitioners could become involved with the church youth activities with a view to providing the petitioners with "a positive, safe, peer group".

[84] Ms Marr in turn contacted Sheila Dunphy (48), a salaried youth worker who works part-time for the church and part-time at a charity café for young persons in Arbroath, the Oyster Bar Cafe [OB's]. Mrs Dunphy and her husband do occasional charity work in Africa. Mrs Dunphy has been a youth worker for 27 years. Mrs Dunphy first met the petitioners when she took them to play football with a group aimed at secondary school pupils, third-year and upwards ie 14 and 15 year-olds and later teens. Her impression was that the petitioners were 16 and 18 years old. According to Mrs Dunphy the boys in the football team did not believe that the petitioners were 11 and 13. (Mrs Dunphy appears to have heard that "the parents had been up in arms" about the petitioners playing for the Dundee Galaxy under-12 or under-13 team.) The petitioners became involved with the church youth group and with OB's youth group and made friends.

[85] Mr and Mrs Dunphy agreed with the Social Work Department that they would provide accommodation for the petitioners. The Dunphys have two teenage daughters of their own aged, as at October 2011, 19 and 17 years old. The Dunphys received payment from the council, as I understand it, in terms of section 22 of the Children (Scotland) Act 1995. The payment did not cover the cost. On 19 May 2010 Lynn Sandeman brought the petitioners to live with the Dunphys at 4 ******* Street, Arbroath. Mrs Dunphy formed the impression that the petitioners were not brothers. Petitioner ALA tended to be uncommunicative with the

Dunphys while petitioner ISA was sociable and cooperative. Petitioner ISA was perceived to be more relaxed when not in the company of petitioner ALA. During a discussion about keeping up with school work Mrs Dunphy was asked by petitioner ALA what age she thought he was. Mrs Dunphy replied that she thought he was 17 or 18 years old. According to Mrs Dunphy, petitioner ALA "exploded" and the pitch of his voice fell. He then kept to his room for five days and refused to eat. He complained about Mrs Dunphy to Lynn Sandeman. According to Mrs Dunphy, after that episode petitioner ALA ignored her, walking past her as if she did not exist.

[86] There seem to have been differences about petitioner ALA staying in bed during the day and staying out late, being late for dinner, watching too much television and so on. Mrs Dunphy felt that it might be unsafe for a 12 or 13-year old African boy to be out late on his own in Arbroath. Petitioner ALA replied that "nothing ever happens in Scotland" or "nothing would happen in Arbroath". Nicola Simpson had the impression that petitioner ALA resented being asked to help in the house by Mrs Dunphy. He reportedly described Mrs Dunphy to third parties as "a bitch" and "a freak".

[87] According to petitioner ALA in oral evidence, he "didn't get on good with the Dunphys - she kept taking the piss". He testifies that Mrs Dunphy said to him: "you'll have to go back to Africa." If petitioner ALA said he didn't like lettuce Mrs Dunphy said to him: "I can't believe you rejected that - people from Africa don't refuse food." Petitioner ALA said that Mrs Dunphy had been to Malawi; and she said people in Malawi go hungry, that their stomachs go big and their hair goes ginger. He denied that he went out on his own. He described Mrs Dunphy as "a control freak".

[88] Mrs Dunphy assessed the petitioners as individuals who are desperate to remain in the United Kingdom and who distance themselves from everything African. When the football FIFA World Cup was being played, the petitioners supported everyone but Nigeria (first round, South Africa, June 2010). While the petitioners were at the Dunphys, Mr and Mrs Dunphy's younger daughter RD spent some weeks doing charity work in Malawi. Petitioner ALA commented that he could not understand why RD had gone to Malawi. In Malawi, RD made Nigerian friends. When she returned home, Mrs Dunphy depones, RD said to the petitioners that they must be from the Yoruba tribe. Petitioner ISA said "Yes!" and his face brightened. Petitioner ALA immediately said: "No, we don't know what we are." In conversations with the Dunphys the petitioners claimed not to remember anything about their past in Nigeria. Mrs Dunphy is reported by Alison Leuchars as noticing that the pitch of the petitioners' voices seemed false and that when they were off guard their voices became lower. In oral evidence Mrs Dunphy states that she overheard "the sound of shaving" when petitioner ALA was in the bathroom. On one occasion she found a razor in his room. He never asked for a replacement. She states that she noticed stubble on petitioner ALA "a couple of times". In cross-examination Mrs Dunphy states that the razor she found was well-used.

[89] From 7 to 15 August 2010 the Dunphys took petitioner ISA with them to a church youth camp. Petitioner ALA refused to join them. Petitioner ALA was temporarily accommodated with Mr and Mrs Mitchell, referred to below. According to Mrs Dunphy, petitioner ISA was popular with the other children and enjoyed himself. The other children questioned petitioner ISA about his age. According to Mrs Dunphy the other children told petitioner ISA that they thought he was 16 years old and petitioner ISA did not correct them.

[90] Mrs Dunphy's husband, Fraser Dunphy (49), owns an engineering business in Arbroath of which he is the managing director. In his spare time he is a youth worker and a coach with Arbroath and District Athletics Club. Mr Dunphy first met the petitioners at the youth group where he played pool with them and others. He depones that in a crowd the petitioners gravitated toward the older teens. Once the petitioners moved in with his family and once they started interacting, Mr Dunphy formed the view that their claimed ages were not credible. He ultimately assessed petitioner ISA as being 16 years of age and petitioner ALA as being 19 years of age. Mr Dunphy had the impression that petitioner ALA would have been happier remaining in the supported accommodation.

[91] When the petitioners were in supported accommodation they caused no problems for the staff. Ms Sandeman depones that when the petitioners moved to the Dunphys they got on well for the first three weeks. Thereafter petitioner ALA became withdrawn, stayed in his room and would not eat with the family. One issue was that the Dunphys wanted the petitioners to go to church. (NA had taken them to church). Another issue was that Mrs Dunphy limited the time during which the petitioners could watch television. Petitioner ISA accepted the regime in the Dunphy household but petitioner ALA did not.

[92] While the Petitioners were in supported accommodation, in May 2010, Lynn Sandeman arranged for them to have legal representation in their dealings with UKBA.
Kirsty Thomson (non-witness) of the Women and Young Persons' Department, Legal Services Agency Ltd, Glasgow, agreed to act for the petitioners. At the close of the introductory meeting Ms Thomson told the petitioners that, at the next meeting, Ms Thomson would ask them questions about their past. Ms Sandeman depones that "One of them" - she does not say which, but I think she probably means petitioner ALA - "looked

as if they were going to cry". She depones: "It was the only time I ever saw this kind of reaction." On 10 May 2010 UKBA received letters from Ms Thomson enclosing mandates and stating that Ms Thomson represented the petitioners. Ms Thomson thereafter instructed an investigator in Nigeria to report on the authenticity of the petitioners' birth certificates and passports. In due course Ms Thomson presented asylum claims on behalf of the petitioners to UKBA. Ms Thomson continues to represent the petitioners.

[93] Alison Leuchars, Intake Team manager, met the petitioners two or three times. Her impression was that the petitioners were articulate, polite and well-mannered. Her view was that petitioner ISA thrived with the Dunphys. She depones that petitioner ALA struggled with the idea that Mrs Dunphy was the head of the house while her husband was at work or away from home. Petitioner ALA was reportedly very resistant to rules and boundaries, such as might be appropriate for a 12-year old boy, about being on time for meals, saying where he was going when he went out and not being out late at night. Alison Leuchars depones that there was a lot of discussion within the department about the petitioners' ages and that the consensus was that they were not 11 and 12 years old. Her own view, ultimately, was that petitioner ISA was 17 or 18 and petitioner ALA was 18 or 19. At the time Ms Leuchars' daughters were aged 16 and 18 years old and her impression was that the petitioners were about the same age as her daughters' male friends.

[94] When Lynn Sandeman first met petitioner ISA he had his hair in dreadlocks. When she next met him his hair was cut short. Petitioner ISA explained that this was because his football coach said that he looked older with his hair long. Initially Ms Sandeman depones that she did not think that the petitioners were 11 and 13 years old. The way that she looked at the question was: "If I worked in a pub I wouldn't serve them as they didn't look over 18."

As time went on Ms Sandeman depones that she came closer to the view that the petitioners were the ages indicated by their passports. Ms Sandeman asked the petitioners why they had their birth certificates but not their passports. Petitioner ALA replied that their father had kept their passports. He continued that they had been given their birth certificates because their father told them they might need their birth certificates to join the library. Eventually petitioner ALA said: "I don't know what age I am." Physically, Lynn Sandeman felt, the petitioners looked like older teenagers. She formed the view that petitioner ISA was between 15 and 16 years old and petitioner ALA was between 16 and 17 years old. Nicola Simpson's assessment was the same. Ms Simpson depones that the petitioners had very high voices that seemed to her not genuine. As Ms Simpson got to know the petitioners she found that the pitch of their voices changed.

[95] Responsibility for the petitioners was transferred from the Intake Team to the Throughcare/Aftercare Team of Angus Council Social Work and Health Department at the beginning of August 2010. Fiona Geekie is a support worker with the Throughcare/Aftercare Team. She has been involved in social care for children and young persons in Dundee and Angus for many years. She first met the petitioners in August 2012 when she and a colleague, Nyree Elizabeth Clark (39), went to play pool with them at the Catherine Street Resource Centre, Arbroath. I assume that the meeting happened when, in early August 2010, responsibility for the petitioners was transferred to their team. Fiona Geekie knew the petitioners by sight and knew their names because her son had played against them in the Sunday morning boys' football league during the 2008-2009 season. The petitioners' size, strength and physicality had given rise to comments on the touchline. Her impression on seeing the petitioners again in 2010 was that they were the same height as she remembered

them being in 2008. Her younger son who had played football against the petitioners, aged 13 at the time of Ms Geekie's affidavit in 2011, had grown noticeably over the same period.

[96] Ms Geekie's particular responsibility was for petitioner ISA but she seems to have gone on several outings with both petitioners; and she accompanied both petitioners to Glasgow on two occasions for appointments with their solicitor. I deduce that Ms Geekie accompanied the petitioners to Glasgow on 17 November 2010, the day when they were first examined by Dr Diana Birch for the purpose of paediatric age assessments. On the return journey petitioner ALA told Ms Geekie that "his dad was not big". This contradicts the information about parental height recorded by Dr Birch and the independent age assessors, Kenneth Ambat and Rose Palmer. Dr Birch reports that the petitioners told her - she interviewed them together - that their father "was a tall, big 'muscley' man". Ultimately Ms Geekie assessed petitioner ISA to be 15 or 16 years of age and petitioner ALA to be 18 or 19 years old.

[97] Nyree Elizabeth Clark, an American, is a support worker with Angus Council Social Work and Health Department. She has three children aged respectively 5, 10 and 14. She had contact with the petitioners from August to November 2010. She first met petitioner ALA while he was staying temporarily with Mr and Mrs Mitchell (from 6 to 15 August 2010). Her immediate impression was that petitioner ALA was 15 years old: but at the meeting that followed between the petitioner ALA's resource worker Joanna Wilson and petitioner ALA, also attended by the then temporary carers Mr and Mrs Mitchell, petitioner ALA came across to Ms Clark as being much older than 15.

[98] Ms Clark met the petitioners together on several occasions between August and November 2010. She became more involved from October. She depones: "It was very apparent during our first meeting that [*petitioner ALA*] was controlling [*petitioner ISA*]." Petitioner ALA "was trying to pull [*petitioner ISA*] back from volunteering information." Ms Clark had opportunities to interact with the petitioners in different settings. She played pool with the petitioners, took them to the library, took them to an allotment, accompanied them to get their photographs taken, took them to McDonalds, took them to a coffee shop, went shopping for clothes and food with them, inventoried their possessions, showed them the leisure centre, tennis courts, park and beach at Carnoustie, and so on. On one occasion Ms Clark took the petitioners shopping for winter boots. Petitioner ISA took a size 9 and petitioner ALA took a size 8 or 9 depending on the make. In November 2010 she tried to take the petitioners to look round Angus College. The petitioners refused to go. Ms Clark formed the impression that the petitioners are not brothers. Her impression of petitioner ISA was that he acted "typically like a 16 year old" and of petitioner ALA that "he was acting like he was older - a typical older teenager." Petitioner ALA came across to her as less forthcoming, "harder work", more distant, "trying to play dumb", even "devious". Both petitioners are described as "very guarded": "Any time you approached any subject with them about their past, they became very guarded." She depones: "The more time I spent with [*petitioner ISA*] and [*petitioner ALA*] the older they came across." Ms Clark saw the petitioners' passport photographs at one stage. She did not think that petitioner ISA's photograph was a photograph of him.

[99] In 2010 the Team Manager of the Throughcare/Aftercare Team based in Arbroath was Alison Millar (49). Ms Millar qualified as a social worker in 2003. Following "a management

decision" to transfer the petitioners' cases from the Intake Team to the Throughcare/Aftercare Team a handover meeting was held on 29 July 2010. The Throughcare/Aftercare Team opened files for the petitioners on 4 August 2010. Ms Millar assigned Joanna (Jo) Wilson (43), resource worker, as the petitioners' primary worker. On 6 August 2010 Ms Millar and Ms Wilson took the petitioners to UKBA in Glasgow for their asylum interviews. A member of UKBA staff asked Ms Millar whether it would be appropriate to interview the petitioners in English. Petitioner ALA responded "English?" in a puzzled manner, as if he did not understand the language. Petitioner ALA then agreed that his English was good. Alison Millar depones that she got a sense that petitioner ALA was trying to pretend that he could not do something that he could do. On the return to Arbroath petitioner ISA went with Mr and Mrs Dunphy to join the church youth camp and petitioner ALA went to stay for ten days with Mr and Mrs Mitchell in Carnoustie. Jo Wilson depones that the petitioners were "non-emotional" when separating: "I found it very bizarre that on leaving each other they did not say anything."

Petitioner ALA returned to the Dunphys' house on 16 August. The Throughcare/Aftercare Team were aware of strained relations between petitioner ALA and the Dunphy family. Petitioner ALA complained to Jo Wilson that he was made to go to church and was made to get up early. He stated that Mrs Dunphy was "evil". The Dunphys made it clear that the situation could not continue. Petitioner ISA, in contrast, integrated well with the Dunphy family and he was welcome to stay. Towards the end of August 2010 the Social Work Department arranged for the petitioners to be accommodated by William Mitchell (68), retired engineer officer in the merchant navy, and his wife Adelaide (68) retired kennel keeper, at their home in Carnoustie. To begin with petitioner ISA was happy to remain with

the Dunphys. At the last minute he changed his mind and stated that he wished to go with petitioner ALA. Jo Wilson depones that the Dunphys were unhappy but not surprised that petitioner ISA had moved on.

[100] As stated above, the Mitchells had provided accommodation for petitioner ALA during the ten-day period when petitioner ISA had gone with the Dunphys to youth camp. Because of the uncertainty over the petitioners' ages the respondents felt unable - correctly in my view given the child protection dimension, though this is no reflection whatsoever on the petitioners - to place the petitioners in a foster household where there were children. There were no fostering places available in Angus Council area which did not have children already in the house, either foster children or children of the foster carers. The Mitchells had fostered children in Dundee and Arbroath in the past and consented to be re-vetted. The respondents make support payments to the Mitchells in terms of the Children (Scotland) Act 1995 s. 22. The petitioners remain with the Mitchells. In October 2010 the monthly payment was £350.

[101] Mrs Mitchell depones that when she first met petitioner ALA during the temporary placement she could not believe how nice he was compared with some of the difficult children she had fostered in the past. Both petitioners came to stay permanently at the end of August or the beginning of September 2010. Mrs Mitchell depones: "It was nice to have them around and it still is." Mr Mitchell depones that in his view the petitioners are not full brothers. He assesses petitioner ISA to be 16 years of age and petitioner ALA to be 15 years of age. Mrs Mitchell concurs with her husband's assessment. Like other observers, the Mitchells remark how petitioner ALA has no difficulty reading grown-up books. Mrs Mitchell depones that, if asked about their ages, the petitioners state that they do not know

their ages. One of the reasons given by Mrs Mitchell for thinking that the petitioners are younger than they have been assessed to be by the respondents is that they "don't seem to have any idea of what they want to do in life". Mrs Mitchell depones that petitioner ALA "had a lack of maturity compared with our grandson who is 17". According to Mr Mitchell, the petitioners do not shave. They shower two or three times a day. Mr Mitchell apparently has some familiarity with Nigeria and other countries of the West African seaboard. His impression was that the petitioners came from a relatively well-to-do background. He is reported as remarking that their English is unaccented. He also remarked on petitioner ALA's competence in the French language and his knowledge of place names in "the Cameroons" [*Republic of Cameroon*].

[102] On 24 August 2010 petitioners ISA and ALA were registered with the Abbey Health Centre medical practice in Arbroath. The GP practice nurse Heather Cruickshank (45) weighed and measured the petitioners. She formed the impression that petitioner ISA was older than petitioner ALA. There is no evidence about the petitioners having been previously registered with a general practitioner in Dundee in 2008-2009: if they were registered in Dundee, no records have been produced. Donna Dingwall, education resource worker, Dundee City Council, depones that in 2008 she advised JA to register the petitioners with her own general practitioners, the Arthurstone Practice.

[103] The photocopy clinical record sheet from the Dundee schools health service relating to petitioner ALA has two relevant entries. On 20 October 2008 it is noted: "Lives with an aunt - will register with GP at Mill Practice." The entry for the following day reads: "letter sent out to parent/carer re registering with GP." The "New Pupil Questionnaire" for petitioner ALA apparently signed by NA three weeks earlier on 1 October 2008 gives the GP as

"Arthurstone Mill Practice". On the other hand a letter from Eileen Tilbury (non-witness), NHS senior nurse Child Protection (Dundee), dated 4 February 2009, states that the practice manager at Mill Practice would not register the petitioners without documentation proving that they were entitled to NHS services. Heather Wilkie's child and family initial assessment report dated 3 March 2009 states, of the JA and NA families and the petitioners: "Neither family have access to public funds due to their [*immigration*] status, thus cannot have the service of a GP."

[104] Alison Millar retained responsibility for the petitioners' cases but had limited direct contact with them. Jo Wilson and other staff, principally it seems Fiona Geekie and Nyree Elizabeth Clark, worked on a programme for the petitioners to involve them in three activities a week. This was above and beyond the normal provision for clients of the Throughcare/Aftercare Team. On an unspecified date in late August 2010 Jo Wilson took the petitioners to meet their solicitor Kirsty Thomson at Angus Council's Youth Justice Office. Ms Wilson depones that the petitioners were interviewed for three hours each. After the meeting Ms Thomson provided Ms Wilson with a copy of the report from the investigator in Lagos which states that the birth certificates are not genuine. On learning this petitioner ISA reportedly stated that he did not know how old he was. Jo Wilson confirmed the latter point in oral evidence.

[105] At the same time Ms Thomson disclosed that the petitioners were victims of human trafficking for domestic servitude and requested the respondents to report their trafficking claims to UKBA. Alison Millar telephoned UKBA to make the report. She depones that she was conscious that the trafficking claims raised child protection concerns and removed petitioner ALA's mobile phone "to prevent any alleged traffickers getting hold of them". No

evidence has been put before me about any interrogation of this phone or any other mobile phone possessed by the petitioners. (Mr Mitchell depones that petitioner ALA has since acquired another mobile phone which he believes petitioner ALA uses for downloading music.)

[106] The trafficking claim for petitioner ISA stated that he, petitioner ISA, was an 11-year old victim of human trafficking from Nigeria who had been trafficked with his brother to the United Kingdom by their father for the purposes of domestic servitude. It was stated that petitioner ISA had been held in a position of domestic servitude from 2008 until February 2010 when he had been abandoned by his trafficker. It was stated that the matter was brought to the attention of the authorities in 2008 but was not investigated properly by the authorities at that time. Claims were made on the petitioner's behalf for refugee status on the basis of membership of a particular social group namely "Nigerian children and former victims of trafficking in Nigeria", for humanitarian protection on the basis that removal to Nigeria would result in breaches of articles 2, 3 and 4 ECHR and for discretionary leave to remain on the basis of article 8 ECHR, for compassionate reasons and "pursuant to UKBA policy on unaccompanied minors returning to Nigeria given that there are inadequate reception facilities". The supporting statement contains a detailed description of a slave-like existence for the petitioner in the JA and NA households. The claim for petitioner ALA was in similar terms. The trafficking claims were submitted on 3 September 2010 and rejected by UKBA on 5 October 2010. The relevance of the trafficking claims to age assessment is that in terms of the Council of Europe Convention on Action against Human Trafficking, article 10(3):

> "when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special measures pending verification of his/her age."

In terms of article 4(d) a "child" is any person under 18 years of age.

[107] Alison Millar depones that "we discussed with Kirsty Thomson whether a paediatrician could undertake a medical assessment". According to Alison Millar:

> "Kirsty Thomson said that she would not advise her clients to partake in this as it would involve a bone scan which is contrary to human rights legislation.
> Kirsty Thomson then asked us to carry out age assessments."

This was at a time when, as I understand it, Ms Thomson was actively investigating the possibility of instructing paediatric assessments of her own on behalf of the petitioners. As mentioned above, during August 2010 UKBA also requested the respondents to undertake age assessments. The respondents had no experience of age assessments and it took some time for Alison Millar and Jo Wilson to assemble enough information to allow them to feel confident about proceeding. The assessments were carried out on 16 September 2010. A description of the process is given below. Petitioner ISA was assessed to be "a child, 16+" and petitioner ALA was assessed to be "over 18". The age assessments were intimated to the petitioners' solicitor on 24 September 2010. A result of the assessments was that relations between the Throughcare/Aftercare Team and the petitioners became strained. The

petitioners' pocket money was paid to them weekly by a member of the team. The petitioners signed for the money - £7.50 each - and did not speak.

[108] Alison Millar and Jo Wilson recognised that additional support was required and on 7 October 2010 made a referral to the Aberlour Scottish Guardianship Service. Jo Wilson's referral letter stated: "As the age assessment is not a scientific or accurate tool I have referred both [*petitioners*] to you regarding any advice or support you may be able to provide." Aberlour is a charity that supports children and young persons who are trafficking victims and UASCs in Scotland. Alexis Wright (31) of Aberlour first met the petitioners on 18 October 2010. Ms Wright has since acted as the petitioners' "guardian", meaning, I think, "advocate". Ms Wright sees the petitioners at least once a month and depones that she often speaks with them on the telephone. Ms Wright adopted her affidavit dated 1 June 2011 in oral evidence. At the date of Ms Wright's affidavit, Aberlour had 30 clients. Ms Wright had a caseload of nine. Ms Wright believes the petitioners are the youngest of her clients.
Ms Wright states:

> "I do not doubt that the boys believe themselves to be 12 and 13...and I am definitely not of the opinion that [*petitioner ALA*] is 19 years old shortly to be 20 and [*petitioner ISA*] is 17.5 years old."

She treats the petitioners as a 12 year-old and a 13 year-old. She sees the petitioners for about two hours once a month and speaks to them on the telephone twice a week. Ms Wright thinks that the petitioners act like two young boys who are scared of the authorities; that petitioner ALA acts like an older brother; and that petitioner ISA acts like a younger brother

looking up to his older brother. In oral evidence Ms Wright states that she thinks the petitioners are children because of the way they interact. Her assessment is that petitioner ISA is 12 to 14 years old and that petitioner ALA is 14 to 16 years old.

[109] Shortly after Alexis Wright's initial contact an issue arose about the transfer of the petitioners to adult accommodation in Glasgow. Ms Wright was informed of this possibility at a meeting with Alison Millar, Jo Wilson and the petitioners on 26 October 2010. According to Ms Wright's affidavit she learned that, because the respondents had assessed petitioner ALA to be an adult, UKBA would not pay for the continuing accommodation of the petitioners with the Mitchells. (My understanding from other evidence is that UKBA were prepared to treat petitioner ISA as a dependent of petitioner ALA for adult asylum support purposes.) Accordingly the respondents proposed to transfer the petitioners to self-catering National Asylum Support Service [NASS] accommodation in Glasgow managed by Ypeople [formerly the YMCA]. Ms Wright understood that it was proposed to transfer the petitioners the next day, 27 October 2010. She states that the situation was very distressing for the petitioners: they "were simply sitting with their bags packed waiting on telephone calls."

[110] As the story is told in Alison Millar's affidavit, following the age assessments the respondents applied for NASS support for the petitioners. Copies of the application forms are dated 15 October 2010. Petitioner ALA's form described petitioner ISA as petitioner ALA's dependent. Ms Millar depones that the petitioners wanted to stay together and agreed that petitioner ISA should apply for support as petitioner ALA's dependent. According to Ms Millar:

> "We asked them if they could choose where to stay, where this would be, for example with Mr and Mrs Mitchell. [*Petitioner ALA*] wouldn't answer and [*petitioner ISA*] nodded reluctantly. [*Petitioner ISA*] said he wanted them to stay together. [*Petitioner ALA*] just shrugged his shoulders and was difficult."

Ms Millar's affidavit is not explicit to the effect that the petitioners were told that NASS support would necessarily involve transferring the petitioners to self-catering NASS accommodation in Glasgow. She depones:

> "We considered this support to be in [*petitioner ISA's*] and [*petitioner ALA's*] best interests given that there were more supports available in Glasgow for people in similar situations to [*petitioner ISA*] and [*petitioner ALA*] than in Angus."

Ms Millar further depones: "[*The petitioners*] did not directly state that they did not want to go to Glasgow."

[111] From the correspondence, including fax and email correspondence, lodged in court, it appears that the respondents' proposal to transfer the petitioners to Glasgow, subject to UKBA approval of NASS support, was a firm one before the end of October 2010. The intended support packages for the petitioners in Glasgow were intimated to the petitioners' solicitor on 29 October 2010. By fax letters dated 29 October 2010 the petitioners' solicitor challenged the age assessment in each case. The letters recorded the writer's understanding in each case "that our client is in the process of being moved to adult accommodation provided by the UK Border Agency in Glasgow..." By email dated 1 November 2010 the respondents' principal solicitor advised the petitioners' solicitor that the petitioners' transfer to Glasgow would be "put on hold" pending consideration of the challenges to the age

assessments. By fax letter to the petitioners' solicitor dated 9 November 2010 extending to eight pages in each case, the respondents rejected the criticisms of the age assessments. The final paragraph of each fax letter stated that the transfers would proceed on the following day, 10 November 2010.

[112] The faxes elicited a same-day email response to the effect that urgent applications would be made for judicial review of the age assessments and requesting that the transfers to Glasgow be delayed until the petitions were before the court. The respondents replied that they intended to proceed with the transfers on 10 November, considering as they did that transfer was in the best interests of the petitioners "having regard to the significant supports and assistance available in Glasgow". On 10 November 2010, following an intervention by Scotland's Commissioner for Children and Young People, the respondents agreed to postpone the transfers for a further 24 hours. It appears from the interlocutor sheets that on Friday 12 November 2010 petitions for judicial review were presented in the Court of Session and that the respondents, who were represented at the applications for first and interim orders, gave undertakings not to transfer the petitioners to Glasgow.

[113] Limited information has been put before me about the petitioners and their circumstances since November 2010. On 11 March 2011 Alexis Wright, the petitioners and Mr Mitchell attended at meeting with the Education Department of Angus Council about how education could be provided for the petitioners. Alison Millar participated. According to Ms Wright the "only offer on the table" was for the petitioners to enrol at Carnoustie High School for the purpose of attending skills courses one afternoon a week at Angus College. Alexis Wright depones that on a number of occasions both Alison Millar and John Anton (non-witness), educational co-ordinator, said that the petitioners could not attend the High

School because of the respondents' duty to protect other children. Petitioner ALA was, according to Alexis Wright, negatively affected by the comments, interpreting them to mean that he is a "paedo". The petitioners were supported in their wish to attend school by Alexis Wright and also, reportedly, by Mr Mitchell.

[114] I infer that that college offer was refused. On 28 March 2011 John Anton wrote to petitioner ISA to state that the educational assessments conducted on 11 March had put his reading ability at primary 6 level with spelling, vocabulary and writing at a lower level. He was offered individual tuition, with an initial focus on English and numeracy, for two hours twice a week. Giving oral evidence on 16 June 2011 petitioner ISA stated that for the previous four months he had been receiving two hours tuition, two days a week. Petitioner ALA also said in oral evidence that he gets tutoring twice a week.

Evidence of the petitioners, issues and preliminary conclusions

[115] The oral evidence given by the petitioners adds little to my understanding. Both of them claim to be their birth certificate ages. I formed an impression in each case as to the possible age range: but I think it would be unwise, if not mistaken in point of law, to rely on my personal impressions. The conclusions I have reached on the evidence are not inconsistent with my own impressions. Both petitioners gave evidence with a special measure in place, namely a supporter in the person of Alexis Wright. The striking feature of the petitioners' presentation was their high pitched voices. This was a matter of impression and on reflection I suppose that the impression arose from the incongruity between the

petitioners' appearances and their voices. The presentation of petitioner ISA was otherwise unremarkable.

[116] I found that petitioner ALA's presentation raised questions. When asked in cross-examination what his date of birth is, he said "5 June 1997". He said he knew it was his birthday because he was "let off stuff": he only had to carry eight buckets of water rather than ten buckets of water. His "birth certificate" was then put to him. He said: "That's my birthday [...] 4 August 1997." The latter date is the purported date of registration rather than the claimed date of birth. Ultimately I have decided to make nothing of this: my note may be wrong or petitioner ALA may have been flustered.

[117] In relation to one particular point I did form the impression from his demeanour that petitioner ALA was lying. This was when he was describing under cross-examination how he had been given both birth certificates by his father in London, told not to lose them, he didn't know why, had given the certificates to NA to keep, then found them in NA's room when the police came in answer to his 999 call in April 2010. It would have been easier for me to believe that petitioner ALA well knew from what his father had told him why he should keep the birth certificates; and that the reason was and is to support a position about his own age and the age of petitioner ISA. However, there is no positive evidence to this effect. Mr Smith QC for the respondents pressed the petitioners on the question of their knowledge that their entry into the United Kingdom, on their account of their dates of birth, was on the basis of passports containing false information: but, as far as I am concerned, this was not a useful exercise.

[118] Observers comment on how guarded the petitioners are. The refrain of the many persons who have tried to find out something about the petitioners is that the petitioners' responses are "don't know" or "don't remember". On the face of it their ignorance and lack of recall about their former lives are not believable: but these issues were not tested in oral evidence. Their English is very good and relatively accentless. (Mrs Mitchell depones that she knows the petitioners lived in East Sussex because one of her friends has placed the accents: I give no weight to this piece of information except to the extent that it confirms that the petitioners' English is relatively unaccented, which is also my own observation.) Several observers have noticed how popular petitioner ISA is with girls, particularly "older" girls, though this observation begs the question about his age. Some say that he does not know how to respond and see this as evidence of his relative immaturity. It may be of course that he simply does not find girls attractive. Three things are very clear: the petitioners do not want to return to Nigeria; they want to be believed about their ages; and they want to go to school. A striking feature of the case, particularly if the petitioners were aged under twelve years when they arrived in Scotland, is that the petitioners have never been heard to express a desire to return to their family in Nigeria, an attitude which I do not find sufficiently explained by the alleged cruelty of their stepmother.

[119] Two issues about which a various views have been expressed are the pitch of the petitioners' voices and whether or not they shave. For example, DS McInally thought that petitioner ALA's voice had broken. Family support worker Nicola Jane Simpson, who had responsibility for the petitioners from April to August 2010, depones that the petitioners "had very high voices which seemed not genuine". Ms Simpson states that the pitch of the petitioners' voices changed and became deeper, as and possibly because they became more

relaxed with her. Nyree Elizabeth Clark, the American support worker, who had contact with the petitioners from August to November 2010, had the impression that the tone, meaning I think the pitch, of the petitioners' voices is not genuine. Alison Millar depones that the petitioners' voices lowered in pitch the more the petitioners got to know the Throughcare/Aftercare Team.

[120] Ms Millar depones that on one occasion she made a telephone call to Mr and Mrs Mitchell. The phone was answered by someone with a deep-sounding voice. She thought it must be Mrs Mitchell, who has a low, husky voice. Ms Millar states: "I was so surprised when I asked who it was and [*petitioner ALA*] said it was him." Mrs Dunphy depones that when petitioner ALA became angry with her, his usually high-pitched voice became "very deep." The independent social workers described petitioner ALA as "having a distinctive, high-pitched voice" and state that his voice has not broken. When Dr Birch examined petitioner ISA on 17 November 2010 she found his Adam's apple to be "not enlarged". She made the same finding for petitioner ALA.

[121] Dundee City Council education resource worker Fiona Scanlon, reportedly observed that the petitioners had "very hairy legs". DS McInally thought that petitioner ALA had facial hair. John Lannon, principal officer Dundee Council School Community Support Service depones: "[*The petitioners*] were perceived to be mature in terms of their body hair" but does not give the source of this information. Mrs Dunphy states in oral evidence that she thought petitioner ALA was shaving once a day. She saw his stubble a couple of times. On one occasion when petitioner ALA was in the bathroom she "heard the sound of shaving". She found a razor in his room. The razor was well used. Mr Dunphy depones that he has observed stubble on petitioner ISA's legs. Mrs Mitchell depones that the petitioners do not

shave. They do not have any razors. They shower three times a day. Jo Wilson, Angus Council Social Work Department support worker, depones that there was an occasion when she saw stubble on petitioner ISA's neck: the next time she saw him it was not there. Donna Marie Ross depones that the petitioners had no facial hair. She never saw any razors in their flat and never bought any razors for them. Alexis Wright depones:

> "I do not think the boys voices have broken yet. I have never noticed their voices changing in pitch and tone and I have spoken to them a lot in the last 8 months. I have never noticed any facial stubble or facial hair growth on either of them."

[122] In oral testimony, petitioner ALA says that Mrs Dunphy is lying about razors: she is a control freak, he has never shaved "and that's the truth". Petitioner ALA says that Mrs Dunphy thinks he has shaving kit "'cos one time I took so long in the shower, 45 minutes". Petitioner ISA agreed to let the independent social workers instructed for the petitioners, Kenneth Ambat and Rose Palmer, touch his face to show that he does not shave and "Mr Ambat confirmed that the skin is smooth and devoid of any evidence of a shaving routine". The independent social workers express confidence that petitioner ALA does not shave. This is on the basis that he had no shadow when they interviewed him at 4.30 pm and that he had had no opportunity to shave in the course of that day. When Dr Birch first examined petitioner ISA on 17 November 2010 she found no facial hair. At the review examination on 5 May 2011, Dr Birch found, for the first time, the "very beginnings of a little hair at the extreme outer ends of [*petitioner ISA's*] upper lip (consistent with 13 years of age)". When Dr Birch first examined petitioner ALA she found that he had "a very little

facial hair which is minimally discernible on the upper lip". On review, petitioner ALA's facial hair was found to have developed a little "with a minute amount of hair on his moustache area and chin with some on the sideburn area (consistent with 14 years of age)".

[123] Dr Diana Birch states in oral evidence that the questions whether people shave and whether they have facial hair are not the same: young male asylum seekers frequently shave at an earlier age to encourage, as they see it, the growth of facial hair. In her book, *Asylum Seeking Children*, she explains that this is to make them look older and to discourage homosexual predation, particularly on the overland journey to the United Kingdom. (The focus of this observation is UASCs from Afghanistan.) She would not attach much importance to shaving. The difference of views about the pitch of voices and the presence of facial hair brings us into the territory explored by Mr Justice Collins in *A* v *London Borough of Croydon* [2009] EWHC 939 (Admin) (08 May 2009). At paragraphs 74 and 75 Collins J said:

> "[*Senior counsel*] took me through the cases in which reports from Dr Birch contradicted assessments made by Kent [*County Council*]. All produced a result consistent with the individuals' claimed age. In many instances, Dr Birch contradicted the social workers' observations on voice or Adam's apple or facial hair and shaving. Thus it was submitted that she was biased in favour of claimants and her reports could be disregarded. She has vigorously denied this [...] I am satisfied that Dr Birch has not deliberately falsified her observations to assist a claimant. I do not doubt that she has been doing her best to act as an expert should. But Kent are entitled to look with considerable scepticism at her findings which contradict their own. It does suggest that her judgment may be faulty and that the accuracy of her measurements cannot be assumed. Conclusions on whether voices have broken or Adam's apples are prominent or that demeanour suggests a particular age range involve to a greater or lesser extent the exercise of judgment..."

I cannot find a reason to disbelieve Mrs Dunphy when she says that she found a razor among petitioner ALA's belongings. I accept her evidence about the razor. The question was

not explored in the present cases whether there might be reasons for the petitioners, or either of them, to shave body hair or the hair on their legs rather than facial hair.

[124] One fixed point in the petitioners' story is that they are full brothers, the sons of the same mother and of JOA, though they claim not to know the father's middle name as recorded by UKBA. The mother's name is given on their birth certificates as RA. The story is that their mother left home when they were very young. Neither has any recollection of their mother. Both appear to have Muslim given names, whereas the parents have, or have adopted Christian names, a detail that remains unexplained. It also remains unexplained how their father and their stepmother, who apparently succeeded their mother, are the parents of their older, apparently adult, stepbrother "G".

[125] Another fixed point in the petitioners' story is that petitioner ALA is older than petitioner ISA by more than a year. Their birth certificates give their birth dates as 5 June 1997, petitioner ALA, and 6 November 1998, petitioner ISA, which makes petitioner ALA seventeen months or one year and five months older than petitioner ISA. Their passports give their birth dates as 5 June 1991, petitioner ALA, and 6 November 1993, petitioner ISA, which makes petitioner ALA 29 months or two years and five months older than petitioner ISA. Petitioner ISA says that petitioner ALA has always been - implying from the date of petitioner ISA's earliest memories - his big brother. Petitioner ALA says that his first memory is of petitioner ISA being smaller than him. He tells me in oral evidence that petitioner ISA is a year younger than him because he is a year older than petitioner ISA. Both give an account of their father obtaining the passports. Petitioner ALA claims to have noticed the age discrepancy when the passports were issued but felt unable to challenge his father. No witness could suggest a motive for exaggerating the ages in the passports.

[126] In the case of *SH (Afghanistan)*, the claimant would have been, at the date of his entry into the United Kingdom, 20 years old on the basis of a rejected student visa application he had made in Pakistan two years before arriving clandestinely and claiming to be 15 years old. Lord Justice Moses, with whom the other members of the Court of Appeal agreed, rejected the claimant's appeal for the reason that: "There is no rational basis upon which this appellant could have held himself forward as being over 18 at a time when he was only 13" [*SH (Afghanistan)* v *Secretary of State for the Home Department* [2011] EWCA Civ 1284 (08 November 2011) at § 24]. The same sort of argument might have been presented in the present case: no witness who was asked could think of a reason for exaggerating the petitioners' passport ages. I would not feel comfortable taking the same line because I can see nothing to suggest that the petitioners are responsible for the information in their passports; and according to UKBA records they did enter the country with their father and stepmother.

[127] There are circumstantial details which I find persuasive as to the relative age of the petitioners. In this case I have no sufficient reason not to accept the petitioners' evidence about their father's identity. I infer that their father, or whoever obtained their identity documents or caused them to be obtained, was in a better position than anyone else to know their relative age. Petitioner ALA's account to the independent social workers instructed to conduct age assessments on the petitioners' behalf is that petitioner ISA was allowed to share the sole bed in the family house with their stepmother when their father was away from home whereas petitioner ALA slept on the floor because he was the older one. Petitioner ISA's account is that he sometimes shared the bed with his stepmother but started to sleep on the floor shortly before he left Nigeria "as he was getting taller". Petitioner ALA

claims to have reached year five at "Duntes" or "Dante" Primary School in Lagos. Petitioner ISA claims to have reached year four at the same primary school at the same time. Petitioner ISA told the independent social workers that he used to watch the older boys from the fifth and sixth years playing football but he could not join in because he was in the fourth year. Petitioner ALA told the same investigators that he used to play football at school with year five and six pupils but his brother could not join in because he was too young. (Accepting these details does not necessarily involve accepting that the petitioners were in years four and five respectively immediately before arriving in the United Kingdom.)

[128] When JOA left the United Kingdom in about June 2008 he apparently took the petitioners' passports with him. He left them with their birth certificates, both of which he seems to have confided to the keeping of petitioner ALA: this suggests to me that he regarded petitioner ALA as the older of the two. Shortly after NA moved from Angus to London in March 2010 she telephoned petitioner ALA and instructed him that petitioner ISA must "dump" his mobile phone. This was passed on and petitioner ISA did what he was told by petitioner ALA. The proposition that petitioner ALA is older than petitioner ISA is supported by the evidence of Dr Birch and Professor Cole about the petitioners' relative rate of growth, discussed below.

[129] In oral evidence, Kenneth Ambat, independent social worker, stated that the petitioners "seem very happy and secure" in their sibling relationship. He and his colleague could find no evidence that the petitioners are not brothers. Other investigators and observers, notably the paediatrician Dr Birch, have formed the view that the petitioners may not be full brothers or possibly may not be brothers at all. This impression is shared by William Mitchell, the current carer's husband. The former carer Sheila Dunphy does not

think that the petitioner's are brothers. Her husband, Fraser Dunphy, thinks that the petitioners did not act like brothers when the petitioners stayed in the Dunphys' home from August to October 2010. The Dunphys have two teenage daughters of their own. The Dunphys work with young people (above). Donna Marie Ross, the Angus Council resource worker with the support to families team, who dealt with the petitioners between April and June 2010 depones: "nothing suggested they were particularly close." Joanna Wilson, resource worker for the Throughcare/Aftercare Team, who was responsible for the petitioners from the end of August 2010 had the same impression.

[130] The question of relationship is relevant to the issue of age assessment because an age difference of at least ten months would be expected between non-twin full siblings.
Dr Birch's review age assessments dated 5 May 2011 put petitioner ISA's age at 14 years 5 months and petitioner ALA's age at 14 years 10 months, only five months difference. At the same date their birth certificate ages would have been 12 years 6 months for petitioner ISA and 13 years 11 months for petitioner ALA; and their passport ages would have been 17 years and 6 months for petitioner ISA and 19 years and 11 months for petitioner ALA.

[131] Some observers think that petitioner ISA is older than petitioner ALA. The GP practice nurse Heather Cruickshank formed that impression when she weighed and measured the petitioners on 24 August 2010. Their current carer Adelaide Mitchell thinks that petitioner ALA is 15 and petitioner ISA is 16. Each petitioner states that his birthday was acknowledged but not celebrated at home in Nigeria. In oral evidence both petitioners maintain that they are the age vouched by their respective birth certificates. However, according to Joanna Wilson, the respondents' Throughcare/Aftercare support worker for the petitioners, when it was disclosed to petitioner ISA by his solicitor that his birth certificate

was not authentic he became upset and, if that were so, he said: "I do not know what age I am." Similarly petitioner ALA confided to Lynn Sandeman, Angus Council social worker in the Intake Team who saw the petitioners weekly in May 2010 and fortnightly in June and July, that he did not know what age he was.

[132] Ms Stirling asks me to accept that the petitioners' evidence about their birthdays is correct. At least, it is suggested, the day and the month of birth are correct for the reason that the day and the month in the respective birth certificates and passports are identical. I am unwilling to make any such findings. The petitioners claim not to know their father's birthday, their stepmother's birthday or their claimed stepbrother G's birthday. Why should I believe that they reliably know their own birthdays? The evidence as a whole has left me with the impression that the only knowledge that the petitioners have of their own birthdays comes from their birth certificates, which are forgeries. It seems to me that someone who obtains forged birth certificates and genuine passports based on false information, which is the suggestion made on behalf of the petitioners, might well use the same days and months of birth whether the details are genuine or fictitious. The impression I was left with is that the petitioners did not have sight of their birth certificates until their father was about to depart the United Kingdom. The independent social workers conclude: "It is evident that [*petitioner ISA's*] presenting age was provided by JOA and/or NA and JA when [*petitioner ISA*] was provided with the birth certificate that he relies upon to confirm his age/identity". They reach an identical conclusion in relation to petitioner ALA.

[133] My finding is that the petitioners are full brothers and that petitioner ALA is older than petitioner ISA by something more than a year. I base this conclusion substantially on the oral testimony of the petitioners and what they are reported to have told numerous

investigators and observers. There is strong supporting evidence for the relative age of the petitioners in the growth velocity observations referred to below. I reach my conclusion as a matter of probability, on the evidence parties have chosen to put before me, in the absence of reliable birth documentation, in the absence of acceptable first-hand witness testimony about the petitioners' parentage and birth, and in the absence of DNA testing, any of which might prove me wrong.

[134] When I say "the absence of reliable documentation", it should be understood that I feel unable to rely on the birth certificates or the passports to any extent beyond the fact that they represent petitioner ALA to be more than a year older than petitioner ISA and confirm their relationship. The other uses this material has are, to define the outer limits of the age disputes and to show that deception on someone's part is involved. The birth certificates are admitted forgeries; and the skilled witnesses for the petitioners do not support the ages that would follow from the dates of birth given in the certificates. A substantial body of opinion - there is of course a question about the evidential value of such opinions or indeed whether some of the opinions ought to be received as evidence at all - is that the petitioners are not as old as the passports would make them out to be. I accept the evidence for the petitioners that official Nigerian passports can be obtained without exhibiting birth certificates and simply on parental say-so as to dates of birth. The respondents' age assessments of 16 September 2010 do not rely on the travel documentation. I accept the submission for the respondents that had the petitioners wished to demonstrate that they are not full brothers they ought to have brought forward DNA evidence.

[135] Why are the petitioners in the United Kingdom? This is a matter of speculation and, for the purposes of age determination, it is not necessarily a relevant question, although, if the

petitioners are here for schooling, they have to be, or to be able to pass as being of the appropriate school ages. According to UKBA records the petitioners arrived at Heathrow on 11 April 2008 with their father, JOA, and stepmother, FAA, and one BA, recorded date of birth 3 January 1988, said to be a half-brother, the son of JOA and stepmother FAA. He would have been aged 22 years at the time of the age assessment on 16 September 2010. As at the date of initial Social Work contact with the petitioners in Dundee, UKBA believed the stepmother and the half-brother to have remained in the United Kingdom at an unknown address. The petitioners' version of events does not mention that the stepmother travelled to the United Kingdom with them. The petitioners say that there was an older boy in their party whom they do not know. The older boy was presented as their father's son. As mentioned above, the petitioners told the independent social workers that they have a stepbrother called "G". They do not know what age he is but they think he is an adult. He did not travel to London with them.

[136] The journey was planned some time in advance. The petitioners say that they and "the other boy" were, in turn, made to wear the same red tartan shirt for the purpose of their passport photos. The passports were issued on 29 October 2007. Assuming the forged birth certificates to have been obtained in Nigeria, it is fair to say that the age deception - for that is what I must conclude it is - was planned in advance of departure too.

[137] The narrative advanced on the petitioners' behalf is that they have been brought here and abandoned by their father and, or alternatively, trafficked into domestic servitude and then abandoned. A number of witnesses have expressed surprise at how well spoken and well clothed the petitioners are and how much luggage they have. The Dunphys and the

Mitchells have the impression that the Petitioners come from a reasonably well-to-do background. The independent assessment report states:

> "[*Petitioner ISA*] does not know how his father derived an income but remembers his father commanded a great deal of respect and fear in the community. His stepmother did not work but did travel frequently though [*petitioner ISA*] and his brother were never told where his stepmother or father went even when they were gone for days or weeks at a time."

The UKBA records reportedly show the father to have been a frequent visitor to the United Kingdom for undisclosed business reasons. He is recorded as having been born on 20 September 1957, making his age 52 at the time the petitioners were age assessed by the respondents on 16 September 2010. In his asylum claim submitted to UKBA on 3 September 2010, petitioner ISA states:

> "My dad is scary. He looks like a beast. He is very scary and he has a big beard. The people in the gangs would shake my dad's hand when they saw him. It looked like they were even scared of him. I do not know why they were scared of him but these gangs would come up to me and say that my dad did things like drugs. They would say he is a really tough guy and that he used to have a gun and be in fights..."

The petitioners' stepmother is recorded by UKBA as being FAA. The petitioners claim not to know the first two names "F******e A****a", stating that her forename is "L***e". The petitioners told the independent social workers that they do not recognise the woman in the photograph said to be of FAA. (Presumably this photograph was supplied by UKBA). If this

Court were in full inquisitorial mode it might want to follow up the internet report of 7 July 2009 that a female travelling under the same name FAA, age 50, had been arrested at Kano International Airport, Nigeria, having been detained on suspicion and having then excreted 42 wraps of cocaine weighing 585 gms.

The nature and quality of the witness evidence

[138] A number of issues arise about the nature and the quality of the witness evidence. For convenience, there are three categories of evidence, namely (1) evidence supposedly deriving from first-hand knowledge provided directly and indirectly by the petitioners and provided indirectly by NA as reported by a number officials; (2) opinion or impression evidence from a parade of witnesses who have interacted in various ways with the petitioners in the United Kingdom; and (3) evidence from skilled witnesses. Some comment is required on each of these types of evidence. The witnesses who gave oral testimony are, in order of appearance: Dr Diana Birch, Alexis Wright, petitioner ISA with Alexis Wright as his "supporter", petitioner ALA with Alexis Wright as his "supporter", Professor Tim Cole (interposed), Kenneth Ambat; Dr Colin Stern, Sheila Dunphy, Alastair Govan, Joanna Wilson, Alison Millar (formerly Smyth).

[139] As regards the evidence supposedly deriving from first-hand knowledge, it is remarkable that the petitioners' evidence is substantially presented indirectly, through the reports of persons who have interviewed them. For example, what I know about the petitioners' schooling in Nigeria is hearsay of this sort. The petitioners were not examined or cross-examined in Court in any detail about the subject, an exercise that might have afforded

insights into their age and, or alternatively, their credibility. No explanation has been given for failing to adduce evidence, by video link, by interrogatories or on affidavit, from the petitioners' father and stepmother. Something else to be remarked on is the absence of the direct testimony of NA. According to Alastair Govan, UKBA Higher Executive Officer, NA is on immigration bail, with reporting conditions, living at an address in or near London known to UKBA. If the current proceedings were a serious fact-finding exercise, she ought to have been a witness. If there is an issue about her blood relationship with the petitioners, that too might have been resolved by DNA evidence.

[140] Equally, notwithstanding the veil of mystery thrown over the arrival of the petitioners in the United Kingdom and their subsequent appearance in Dundee, the case papers disclose the address at which the petitioners lived in London, namely 18 (or maybe 16 or 19) ********** Way, East Ham, London E6 6**. Why haven't inquiries been made at that address? After all, the petitioners' solicitors have instructed an investigator in Lagos, Nigeria, Mr Tokunbo Olagoke, solicitor, to investigate the authenticity of the petitioners' birth certificates and passports. The investigator has not been instructed to investigate the information as to identity and parentage underlying the admittedly genuine passports or, if he has, the results have not been disclosed. It would clearly have been of assistance if he had been asked to investigate and report on the petitioners' claims about their schooling in Nigeria. The independent social workers instructed to conduct age assessments on behalf of the petitioners stress the importance of obtaining information from the petitioners' former school in Lagos. The petitioners have told several investigators that they attended "Dante School" or "Duntis School" or "Duntes School" - did anyone ever ask them to spell the name? - presumably on Lagos Island where they claim to have lived. The independent social

workers say that they have been unable to find the school. They might have tried Duntees School, 9B Eti-Osa Way, Dolphin Estate, Ikoyi, Lagos, telephone number 00 234 1 4814947, although I would not necessarily be confident that a record of the petitioners' attendance would be found. In cross-examination, petitioner ALA appeared to know of the district, Ikoyi, and said he had not been there.

[141] Moving to the evidence about the petitioners' ages from the parade of witnesses not claiming to have skill in age assessment, I have struggled to understand how this material - which has been led by both sides in the present proceedings and seems to be routine in age determination reviews in England & Wales - can be admissible. The explanation which occurs is that these views about the petitioners' ages are admissible, not as opinion evidence, but as evidence of impression. Evidence of instantaneous impressions as to age is admissible; and in criminal trials such evidence from eyewitnesses is commonplace for identification purposes. What I think I have been offered in this case is evidence of impressions formed casually over a longer period. I take the view that impression testimony in age assessment cases has the same evidential quality whether it is offered by lay persons or professionals. Intuitively, it seems, courts of law expect persons who have greater familiarity with the individuals who are the subjects of the assessment, or who have greater experience of dealing with young people generally, to offer more reliable impressions. The latter category would include social workers experienced in dealing with children and young persons.

[142] What about the evidence of experienced social workers who claim to be skilled in age assessment? Mr Smith QC, for the respondents, submits that there is no such thing as expertise in this field or, to be precise, that there is no such thing as expertise which can

reliably instruct the Court in the precise determination of chronological age. Mr Smith acknowledges that in a sense the independent social-worker assessors acting for the petitioners, Kenneth Ambat and Rose Palmer (non-witness), are experts: but he argues that their expertise in this context lies in implementing the *Merton* guidelines; and that the *Merton* guidelines are not a scientific methodology but a framework for procedural fairness [*R on the application of B* v *London Borough of Merton* [2003] EWHC 1969 (Admin) (14 July 2003)]. The independent social workers would possibly claim expertise, as well, in eliciting information by skilled interviewing and in writing cogent reports. However, I have come to be persuaded that essentially Mr Smith's submission is correct. There may be situations in which social workers bring expertise to the assessment of age, for example specialist knowledge of coming-of-age rituals or familiarity with identity documentation in particular countries. Otherwise, and particularly as regards evidence of impressions formed during interviews intended to assess age, I am not convinced that social-worker age assessors can aspire to be called expert witnesses in the full legal sense.

[143] I have also been offered the evidence of skilled medical and scientific witnesses, namely Dr Diana Birch, paediatrician, Dr Colin Stern, paediatrician, and Professor Tim Cole, medical statistician. No point is taken about the evidence of Dr Stern and Professor Cole, witnesses for the respondents. Dr Colin Stern (69), MA, MB, BChir, PhD, FRCP, FRCPCH, DCH, FHEA was for 30 years until his retirement in 2006 a consultant in full-time practice with the National Health Service and is now Consultant Paediatrician Emeritus to the Guy's and St Thomas' Hospitals Trust, London. I gather from the curriculum vitae appended to his report that his special interest is in immunology. He tells me that he has produced 40 reports "in cases like this" [*e.g. A* v *London Borough of Croydon* [2009] EWHC 939 (Admin) (08 May

2009); *R, R (on the application of)* v *London Borough of Croydon* [2011] EWHC 1473 (Admin) (14 June 2011)]. His role in this and similar cases is not to assess the age of the claimants but to provide a paediatric critique of the methodology of Dr Birch.

[144] The role of Professor Tim Cole (64) is to provide a statistical critique. Since 1999 Professor Cole has been the Professor of Medical Statistics at University College London Institute of Child Health. His research interests are in the statistical assessment of body size, growth and development, particularly in the construction of growth charts and the assessment of age using developmental markers, on which he has published widely. For this work he has been elected an Honorary Fellow of the Royal College of Paediatrics and Child Health and a Fellow of the Academy of Medical Sciences. Dr Stern and Professor Cole do not know each other.

[145] Dr Diana Birch (64), paediatrician, MB, BS, DCH, MSc (Psych), MFCH, MD, FRIPPH, FRCPCH, FRCP, FSAM (USA), MAE, Director of Youth Support, is a witness for the petitioners. She has examined each of the petitioners on two occasions, about six months apart, and has produced paediatric age assessment reports and follow-up reports. Dr Birch has been put forward by counsel for the petitioners as an expert witness on age assessment. Points have been taken by senior counsel for the respondents about the expertise professed by Dr Birch. I shall deal with these in the next section.

The role of expert evidence in age assessment

[146] Under reference to a number of cases and text books, Mr Smith QC for the respondents submits that the issue in these proceedings is not something susceptible of resolution by

expert evidence of any kind; and further that the opinions as to age offered by Dr Birch do not satisfy the criteria for reception by the Court as expert evidence [*Wilson* v *HM Advocate* 2009 JC 336 at § 58 and also at 59-63; also *Davie* v *Magistrates of Edinburgh* 1953 SC 34; *Mearns* v *Smedvig Ltd* 1999 SC 243; *McTear* v *Imperial Tobacco Ltd* 2005 2 SC 1 at §§ 5.2-5.19; W J Lewis, *Manual of the Law of Evidence in Scotland* (Edinburgh, 1925), 47-49; M L Ross and J Chalmers eds, *Walker and Walker: the Law of Evidence in Scotland*, 3rd edn (Haywards Heath, 2009 §§ 16.3.2-16.3.8; Rt Hon Lord Justice Leveson, "Expert evidence in criminal courts - the problem", lecture to the Forensic Science Society, 16 November 2010]. Mr Smith submits that Dr Birch's evidence is inadmissible.

[147] I think it important to address Mr Smith's argument notwithstanding that it has been largely superseded by a concession made by Ms Stirling in oral submissions. Before addressing the argument, I note that the principles governing the reception of expert evidence by the Court are well known but remain capable of being misunderstood. It is still possible to find confusion of "expert evidence" with "opinion evidence". Though "expert evidence" encompasses "opinion evidence", there is a distinction to be drawn between the two concepts. Expert evidence may be descriptive of facts, or it may be expressive of opinion, or it may be both. The particular privilege allowed to expert witnesses is that they are authorised to interpret the facts, not just facts derived from their own observations but also assumed facts based on information supplied by others, and to instruct the court with their opinions, in other words, to give opinion evidence. Dr Birch offers both factual evidence and opinion evidence.

[148] Mr Smith's first proposition is that everyone makes judgments about age; that making judgments about age is not a subject of expertise; and that it is not a matter on which the

judicial fact-finder requires to be instructed. Therefore, he argues, the opinions of Dr Birch "fall at the first hurdle of admissibility" because they are "simply unnecessary" to resolve the issue. I reject this proposition for two reasons, one to do with the way parties have conducted these cases, the other drawn from the jurisprudence. Taking the proposition to its logical conclusion would mean that age-determination tribunals do not require instruction by third party witness evidence at all and that they can simply look at age-disputed applicants, hear something of their background, observe their demeanour and form their own impressions. While that may be a possible way of proceeding it is not the way parties have chosen to proceed in these cases; and, as I say, having been offered witness evidence on the subject I do not think it right to determine the matter by reference to my own impressions. If the impression evidence of, for example, the respondents' witness Mrs Dunphy is relevant to instruct the Court - and her evidence was led and commended to me by Mr Smith QC - it is difficult to see that the evidence of the petitioners' witness Dr Birch should be rejected as inadmissible, particularly given that it was led without objection by the respondents. That is the first reason for rejecting Mr Smith's proposition.

[149] The second reason for rejecting the proposition is that it does not properly reflect the case law. The correct proposition to be derived from paragraph 58 in *Wilson*, cited by Mr Smith in his written submissions, is not that the application of expertise in the interpretation of the facts must be necessary, but that it must be necessary for a sound understanding. A proper function of expert evidence is to persuade the fact-finder of its own necessity by demonstrating that intuitive conclusions, for example as to causation, are unsound. In *Davie* the defenders led expert evidence to the effect that, contrary to appearances, rock blasting with explosives could not possibly have damaged the pursuer's

house which was 930 feet distant from the nearest point in the line of the sewer they were constructing. In the event, the lay evidence was preferred. The threshold test for the reception of expert evidence is the same as the test for the admissibility of evidence generally, namely *prima facie* relevance. In the *Wilson* case Professor Gudjonsson offered his expert opinion that confessions by two murder suspects 25 years before were unreliable. His conclusion as expressed was rejected on the basis that it usurped the function of the Court: but his opinions on the vulnerability of the individuals concerned were received and, after evaluation in the light of the other evidence and submissions, accorded limited weight [*Wilson* v *HM Advocate* 2009 JC 336 at §§ 75-81].

[150] As to the second submission, that the evidence of Dr Birch in particular does not satisfy the criteria for expert evidence, I reject this also. Mr Smith advances propositions about Dr Birch's personal qualifications and about the status of the branch of knowledge in which she offers instruction to the Court. As to the first proposition senior counsel submits that Dr Birch does not possess the expertise which she professes. This is partly on the basis that "her professional qualifications are all [...] of considerable vintage." That tends to be the case with senior members of any profession and I do not regard the point as a telling one. Dr Birch has demonstrated in oral evidence, by reference to a certificate of good standing issued by the General Medical Council and to certificates of continuing professional development issued by the Royal College of Paediatrics and Child Health, that she can properly claim current expertise.

[151] Senior counsel further submits that it is not apparent that Dr Birch has kept her clinical skills up to date. He makes this point on the basis that for the past 25 years Dr Birch has been the director of a charity, Youth Support. The certificates from the Royal College answer

the point: in the five years to the end of 2010 Dr Birch scored five times the minimum credits required. Besides, Dr Birch is not a clinician in the full sense of that word. Her career in the National Health Service was as a public health physician. The clinical skills she requires in her age assessment practice include the taking of relevant and accurate subject histories and the making of accurate anthropometric observations. She has very substantial, possibly unequalled experience in the area of age assessment. In oral evidence Dr Birch states that her clinical skills have never been criticised. This testimony was not challenged or contradicted.

[152] Mr Smith also submits that Dr Birch's opinions rest on a statistics-based methodology whereas Dr Birch, not being a statistician, is not competent to instruct the Court on such matters. My view is that this point goes to weight rather than admissibility. Medical specialists necessarily have some understanding of statistics; and it is routine for the courts to receive evidence about statistics from such persons, for example when they are commenting on journal articles containing statistical material. At paragraph 4.20 of his report, which he adopted in oral evidence, Mr Smith's own witness, the paediatrician Dr Colin Stern, offers opinions about the statistical element of Dr Birch's method. Dr Stern states that, while he is not a statistician, he is trained and experienced in the evaluation of the statistical significance of scientific information. Paradoxically Professor Cole, a medical statistician, the other skilled witness for the respondents, has offered an expert opinion on the ages of the petitioners, something that was plainly not intended when his name was put on the respondents' witness list. Mr Smith invites me to reject Professor Cole's evidence but does not argue that it is inadmissible.

[153] Further, Dr Birch states or at least implies that the statistical component of her method has been validated by a mathematician, Dr Brian Sutton. As set out in a standard appendix

to her reports, the method is explained in Dr Birch's book, *Asylum Seeking Children* (2010). Dr Sutton has contributed the relevant chapters. Professor Tim Cole, the medical statistician who gave evidence for the respondents, accepts what he calls "Dr Sutton's weighted average method" as valid in principle: he has reservations about the standard deviations used; and he criticises Dr Birch's application of the method. A substantial part of the criticism is directed at the use by Dr Birch of "clinical judgment" to interpret her findings before submitting them to the statistical process. Professor Cole sees "clinical judgment" as a potential source of bias. This issue is more about general scientific method or scientific objectivity than the use of statistics.

[154] The statistical principle which Professor Cole endorses at a theoretical level is that the standard deviation decreases if a number of different, non-correlated measures are combined and averaged. Some of the perceived difficulties in applying this principle to measures of human development in order to ascertain chronological age, as Dr Birch's method does, are discussed below. The radical challenge made by Mr Smith to the admissibility of Dr Birch's evidence is that the subject-matter is not "part of a recognised body of science or experience which is suitably acknowledged as being useful and reliable, and properly capable of reaching and justifying the opinions offered" [*Wilson* v *HM Advocate* 2009 JC 336 at § 58 *per* Lord Wheatley delivering the Opinion of the Court]. The question at this point is: should this Court, deciding these two civil disputes, completely shut its ears to Dr Birch's evidence because it is based on a previously untried, possibly pioneering application of one recognised body of science, statistics, to another recognised body of science, medicine?

[155] I think the answer has to be "no". I acknowledge that it is generally inexpedient for litigation to be used as a test bed for scientific theories, at least where the science is collateral rather than being, as it can be in a patent case, a central issue. On the other hand the Court should not be too easily persuaded to ignore developments. As Lord President Clyde said in a related context: "Indeed it would be disastrous if this were so, for all inducement to progress in medical science would then be destroyed" [*Hunter* v *Hanley* 1955 SC 200 at 206]. Some of the best expert witnesses are individuals who are actively engaged in research; and I do not think it would necessarily advance the cause of justice to prevent them expressing opinions based on their ongoing work. The fact that Dr Birch's methodology is "work in progress" should not, in my view, be a bar to the reception of her evidence.

[156] In the case of *A*, 8 May 2009, a traditional judicial review decided before the judgment of the Supreme Court in *R(A)* v *Croydon London Borough Council* 2009 1 WLR 2557, Mr Justice Collins had to address the question whether local authority age assessors were bound to consider paediatric reports submitted on behalf of claimants. He found that Dr Birch's reports were flawed and continued:

> "Flawed though they may be and in my judgment are, they should be considered since there is always a possibility that they may identify something which could and occasionally should lead to a different conclusion." [*A* v *London Borough of Croydon* 2009 EWHC 939 (Admin) (08 May 2009) at § 75].

[157] I mean to admit Dr Birch's evidence and to consider it for what it is worth. Even if I were to find nothing determinative in Dr Birch's evidence, there might well be benefit for the

age assessment community at large in knowing that Dr Birch's evidence in the present cases is found to be of limited assistance or of no assistance at all. The age determination decisions in England & Wales seem to have been made on the papers or with only limited cross-examination. Dr Birch's oral testimony in the present cases lasted for two days with extensive, though curtailed, cross-examination by Mr Smith QC; and it may be that there are lessons to be learned.

The evidence of Dr Diana Birch

[158] On 17 November 2010 Dr Diana Birch, a paediatrician of long standing with an interest in child protection and age assessment, examined the petitioners and reported on their ages. Dr Birch was acting on the instructions of the petitioners' solicitor. The doctor assessed petitioner ISA as being on that date 14 years and 2 months old. After a follow-up examination on 5 May 2011, six month later, she assessed petitioner ISA as being on that date 14 years and 5 months old. In a sense petitioner ISA had lost two weeks for every month he had grown older. (If what these results demonstrate is the non-reproducibility of results, this of itself assists in answering the question whether chronological age is a matter of judgment or an objective fact that can be established with precision in the absence of reliable documentation.)

[159] Dr Birch's findings, at least some of her workings and her conclusions are presented in two reports in relation to each petitioner, four reports altogether. Dr Birch's reports have been adopted by her in the witness box. To put Dr Birch's conclusion relative to petitioner ISA in context, as at the date of Dr Birch's review assessment, 5 May 2011, petitioner ISA was

12 years and 6 months old by reference to his birth certificate and 17 years and 6 months old by reference to his passport. In other words, Dr Birch found the petitioner to be one year and eleven months older than his birth-certificate age and three years and one month younger than his passport age.

[160] As I understand the reports produced in these proceedings and the description given in other cases, Dr Birch's method involves relating her clinical observations to standard population growth and development data sets, charts and tables, combining five parameters (physical growth, physical development, sexual development, maturation and emotional development) and averaging the results with the ultimate effect of producing a combined two-year age range and then fixing the age of the subject at the mathematical mid-point of the range. Her claim, as set out in her reports, is that:

> "A mathematical proof has been employed to validate the fact that the standard deviation decreases across a range of measured parameters and that in other words the accuracy is improved by combining a variety of approaches as is done here."

Dr Birch told me that in the absence of ethnically specific growth charts she uses the American Centre for Disease Control [CDC] stature-for-age tables as recommended, she says, by the World Health Organization. Various other measures of development are referred to in her reports. The fact that she is a qualified psychotherapist as well as a physician allows Dr Birch to claim that she can provide a "holistic" or "multi-factorial" approach to age assessment.

[161] In her parole evidence Dr Birch stated that assessing the age of teenagers is a matter of opinion rather than fact. She explained that a range wider than two years was more likely to be right: but, she continued, it is a practical question - referring I think to statutory age-dependent criteria for local authority services, to age-dependent border control rules and policies and to recent developments in age-assessment jurisprudence. Dr Birch stated that, in specifying a precise age, she was "putting her head on the chopping block".

[162] The axe fell on 30 July 2011. On that day Sir Richard Buxton in the Court of Appeal of England & Wales refused permission to appeal against the refusal of Simon J in the High Court to grant permission to apply for Judicial Review in the age assessment case of *R (FM)* v *Secretary of State for the Home Department* [Court reference C4/2011/1274], giving the following reasons:

> "The judgment of Simon J contains a formidable analysis of the difficulties facing the claimant... Against that, there is really only the evidence of Dr Birch ... However, since [*the hearing before Simon J*] the position has been transformed by the decision of the Administrative Court in *R (R)* v *Croydon LBC* 2011 EWHC 1473 (Admin). The judgment of Kenneth Parker J in that case constitutes a detailed, carefully argued and wholly convincing rejection [*of*] the evidence of Dr Birch and in particular of her general methodology. No court should in future decide a case on the basis of the evidence of Dr Birch. It would therefore be inappropriate to grant permission in this case, since the Judicial Review court would be bound to reject the claim."

[163] This happened after Dr Birch had given evidence in the present case, in the adjournment between the first and second parts of the proof. A copy of Sir Richard Buxton's order was produced by Mr Smith QC at the continued proof on 27 October 2011. In submissions Mr Smith also referred to the then extant adverse evaluations of Dr Birch as an

expert witness at first instance in *R (on the application of A)* v *Croydon London Borough Council* and *R(on the application of WK)* v *Kent County Council* 2009 EWHC 939 (Admin) (8 May 2009) at §§ 24-35, 45-47 and 66-81; *R (on the application of R)* v *Croydon London Borough Council* 2011 EWHC 1473 (Admin) (14 June 2011) at §§ 31-52 and *R (on the application of KN)* v *Barnett London Borough Council* [2011] EWHC 2019 (Admin) (29 July 2011) at §§ 70-76. Adverse first-instance evaluations since 27 October 2011 include *R (on the application of AK)* v *Secretary of State for the Home Department & Anor* 2011 EWHC 3188 (Admin) (2 December 2011) at §§ 25, 26 and 29; *R (on the application of MWA)* v *Secretary of State for the Home Department & Ors* 2011 EWHC 3488 (Admin) (21 December 2011) §§ 65 to 72. (See also L Brownlees and Z Yazdani, *The Fact of Age: review of case law and local authority practice since the Supreme Court judgment in R(A)* v *Croydon LBC* [2009] (Children's Commissioner, London, 2012), § 3.19, "Paediatric expert evidence".)

[164] Mr Smith QC does not advance any particular *legal* proposition as to how adverse comments in other cases should affect my evaluation of Dr Birch's evidence in this case: the import of his submissions is to warn me off "accepting Dr Birch's evidence at all" and to caution against "giving her a latitude that she would no longer enjoy elsewhere in the United Kingdom". I invited both counsel to consider whether there was anything to be learned from the treatment of the evidence of the expert witness Dr Kahki or Kahkhi in various immigration cases including the most recent one where he is mentioned, which was referred to for another purpose by Ms Stirling [*R (on the application of CJ)* v *Cardiff County Council* 2011 EWHC 23 (Admin) §§103-108; *SB (risk of return - illegal exit*) *Iran* CG 2009 UKAIT 00053 at § 60; *MS (fresh evidence) Iran* 2004 UKIAT 00130 at § 34]. Nothing came of

that suggestion. I remain in the position where I have to consider Dr Birch's evidence in these cases on its merits.

[165] Before I do so I should say that Dr Birch's demeanour in the witness box made a favourable impression on me. She remained calm and dignified under prolonged and, I have to say, fierce cross-examination by Mr Smith QC. This impression deserves to be recorded, though it is not necessarily the same as saying that I accept the substance of Dr Birch's evidence.

[166] In a sense Dr Birch is a casualty of the new age-assessment jurisprudence. There are layers of irony in the situation. The law in England & Wales now demands precision; and Dr Birch has come forward as someone who offers to deliver what the Supreme Court requires and to assist in the task of assigning an exact date of birth stating, at the same time, that the chronological age of teenagers and young adults without reliable documentation is a matter of opinion. Dr Birch's method poses the question, under reference to standard age-and-development charts: "what would be a reasonable assessment of the chronological age of this particular individual given his or her known development?" This is a judgment question, being the mirror image of one of the illustrative judgment questions posed by Lady Hale: "what would be a reasonable standard of [...] development for this particular child?" - a question that assumes a known chronological age. Having given examples of judgment questions confided to the discretion of local authorities, subject only to *Wednesbury*-type review, Lady Hale continued: "But the question whether a person is a "child" is a different kind of question. There is a right or a wrong answer" [*R(A)* v *Croydon London Borough Council* 2009 1 WLR 2557 at §§ 28].

[167] This *dictum* is unchallengeable as a matter of law, that is, as a matter of the proper construction of the Children Act 1989 as laid down by the Supreme Court. As a matter of fact there is no known technique or combination of techniques for determining the "right" answer at a particular moment in time [T Smith and L Brownlees, *Age Assessment Practices: a Literature Review and Annotated Bibliography*, UNICEF Discussion Paper (New York, 2011)].

[168] As it happens, the main criticism of Dr Birch's method offered by Dr Stern and Professor Cole is that reading the age-and-development charts backwards, as it were, is not a legitimate use of the data. The adverse evaluation of Dr Birch's method in other cases [above] also focuses on her handling of the age-and-development statistics. In the present case, having listened to Mr Smith's criticisms in oral submissions, Ms Stirling replies that she is not relying on the statistical side of Dr Birch's reports: she now submits that the statistical material is severable from the clinical material.

[169] Ms Stirling's submission begs the question whether one part of the reports can actually be separated from the other and - assuming, for the reasons given by Dr Stern and Professor Cole, that the statistical part is unreliable without now having to decide the point - whether the defects have leached into the clinical side. The situation is comparable in some ways with the situation that arose in the case of *R (on the application of KN)*. In that case a directions hearing resulted in Dr Birch's report being redacted, apparently to remove the statistical material. At the fact-finding hearing HHJ David Pearl sitting as a Deputy Judge of the High Court nonetheless found that Dr Birch's method starts with the statistics then moves to the clinical assessment. He followed Kenneth Parker J in concluding that Dr Birch's "misplaced confidence" in her statistical methods "undermines the other evidence she has given". The learned Deputy Judge declined to accept Dr Birch as an expert witness [*R (on the*

application of KN) v *Barnett London Borough Council* 2011 EWHC 2019 (Admin) (29 July 2011) at §§ 70-76; *R (on the application of R)* v *Croydon London Borough Council* 2011 EWHC 1473 (Admin) (14 June 2011) at § 52]. In the case of *R (on the application of MWA)*, in the light of criticism of her method, Dr Birch prepared a review report that did not refer to statistical material and offered a conclusion apparently based on her clinical judgment alone. Nonetheless Beatson J rejected her evidence as "unsatisfactory" [*R (on the application of MWA)* v *Secretary of State for the Home Department and Another* 2011 EWCA Civ 1590 at §§ 50-53, 64-72 and 75].

[170] Dr Birch's own explanation to me is that the age-and-development statistics offer a yardstick for backing up her clinical judgment. She does not personally feel the need to back up her clinical judgment. She reaches a judgment fairly early on as to the possible age. She wants to be able to explain the results to paediatric colleagues. She is reaching retirement age and she wants to build a reproducible model. She is trying to put forward a methodology that others can follow. The statistical model is work in progress. It is possible to leave the statistics out: but they give an added dimension. The statistical analysis is best regarded as useful in showing how individuals relate to the general population. In relation to each development marker she always makes a clinical assessment. She interprets the statistics in the light of her clinical findings. Dr Birch's purely clinical opinion, as at the time of her first report, was that petitioner ISA was between thirteen-and-a-half and fourteen-and-a-half years old. She does not claim that she can be accurate (on a clinical basis) to within two months.

[171] In cross-examination Dr Birch denied that mathematics and statistics are "driving her conclusion". She said that she looks predominantly at the clinical picture. In order to

improve the accuracy of her assessment she looks at five measures of growth and takes an average. The statistical data help to place the individual in context, to show how he fits in with the general population. She does not claim that there is a scientific way of fixing age. She does not claim that she can predict age from height: she is saying that this is where the individual's height fits in to the general population. The method backs up the clinical assessment but it does not drive it.

[172] My impression is that Dr Birch's parole evidence understates the importance to her work of the statistical material. Nevertheless, on the basis of her parole evidence I would have hoped that it might be possible to sift out the clinical component and that the clinical component might be capable of standing on its own, for what it can contribute to the fact-finding exercise, provided of course that her evidence in that regard is otherwise acceptable. I shall return to this question below.

[173] Dr Birch said in evidence that no one had ever challenged her clinical competence. (I have no reason to doubt this evidence: on the other hand I am not sure how far its relevance extends beyond the taking of histories from her subjects and the making of certain clinical observations and measurements.) The respondents' written submissions invite me to find, on the basis of the evidence of Dr Stern and Professor Cole, that Dr Birch's testimony is without value - but only "insofar as it seeks to rely upon statistics". Mr Smith QC did not cross-examine Dr Birch on the clinical component of her assessment. Rather, he invites me to reject her evidence in its entirety on the basis that his cross-examination of the witness about her claimed expertise and curriculum vitae has shown her to be incredible and unreliable. He submits that she has sought to mislead me and that her evidence cannot be trusted in any respect.

[174] I am reluctant to find that Dr Birch has sought to mislead me: but I do think that the way in which Dr Birch presents herself and her work is in certain respects potentially misleading. It is arguably unrealistic to look for "the truth, the whole truth and nothing but the truth" in a curriculum vitae, such as that tendered by Dr Birch, which has some use as a marketing tool. However, the representations with which Mr Smith QC takes issue are found not just in the witness's curriculum vitae. They are also in her reports. The reports conclude by stating: "I submit this report in the knowledge that it may be placed before a court and confirm that I believe the contents to be true." An expert witness declaration, in what I understand to be the standard form for England & Wales, is also attached to the reports.

[175] I cannot think why Dr Birch's presentation is not more scrupulous. I say this partly because she knows or ought to know that certain claims she makes are likely to be challenged and partly because I cannot see why there should be any need for her to exaggerate. From 1980 to 1989 Dr Birch was Principal Medical Officer for King's Health District of the Southwark, Lambeth and Lewisham NHS Area Health Authority (Southwark and Lambeth) Community Child Health Service. She tells me that the post had consultant paediatrician status. Since 1989 she has worked for a self-funded charity, Youth Support. She describes herself as the Medical Director. She set up the charity in 1986 in response to the lack of provision for young persons within the public health services.

[176] I have no reason to doubt Dr Birch's claim that she has pioneered adolescent medicine as a speciality in the United Kingdom. Her main interest seems to have been teenage pregnancy and parenting, which was the subject of her doctoral thesis. Other interests include child protection and, now, age assessment. Through the charity she has undertaken

fee-paying child protection and age assessment consultancy work. She started doing age assessment work in about 2007. Because of the growing demand in the United Kingdom for age assessments of young asylum seekers from Afghanistan, Dr Birch went to Afghanistan in 2009 to do age-assessment field work. Her account is published in D Birch, *Asylum seeking Children including Adolescent Development and the Assessment of Age* (Youth Support Publications, London, 2010). Dr Birch estimates that she has done 740 age assessment reports, by which I think she means fee-paying reports in the United Kingdom. As from 1 April 2010 Youth Support charges £650.00 for each age assessment report and £165.00 per hour for addendum reports plus travel and expenses. The travel and expenses tariff for Scotland is £280.00.

[177] A point to which Mr Smith QC devotes much attention is that the pro forma introduction to Dr Birch's age-assessment reports includes the claim: "My Methodology has been peer reviewed and widely discussed with colleagues on an International basis." I find as a fact that Dr Birch has been aware for two years before giving evidence in this case that her "peer review" claim is controversial. I would normally understand "peer review" in this context to mean that the method has been written up for publication, has been accepted for publication in an authoritative journal on the basis of evaluation by referees who are independent experts in the field and has been published to the relevant community. Dr Birch appears to recognise that this is the normal meaning of peer review: but, she says, this is not what *she* means. What she means is that the method has been circulated to workers she regards as her peers, that is, she says, every member of the Society for Adolescent Health and Medicine, an American-based organisation; and, she says, she has

received very positive feedback and what she calls "full reviews", from three prominent paediatricians.

[178] The paediatricians in question, who appear to be personal acquaintances, are Professor Richard MacKenzie, Head, Division of Adolescent Medicine, Children's Hospital, Los Angeles; Dr Joan-Carles Suris, described as "previously Professor of Paediatrics and Adolescent Health, Barcelona", latterly Director of the Groupe de Recherche sur la Santé des Adolescents, Institut Universitaire de Médecine Sociale et Préventive, University of Lausanne; Professor Hatim Omar, Chief, Adolescent Medicine & Young Parent programs, Kentucky Clinic, University of Kentucky. Copies of the three "full reviews" are produced on the petitioner's behalf. The first two copies are in similar but not wholly identical terms, are typed on plain paper and are unsigned and undated. The last-mentioned bears to be signed and dated, on headed paper. It concludes: "In summary, this is an outstanding proposal and when the evaluation is done by an adolescent medicine specialist, it will be highly effective and accurate." The item describes Dr Birch as having "vast experience in this field". There is no doubt that Dr Birch is an "adolescent medicine specialist" or "ephebiatrician" to use the American terminology. To be fair, appreciations of Dr Birch's work by Professor MacKenzie, Dr Joan-Carles Suris and Professor Omar are also carried in Dr Birch's book.

[179] In answer to a question from Mr Smith QC in cross-examination, Dr Birch stated that, if she had used "peer review" to mean "publication in peer-review journals", "I'd've surely put in the references". Well, I suppose that is true: but it does not really answer the criticism. Dr Birch now recognises that her use of the expression "peer review" could possibly be misleading but also states that she has no intention to mislead. In this context I should record that, so far as the evidence goes, none of Dr Birch's work has been carried in any

peer-review publication. Her curriculum vitae includes a very long list of publications, papers and presentations. Most of the "published" articles have appeared in the *Journal of Adolescent Health and Welfare* (1986-2002) which was the newsletter of Youth Support, having the appearance of a *samizdat* production and edited by Dr Birch herself. Dr Birch's monograph *Asylum Seeking Children* is self-published.

[180] Mr Smith QC also challenged the references to Dr Birch's connections with the University of London. Her curriculum vitae states:

> "**Research** - ... She has conducted longitudinal studies over a twenty year time span and has worked on the British Cohort studies (London University) and Millenium Cohort (Institute of Child Health)...
>
> **Formerly Research Director and Trustee ICCS** (International Centre for Child Studies) with respect to British Cohort Studies - University of London
>
> **Research Fellow** Institute of Education London University, Centre for Longitudinal Studies; in conjunction with The Institute of Child Health (Great Ormond Street, London) [...] Supervises ongoing research which includes supervision of PhD students; Conducts comparative study projects on an International basis."

In the pro forma Appendix 3 to her age assessment reports Dr Birch states: "I have conducted Longitudinal studies over a twenty year time span and am working on the British Cohort studies (London University)."

[181] Dr Birch explained these references under cross-examination by stating that she had been a "visiting fellow" at the Institute of Education, London University (which houses the Centre for Longitudinal Studies of the British Birth Cohorts), for "more than one year", apparently starting in November 2005. She was there for proposed research that was intended to run until June 2007. She did not attend after, I think, April 2007. There was preparatory work: but it is not clear to me that any substantive research was carried out. Professor Neville Butler had written the research proposal and completed the application, which apparently came to nothing. (I would have thought that this meant there was no funding for Dr Birch's fellowship but the matter was not explored.) Professor Butler died in February 2007. According to Dr Birch, Professor Butler was "very ill at the time" by which I think she meant at the time of the writing of the proposal and thereafter until his death. The proposal was for research into children in care and teenage pregnancies in the cohorts.

[182] Dr Birch said that she had been involved with Professor Butler for a long period of time. She was not saying that she had worked with London University for twenty years. Any "comparative study projects on an International basis" carried out by Dr Birch have not been carried out by her as a research fellow at the Institute of Education. "Undertakes" original research should read "undertook". "Supervises" PhD students should read "supervised"; and she had supervised only one research student during her period as a visiting fellow. When she wrote that part of the curriculum vitae she had intended to supervise more students. Dr Birch said of the references to her connection with the British Birth Cohort Studies and London University: "I wrote this some years ago but when I updated it recently I missed that point - there was no intention to deceive - I am sorry." In connection with updating, I note that the last entry in the curriculum vitae section headed

"Papers and Articles" is: "'Views from the Practitioner: the Holistic Approach' - in the IGC [...] Workshop on Strategies and Policies for Age Assessment of Unaccompanied Minors Geneva June 2011". Cross-examination was curtailed to allow Dr Birch to leave the court on 15 June 2011 in time to be at the event the next day. I have not previously seen a professional curriculum vitae which includes reference to something that has not yet happened.

[183] Mr Smith QC describes Dr Birch as "an advocate for the petitioner" implying to my mind that her assessments are subject to cognitive bias and also, possibly, observational bias. This particular point was not, I think, put to Dr Birch and on that account it might be unfair to make too much of it. On the other hand, because of her commitment in Geneva, Dr Birch could not make herself available in my Court for more than a limited period and cross-examination was curtailed. I did form the impression that Dr Birch sees herself as an advocate for young persons generally, something which in itself is not unworthy.

[184] It is true that there are indications of advocacy in Dr Birch's age assessment of the petitioners. In the section on "Mental and Emotional Development - Psychometric Testing, Findings and Results" at page 12, the report of 17 November 2010 on petitioner ISA states:

> "8. **Emotions and Stress** - [*Petitioner ISA*] has been traumatised and treated as a servant for as long as he can remember. He is polite, softly spoken and somewhat over-compliant.
>
> 9. It is essential that he continue in foster care with his brother and that he receive appropriate education in a secure and stable environment."

In paragraph 9 just quoted Dr Birch is advocating the outcomes sought by the petitioner and his representatives from these proceedings and from his applications to UKBA. This advocacy is not properly part of an age assessment exercise. The first report on petitioner ALA has an identical feature.

[185] As for paragraph 8, the statement that the petitioner "has been traumatised and treated as a servant for as long as he can remember" is both contentious and tendentious. Although other investigators have made a finding about the petitioner doing work for the household in Nigeria, none has suggested victim status. The asylum claims based on trafficking for domestic servitude have been rejected by UKBA. The petitioners did not give evidence in Court to the effect that they were or are victims. Nonetheless it is a theme of Dr Birch's reports, frequently repeated. I would require some persuading that it is unusual, oppressive or exploitative for a Nigerian child to be asked to fetch water for a household that does not have a mains supply.

[186] Dr Birch reports of petitioner ISA: "He was evidently intelligent and thoughtful but immature and he often asked what various words I had used meant - e.g. 'what's cruel'; 'what's a stepbrother'." I find this passage curious because the petitioner has been noted by all observers, and appears to me, to be perfectly articulate in English. At the very least the passage is suggestive of an interview which was not conducted using open questions that allowed the petitioner to express himself in words of his own choice. Nyree Elizabeth Clark, the American-born Support Worker who helped to care for petitioner ISA and petitioner ALA from August 2010 states in her affidavit: "When [*petitioner ISA*] said 'What do you mean?' he meant "How much information do you want?"', which introduces a different, and I think rather more realistic perspective.

[187] To put the matter in context, elsewhere Dr Birch finds that the petitioner "speaks very good English"; and the affidavit of William Mitchell, current carer, states:

> "... I have never heard *[petitioner ISA*] or [*petitioner ALA*] speak anything other than English. [*Petitioner ALA*] has also got perfect French translation [*pronunciation?*] of football teams particularly the Ivory Coast team. I have no idea how he knows this [...] [*petitioner ALA*] and [*petitioner ISA*] do not struggle with language other than some slang Scots words. They understand most things perfectly and if they don't understand they will ask."

When Dr Birch was asked in cross-examination whether evidence that petitioner ALA shaves would affect her report, her answer immediately struck me as glib and polemical. She said that "young asylum seekers frequently shave at an early age" and "the fact that a boy shaves is a different matter from whether he has facial hair". These observations may have relevance to the situation of young Afghans making the overland journey (see above), but they have no obvious bearing on the situation of these petitioners. So, yes, I do think, agreeing with Mr Smith QC, that there are indications of advocacy carrying with it a risk of lack of objectivity. If potential lack of objectivity were present then it would be doubly important to have an assessment method designed to safeguard against bias. In his report, adopted in evidence, Professor Cole clearly implies that Dr Birch's method is not structured to minimise bias: indeed the Professor sees the application by Dr Birch of "clinical judgment" to interpret the findings as a potential source of bias.

[188] Returning then to the question whether I can rely on the clinical aspects of Dr Birch's reports, the answer is that I find myself unable to do so with any confidence. I do not have

the advantage of the judges in other cases in which, in one way or another, the clinical component of Dr Birch's reports was separated out from the statistical [*R (on the application of MWA)* v *Secretary of State for the Home Department and Another* 2011 EWCA Civ 1590; *R (on the application of KN)* v *Barnett London Borough Council* 2011 EWHC 2019 (Admin); *AS* v *London Borough of Croydon* 2011 EWHC 2091 (Admin) (25 October 2011)]. Dr Birch was not asked in evidence in the instant proceedings to identify the purely clinical parts of her reports; nor did Ms Stirling in submissions identify for me the clinical bits or tell me how I should go about identifying them for myself. Had Ms Stirling indicated at the outset that the statistical component was not to be relied on, cross-examination might well have taken a different course. I do not think it would lie with the petitioners to complain if I were to make my own assessment of what constitutes the clinical component - as I have done -and what its value is. I have concluded that generally speaking Dr Birch's clinical assessment does not have value in the fact-finding exercise in which I am engaged: but there is one important exception.

Report by Dr Diana Birch dated 17 November 2010

[189] The difficulty can be focussed by looking at Dr Birch's age findings for three physical growth parameters, namely height, weight and body mass index [BMI]. In her report on petitioner ISA dated 17 November 2010, adopted in oral evidence, Dr Birch recorded the petitioner's "raw value" height at 170.5 cms, his "raw value" weight at 62 kgs and his "uncorrected" BMI at 21.3. From these values Dr Birch derives ages by plotting the results on, respectively, stature-for-age, weight-for-age and BMI-for-age growth charts. Reading the charts "backwards" in this way is in itself the subject of adverse comment but for present purposes the point is that it is difficult for me without instruction to identify with confidence

any clinical component in the exercise beyond the gathering of the actual "raw value" data. Overall the plotted ages lie between the 75th centile for males aged 14.25 years and the 25th centile for males aged 20.00 years, a spread representing half of the relevant reference cohort. The 50th centile, average or mean ages for individuals in the cohort having the same height, weight and BMI are 15.25 years (height), 16.25 years (weight) and 17.00 years (BMI).

[190] The second point is about the "corrections" applied by Dr Birch to the "raw value" measurements. Professor Cole comments that the classic bell curve distribution of growth parameters for age ceases to exist towards the top of the growth or age range for the reason that once, in particular, full-grown height is reached the age range is unbounded (until mortality supervenes) on the "upward" side of the flattening growth curve or, as Professor Cole puts it at paragraph 20 of his report, the distribution curve has a left tail but no right tail. In this situation Professor Cole opines that "the mean and SD [*standard deviation*] are meaningless as summaries of distribution"; and he makes the point graphically, and persuasively to my mind, with charts derived from a large Dutch data set.

[191] This suggests to me that in addition to potential bias deriving from personal sympathy there may be another potential source of bias, namely Dr Birch's advocacy of a method which, insofar as it has validity, arguably has validity only or primarily for individuals below the problematic 16 to 20 year-old age range. What might be particularly concerning is that Dr Birch applies not-well-explained "corrections" to the mean weight and BMI values, 16.25 years and 17.00 years respectively [Professor Cole, para. 36]. The corrections are expressed to be the result of evaluation "against the full clinical picture". As regards weight, the report states: "Despite being thin his body weight is minimally above the ideal for his height... and his ideal weight for height would be 58 kg..." There are two difficulties here: the

first is with the concept of an "ideal", particularly an undefined "ideal"; and the second is that I find this statement impossible to reconcile, on the limited instruction given by the oral evidence, with the earlier statement in the "Growth Velocity" section: "[*Petitioner ISA*] is thin and it may well be that he has been recently going through his PHV (Peak Height) [*meaning I think 'Peak Height Velocity'*] and his height has grown rapidly whilst his weight has not caught up with that growth."

[192] In any event, the "ideal weight" is then plotted on the growth chart to give an age equivalent at the 50th centile, as I read the chart, of 15.25 years, the same as the height-derived age. In the same way the BMI-derived age is "corrected" from 17.00 years to become 15.25 years, again, as by this stage you might expect, the same as the height-derived age. Does it make sense to have an age assessment method based on population-average growth and development parameters and then to "correct" the correlation between the individual subject's measured values and the statistical norms? The sceptic might discern a methodological advantage for Dr Birch in placing the subject lower on the various growth curves, namely that the distribution on either side of the 50th centile or mean becomes more evenly balanced within the 25th to 75th centile range used by Dr Birch. In this context I note that Dr Sutton's worked-up, blind age assessment examples in Dr Birch's book are of individuals below the age of 16 years [*Asylum Seeking Children*, 298-300]. In short, there has to be a concern that the so-called clinical assessment is a servant of the methodology.

[193] To be fair the only "corrected" figure used by Dr Birch when it comes to calculating the average age-from-growth is the "corrected" BMI figure: but the "corrections" create a certain expectation that the end result is bound to be below 16 years of age. The value that brings the average for physical growth decisively below 16 years of age is the last of the four

physical growth parameters used by Dr Birch, namely foot size, which Dr Birch assesses, by reference to M Anderson and others, "Growth of the normal Foot during Childhood and Adolescence", as average for a 14 year old boy [*Asylum Seeking Children*, 134, Fig. 53]. The final calculation is 15.25 (height) + 16.25 (weight) + 15.25 (BMI) + 14 (foot size) = 60.75 ÷ 4 = 15.2 years, average. (Professor Cole dismisses foot size as too variable to be a useful additional component in the age-from-growth assessment.)

[194] <u>Physical growth: 15.2 years</u>. "Physical growth", just described, is the first of the five sets of parameters assessed and then scored in Dr Birch's summary. The others are "physical development", "sexual development", "(dental) maturation" and "mental development", for which the average results are 13.4 years, 15.3 years, 14.0 years and 12.8 years respectively. I suspect that there is a difference in the reliability of various sets of parameters, which difference cannot in Dr Birch's method be adequately represented by the distribution values, and that the results should be weighted before the overall average age is calculated: but this was not a matter explored in evidence. What must be obvious is that the lowest result, the result for "mental development", namely 12.8 years, is the most important score for pulling the overall average down to the final result of 14.16 years.

[195] <u>Physical development: 13.4 years</u>. This section of the report looks at upper arm circumference, waist circumference, waist/ height ratio, body hair, pitch of voice and enlargement of the larynx. According to Dr Birch, petitioner ISA has the middle upper arm circumference of a 14 or 15 year old and the waist measurement of a 12 year old. The arm figure is not explicitly referenced to any statistical material although the measurement is said to be the "50th centile" for the stated age. Similarly the waist figure is said to be "average" for the stated age. I infer that Dr Birch has derived mean ages from the CDC tables shown at

pages 139 to 142 in *Asylum Seeking Children* [see report, 26, "Methodology"]. It follows that the assessment of age in relation to these measures is dependent on the no-longer-relied-on statistical method. In the book, at page 144, Dr Birch stresses the importance of clinical judgment in making corrections to ages derived from waist measurement data. In the very context where you might have some expectation that Dr Birch, if she were following her own method, would apply clinical judgment, she has not done so: the raw data figure of 12 years for petitioner ISA's waist-related age enters Dr Birch's averaging process "uncorrected". There is a double inconsistency by virtue of the fact that Dr Birch has, as we have seen above, applied significant corrections based on "the full clinical picture" to related values, namely the weight-derived, and BMI-derived age figures. It is a possible cause for concern that the only corrections applied by Dr Birch to statistically derived ages are in a downwards direction.

[196] As regards body hair, Dr Birch assigns age norms of 13 years for facial hair (complete absence), 14 years for axillary hair ("immature" growth) and 15 years for pubic hair (see "sexual development" below). At the review examination six months later Dr Birch discerned the beginning of hair growth on the upper lip, "more prominent but still not mature" axillary growth and no change in pubic hair distribution. As regards pitch of voice and development of the larynx, Dr Birch has found a high-pitched voice with some variation and no enlargement of the larynx (Adam's apple) for which she assigns an age norm of 13 years. She found no change at the review examination.

[197] <u>Sexual development: 15.3 years</u>. This section of the report records the findings for pubic hair distribution, penis size (girth and length), scrotum (pigmentation and texture), testicular development (descent and size, either volume or length). Again I find it not

possible to isolate the "clinical" from the "statistical". The introductory note mentions the generally recognised Tanner growth stages, being stages I to V with stage V representing adult development [J M Tanner, *Growth at Adolescence*, 2nd edn (Oxford, 1962)]: but only the subject's pubic hair distribution, "with minimal beginnings of extension to thighs", is linked by Dr Birch to a growth stage, stage IV, though without any consideration of ethnic differences. Professor Cole comments in relation to the other findings: "It is curious that Dr Birch ignores the pubertal stages in her report, even though she has a table for their mean ages" - this is a reference to the Tanner stage table in *Asylum Seeking Children*, 185, figure 108. The "mean ages" are "mean ages for onset" of the Tanner stages. In other words, when stage V is reached the upper age is unbounded.

[198] In petitioner ISA's case the testicles are reported as being descended and [*redacted*] centimetres in length which is, as Professor Cole points out, Tanner stage V. Dr Birch assigns a mean age of 16 on the basis of an unexplained "norm". The petitioner's penis is said to be "approx" [*redacted*] centimetres in length. No explanation is given of the measurement technique or why an approximation is necessary and the matter has not been explored in evidence. (I learn from Dr Birch's *Asylum Seeking Children* book, at page 197, that the penis is "usually" measured "non-erect stretched".) A mean age of 15 is assigned, again on the basis of an unexplained "norm". Professor Cole thinks that the penile findings could be expressed as either Tanner stage IV or stage V. Overall Professor Cole's view is that the sexual maturity findings are consistent with any age between 13 and 17 years and that, if the matter is governed by statistical norms, as it bears to be, it is not appropriate to estimate, clinically as it were, the mean age as opposed to giving the statistical mean.

[199] Unsurprisingly genital examinations are controversial [T Smith and L Brownlees, *Age Assessment Practices: a Literature Review and Annotated Bibliography*, UNICEF Discussion Paper (New York, 2011), 22]. I have to question whether the Courts should admit this sort of evidence except in very special cases. As a generalisation, you might think, wrangling about observational error in the measurement of adolescent genitals is not a proper subject for litiscontestation. I cannot envisage that public authorities would ever be authorised to conduct or commission such examinations as a matter of normal practice; and yet claimants who have been granted legal aid for a paediatric examination and report routinely lead this sort of evidence [*e.g. A* v *London Borough of Croydon* 2009 EWHC 939 (Admin) (08 May 2009) §§ 26-27]. In the present case my understanding of the testimony offered by the respondents is that the petitioners' solicitor warned the respondents, on human rights grounds, not to instruct paediatric assessments.

[200] I am not persuaded that Dr Birch's conclusion on this matter should necessarily cap the petitioner's age at 15.3 years, first, because of the analytical issues highlighted by Professor Cole and, secondly, because the underlying findings are to a degree impressionistic, borderline, uncorroborated and practically speaking unverifiable. To be fair, in her subsequent, review report, Dr Birch does state: "It can be difficult to be precise with respect to the individual stages and dating of hair distribution based on single observations." Having said that, I am prepared to accept Dr Birch's conclusion as suggesting that at the time of assessment petitioner ISA's age was not less than 15 years. In oral evidence Professor Cole described pubertal staging as a "more robust measure" of growth. He appeared to derive particular benefit from Dr Birch's findings under this head and from her findings relating to growth velocity, assuming the measurements to be correct.

[201] Dental maturation: 14 years. Dental maturation "taking into account racial differences" is assessed by Dr Birch explicitly by reference to the "Demirjian scale" [A Demirjian and others, "A new system of dental age assessment", *Hum Biol* 1973; 45(2): 211-27]. It is difficult, therefore, to isolate any specifically clinical element of the assessment apart from the observation that none of petitioner ISA's third molars had erupted. As to the application by Dr Birch of the "Dermirjian scale" I am satisfied that the criticisms made by Dr Stern and Professor Cole in their reports are well founded. Apart from anything else the Demirjian method involves radiological as well as clinical assessment and Dr Birch did not conduct a radiological examination. (There are ethical issues about radiological examination for non-therapeutic, age assessment purposes.) I am also satisfied on the basis of Professor Cole's report that the "racial differences" said to be described by Odusanya and others probably have no part to play in the assessment of petitioner ISA's dentition: what Odusanya described was an accelerated rate of dental maturation among rural Nigerians exposed to a high fibre diet [S A Odusanya and I O Abayomi, "Third molar eruption among rural Nigerians", *Oral Surg, Oral Med, Oral Pathol* 1991; 71: 151-4.] There is no evidence that petitioner ISA is a rural subject who has been exposed to a high fibre diet.

[202] Mental development: 12.8 years. The mental development assessment is the assessment apparently most dependent on "clinical judgment"; and the mental development section of the report is the one that I find the least well-explained, the most subjective or impressionistic, altogether the least satisfactory. Dr Stern's report, at paragraph 4.9, offers the view that Dr Birch's mental development assessment is entitled to little weight, and I agree. There is much comparative material before the Court in the impressions formed by

almost 30 other individuals who have had closer contact with the petitioners over longer periods.

Report by Dr Diana Birch dated 5 May 2011

[203] Dr Birch performed a review examination on 5 May 2011, about six months after the initial examination. The most significant development according to Dr Birch's findings was an increase in height. The height recorded on 5 May 2011 was equivalent to the 50th centile for the age 15.5 years. At the time of the review examination Dr Birch also had access to the GP records. The recorded growth history is as follows: the GP records show that on 24 August 2010 the GP practice nurse Heather Cruickshank measured the height of petitioner ISA at 1.7 metres [*170 cms*]; on 17 November 2010 Dr Birch measured the petitioner's height at 170.5 cms; and at the review examination on 5 May 2011 Dr Birch measured the Petitioner's height at 172.25 cms. Dr Birch finds that the petitioner has grown 1.75 cms in the space of six months between the dates of her two examinations. Treating the measured growth of 1.75 cms over six months as equivalent to an annual growth of 3.5 cms and then plotting the annualised growth on a growth velocity chart apparently taken from the work of J M Tanner and others carried out between 1962 and 1985, Dr Birch deduces that the rate of growth is equivalent to the 50th centile growth rate for males aged 15.5 years, lying between a 75th centile age equivalent of 15 years and a 25th centile age equivalent of 16 years [*cf. Asylum Seeking Children*, 123-124, Fig. 48].

[204] At the review examination Dr Birch found that there was an increase in foot length from 25 cms to 26 cms which she describes as "commensurate with his increase in stature".

As I read the chart relied on by Dr Birch, the increase in foot length gives petitioner ISA an average age equivalent of 16 years at the date of review i.e., in average age equivalent terms, over six months he has gone from 14 years to 16 years old. Dr Birch found an increase in "raw value" weight from 62 kg to 64 kg which she describes as "consistent with his growth in stature": plotting the increased "raw value" weight on the chart, as I read it, gives petitioner ISA an average age equivalent of 16.75 years. Dr Birch found an increase in "raw value" BMI from 21.3 to 21.5 and describes petitioner ISA as being "a little less overweight for height": plotting the increased "uncorrected" BMI on the chart, as I read it, gives petitioner ISA an average age equivalent of 17.5 years. (As I understand Dr Birch's method, if she had proceeded as before and "corrected" the BMI to the height age equivalent of 15.5 years, she would have produced an average for the physical growth parameters of 16.0 years.)

[205] The oral evidence left me with the impression that the Dr Birch's measurement of a growth in height is potentially, and subject to qualifications, a significant pointer to petitioner ISA's age. There are two reasons why this parameter might be significant: first, height is capable of objective quantification to within 1 millimetre and as a rule can be said to have reached its maximum value by the age of 18 years; and secondly, the distribution of growth velocity across the relevant age range is "tighter", as Professor Cole put it in oral evidence, than for other growth parameters. Dr Birch's review report was compiled after Professor Cole's and Dr Stern's reports had been finalised and those witnesses did not produce supplementary reports. I have only their oral evidence about the review report.

[206] Equally, before leading evidence the petitioners had no notice that Dr Birch's measurement technique might be questioned by Professor Cole or Dr Stern. Professor Cole in oral testimony offers estimates of the petitioners' ages on the assumption that Dr Birch's

annualised figures as plotted on the growth velocity chart are reliable. Dr Stern in oral testimony raises questions about the reliability of the measurements and their interpretation. These questions were not put to Dr Birch in cross-examination. In cross-examination the only question put by Mr Smith QC about this matter was: "One of the most important factors is the rate of growth?", a proposition with which Dr Birch agreed. In submissions Mr Smith QC invites me to reject the evidence of Dr Birch and of his own witness Professor Cole about the matter. Ms Stirling objected to the leading of Professor Cole's evidence about growth velocity at the time - I reserved the objection - and she then waives the objection and founds strongly on the evidence in submissions.

[207] Dr Stern's oral evidence is to the effect that various pieces of equipment and techniques are available to make accurate measurements of height and growth in height. He mentioned a "kneemometer" which is available, as I understand it, for measuring the knee-to-heel distance, a proxy measure of overall height, and a "stadiometer" which, as I understand it, is a piece of equipment for measuring overall standing height using, in mechanical versions, a sliding horizontal head piece mounted on and at right angles to a scaled vertical post. Dr Stern also states that "mastoid distraction" is essential for obtaining a reliable measurement, this, as I understand it, being a technique for holding the subject at maximum vertical extension by applying upward pressure to the mastoid processes with the head level along a certain horizontal axis. Dr Stern appeared to imply that it would be difficult for Dr Birch, with only two hands, to obtain reliable measurements working on her own "in the field" as it were. She apparently examined the petitioners in a room at their solicitor's office.

[208] Mr Smith QC invites me to reject Professor Cole's evidence based on Dr Birch's measurements because "measurements, against the wall in a solicitor's office... according to

the unchallenged evidence of Dr Stern... can lead to significant error in measurement". I am not prepared to reject either Dr Birch's evidence or Professor Cole's evidence outright. Mr Smith QC did not explore Dr Birch's measuring techniques with her in cross-examination. He has an excuse in that cross-examination had to be curtailed: but Dr Stern's criticism would have taken only a few minutes at most to put; and if it were to be founded on it should have been put. In the event, since the proof was only part heard at the diet originally assigned, the respondents could have made an application to recall Dr Birch for further cross-examination.

[209] As it happens, during cross-examination Dr Birch did volunteer some information about her height-measurement technique. The context was discussion of a passage in the respondents' age assessment of petitioner ALA, dated 16 September 2010: "Those who have seen [*petitioner ALA*] whilst playing football in Dundee have noted that he does not appear taller than he did at that time." The reference is, I deduce, to playing competitive football for an under-12 team some time during the 2008-2009 season. Dr Birch stated that the passage was factually inaccurate. She explained how height is measured with feet together, heels against the wall, adjusting the jaw so that the subject is looking straight ahead, using a metal tape against the wall. She mentioned that when she measured the petitioners for her review reports, the marks made at the time of her first examinations were still on the wall. Dr Birch also described how trunk height is measured from the knee in the sitting position. My understanding of Dr Birch's technique is filled out by some passages in her book: "Height is measured as standing height using a metal rule to improve accuracy or a wall mounted scale and the measurement is taken in the standard manner with bare feet"; and her book also has illustrations of a stadiometer and of a device for measuring trunk height. This, against the

background of her long experience in the field and her familiarity with the literature, is enough to reassure me that Dr Birch knows how height should be measured.

[210] Whether Dr Birch used a reliable technique and achieved reasonably accurate results when she measured the petitioner ISA is of course a different question. I am inclined to accept that she did, even though the material does not allow me to understand how she was able to mark a true horizontal on the wall at the same time as ensuring that the subject was at maximum extension with his head held in the correct attitude. I start by inferring, in the absence of any suggestion to the contrary, that the measurement by the practice nurse on 24 August 2010 was clinically competent to within the nearest centimetre without being carried out to scientific standards of accuracy with, for example, repeat measurements and averaging. (Mr Smith QC stated during the hearing that there was no objection to the GP records being received in evidence though neither spoken to nor agreed.)

[211] I have two GP results, the record of this petitioner's height and the record of petitioner ALA's height also made by the practice nurse on the same date. Dr Birch's own initial measurements, done three months later, are both within half a centimetre above the nurse's measurements, a not implausible result. Any bias having the tendency suggested by Mr Smith QC would have resulted in under-assessment of the height: it gives comfort to see that Dr Birch's measurements in each case are greater than those of the practice nurse. I accept Dr Birch's evidence that she did not know about the nurse's measurements when she first examined petitioners ISA and ALA. Professor Cole's view is that the six-month interval between Dr Birch's two sets of measurements is long enough to avoid the risk of measurement error. I interpret this to mean that the difference between the earlier and later measurements in each case is greater than might be accounted for by measurement error.

[212] If there had been a tendency to understate petitioners' stature in November there might have been a tendency to overstate it in May, for the sake of demonstrating an increased growth velocity and so a younger age. On the other hand - and this is another reason why I believe I am entitled to have some confidence in Dr Birch's height measurements - height measurements can be so easily checked. As it happens the respondents in this case have not obtained measurements of their own but they could have done so had they seen fit, if necessary with the assistance of a Court order.

[213] Dr Stern also criticises Dr Birch's interpretation of the growth velocity figures. He states that in real life growth proceeds stepwise, not as represented by the smooth curves on the chart. I am not sure how far this observation in and of itself takes me: but appreciating this, the real problem I suspect comes with annualising the six-month growth figure for the purpose of reading the chart backwards. According to the data used by Dr Birch, the rate of growth peaks at the age of about 111/2 years in females and 131/2 in males, thereafter declining sharply from the peak and virtually ceasing at the ages of 16 and 17 years for females and males respectively [*Asylum Seeking Children*, 123-125, Figs. 48 and 49]. Dr Birch does not actually know where the six months' growth she has recorded should fit into any twelve-month period or periods - does it possibly straddle two periods? - and how it should be annualised. If in a single twelve-month period, it might be that in the rest of the period there was no growth at all, not, as she speculates, the same amount of growth. In that event the subject's average age equivalent would be, if I understand Dr Birch's backwards-reading of the chart correctly, 161/2 years.

[214] Dr Birch's conclusion as regards the growth rate is as follows:

> "With respect to the growth rate which [*petitioner ISA*] has demonstrated between the two examinations - this figure is important since he has shown significant growth during the last 6 months and it is thus likely that he is less than 16 years of age."

I do not accept the conclusion as to age as being more than a possibility on the information provided. I am fortified in my rejection of Dr Birch's interpretation when I read about the flexible way she has interpreted growth figures in another case [*MWA, R (on the application of)* v *Secretary of State for the Home Department & O*rs [2011] EWHC 3488 (Admin) (21 December 2011) §§ 25, 45, 53, 72]. I do however broadly accept Professor Cole's opinion. Professor Cole offers the view, working from the annualised figures, that the growth rate in both cases was low, putting both petitioners towards the end of their growth spurt, about two to three years after their peak growth velocity which on Dr Birch's chart occurred around the age of 131/2 years. He said: "It is a very clear indication that they are 151/2, 16 and 17"; or "It is a very clear indication that they are 151/2-16 and 17". Having listened to Professor Cole's evidence on the tape several times, I take this to mean "a clear indication" that petitioner ISA was 151/2 to 16 and that petitioner ALA was 17 at the date of Dr Birch's repeat examination. Petitioner ALA's growth velocity was less, which meant he was older. Simply on the basis that both petitioners were still growing, without reference to the annualised figures, or the particular chart used by Dr Birch, Professor Cole repeatedly expressed the opinion that the petitioners are, or were at the time the measurements were taken, likely to have been under 18 years of age.

[215] This evidence came as a surprise to the respondents. In submissions Mr Smith QC puts the rhetorical question: "If it was as simple as that, why has this not been the subject of publication?" The answer is threefold. First, on the evidence in this case, it *is* as simple as that and the science *is* well-known; secondly, I suspect that the reasons why the science is not applied in the age assessment context is, first, that the focus of age determination efforts has been the assessment of age at a particular moment in time and, secondly, that public authorities are discouraged from undertaking or arranging any kind of clinical examinations on supposedly - and I would say spurious - human rights grounds; and thirdly, it is unusual under present arrangements for there to be funding for claimants' representatives to repeat measurements. Measurement of growth does not of course provide all the answers: but as a rule, as I understand the evidence in this case, male subjects who have stopped growing for six months or so are adults. (I deduce that the interval might be eighteen months or so for female subjects). It is for consideration whether it should be practice to measure the height of all persons claiming UASC status on arrival or at first presentation and at intervals of six months thereafter.

[216] Professor Cole's expert assessment of Dr Birch's measurements finds lay support, in broad terms, in the evidence of Fiona Geekie, the support worker with the Angus Council Social Work and Health Department Throughcare/Aftercare Team. She is the witness who has known the petitioners for longest. She saw the petitioners playing in the boys' football league in 2008-2009 and she met them again in a professional capacity in 2010. She thought they had not grown, at least compared with her son who had gone through a growth spurt. It seems that Ms Geekie is the source of the statements in the respondents' age assessment reports: "It is noted that [*petitioner ISA*] is not much taller now than he was 12-18 months ago

when he was playing for the Dundee team"; and: "Those who have seen [*petitioner ALA*] playing football in Dundee have noted that he does not appear taller than he did at that time." Interestingly, these lay impressions suggest that petitioner ALA is older than petitioner ISA, in that the former had not grown at all and that the latter had grown a little. This links with the other important conclusion to be drawn from Professor Cole's assessment of Dr Birch's growth findings, namely that petitioner ALA is roughly one to one-and-a-half years' older than petitioner ISA. This conclusion is supported by the evidence of the petitioners themselves.

The evidence of Kenneth Ambat

[217] Kenneth Ambat (44) is an independent social worker. He and a collaborator were instructed by the petitioners' solicitor to make age determinations of the petitioners. The collaborator is Rose Palmer, an independent social worker currently "seconded", I am told, to the Supporting People Team, Kensington and Chelsea, where she is Development Manager, Gypsies and Travellers. The Ambat-Palmer assessments are based on interviews carried out at the offices of the petitioners' solicitor in Glasgow on 13 May 2011 and on a large amount of documentary material, including the respondents' assessments, provided by the solicitor.

[218] Each interview was over two hours long. Further information was sought from petitioner ALA by telephone. The Ambat-Palmer reports are dated 16 May 2011. The conclusion of the ISA report is that:

> "In the absence of credible documentary evidence [*petitioner ISA's*] date of birth is estimated to be on or around 6 November 1996 based on the assessors estimate of a current age of 14 years."

The more precise age based on the postulated birth date is 14 years and 6 months. To put the Ambat-Palmer opinion in context, at the date of the assessment petitioner ISA would have been aged 12 years and 6 months based on his birth certificate and 17 years and 6 months based on his passport. In other words the Ambat-Palmer opinion is that petitioner ISA is two years older than his birth certificate age and three years younger than his passport age.

[219] Mr Smith QC for the respondents accepts that Mr Ambat is a good witness in terms of his demeanour, knowledge and professionalism. My assessment is that presentationally Mr Ambat is an excellent witness. The main issue raised by Mr Smith is whether the Court is entitled to receive the Ambat-Palmer age determinations as expert opinion evidence. I shall return to this issue at the end of the section.

[220] Mr Ambat was originally a construction worker. He worked as a mechanical fabricator on the Jubilee Line. I gather that he moved into education support work in 1996 and social work around 2000, originally as a support worker. He worked for Northamptonshire Asylum Support Team, which dealt with adults and children. When the National Asylum Support Service [NASS] took over responsibility for adult asylum seekers in 2003 the support service became dedicated to child asylum seekers, some of known age, some age-disputed. He first started doing age assessments in about 2001 when Northamptonshire Council was faced with numbers of Albanians and Kosovans claiming to be 14-year olds. Between 2003 and 2005 he undertook about 40 age assessments a year. Mr Ambat gained a

diploma in social work from the University of Northampton in 2005 and a BA (Social Work) from the same institution in 2006.

[221] As I understand it, Mr Ambat moved to work for a private provider Unity Care Services Ltd who offer hostel accommodation in the Solihull or Birmingham area for young asylum seekers with ages ranging from 16 to 24 years. He supervised about 50 assessments a year. Mr Ambat moved to Milton Keynes Council at some stage where I gather he worked with young persons, gave age assessment training, supervised age assessments and conducted age assessments with others. I gather that in about 2009 or 2010 Mr Ambat established himself as an independent social worker and in that capacity has worked on 30 or 40 age assessments with Ms Palmer. Both Mr Ambat and Ms Palmer are members of the British Association of Social Workers. Ms Palmer is married to a man from the Ivory Coast [*Côte d'Ivoire*]. Mr Ambat has some familiarity with Africa, having lived in Zambia when he was younger. (His father worked in Zambia for 25 years.) He says that his best friend in Ireland - the implication being that he is Irish - was a Nigerian. He has age-assessed many nationalities including about eight Nigerians before the petitioners.

[222] Mr Ambat adopted the Ambat-Palmer reports as his evidence subject to qualifications and additions made in oral testimony. The Ambat-Palmer reports are well-presented and professional-looking. On the face of it, the petitioners opened up to these investigators and made disclosures in a way they did not to the respondents' assessors. My initial impression was that the Ambat-Palmer report on petitioner ISA offered a valuable and apparently authoritative insight into the age question, based on expert knowledge and solid evidence, above all in the findings about the petitioners' schooling in Nigeria [§§ 10.1-10.4]. The report states that primary schooling in Nigeria generally starts at the age of six and that there are

six years of primary schooling followed by three years of compulsory education at junior secondary level. On petitioner ISA's account he reached year four of primary school at "a local school known as Duntes School which was near to his home in Nigeria".

[223] On closer reading I sense a degree of equivocation in the finding about the age significance of the schooling history, which is: "[*Petitioner ISA*] was attending fourth year which suggests that he was aged 9/10 at this time if he was attending prior to leaving Nigeria in 2008." As expressed the sentence is not entirely logical. The immediately preceding findings would logically support the following hypothesis: "If petitioner ISA was attending fourth year immediately prior to leaving Nigeria in 2008 he was aged 9/10 at the time of his arrival in the United Kingdom." The "if" is a big "if" because it involves that by the time it came to the Ambat-Palmer age assessment almost exactly three years after the petitioner arrived in the United Kingdom, petitioner ISA would have been aged "12/13", his birth certificate age.

[224] In fact Mr Ambat and Ms Palmer assessed petitioner ISA to be "14/15"; and, they say, "it would be naïve to place any significant degree of weighting" on the birth certificate [paragraph 15.9]. This difficulty and the implications for the credibility and reliability of the petitioner are not confronted by the Ambat-Palmer report. I find this interesting for the reason that in the case of *SH (Afghanistan)*, Lord Justice Moses, with whom the other members of the Court of Appeal agreed, found that Mr Ambat and Ms Palmer did "not however grapple with the difficulties certain undisputed facts present" [*SH (Afghanistan)* v *Secretary of State for the Home Department* [2011] EWCA Civ 1284 (08 November 2011) at § 20]. The failure had apparently caused a Senior Immigration Judge at an earlier stage to question the impartiality of Mr Ambat and Ms Palmer. That is not something I feel compelled to do:

but I do agree that Mr Ambat and Ms Palmer gloss over some obvious difficulties. Let me give two other examples.

[225] In the nearly identical sections in each report headed "Diversity and Discrimination Issues", which, as presented, contain nothing obviously relevant to age assessment, it is stated:

> "13.4 [*Petitioner ISA/Petitioner ALA*] has experienced discrimination on the
>
> basis of his racial identity since coming to the UK. [*Petitioner ISA/Petitioner ALA*] was subjected to racial abuse from players and parents while playing football..."

When Mr Ambat and Ms Palmer wrote these sections on 16 May 2011 they were in possession of "Affidavits from Angus Council", at that date including presumably the affidavit of Fiona Geekie, sworn on 22 March and lodged in Court on 14 April 2011 (see above). They were also in possession, according to Mr Ambat's oral evidence, of the respondents' age assessment reports. The respondents' age assessment report for petitioner ISA states:

> "[*Petitioner ISA*] played football whilst living in Dundee. He played for a local team based on the age he provided. It was noted by others that he was considerably taller and more skilled than the other boys. This created difficulties for the team as other teams lodged complaints."

Accordingly, the independent assessors must have known that there was concern on the part of players in the boys' league and of their parents that the petitioners were over-age, a

matter that is clearly relevant to age assessment but something that the independent assessors do not mention. If the independent assessors' intention is to present legitimate concerns about the petitioners' ages as racial abuse, I would find that very unhelpful.

[226] In the case of petitioner ALA, the Ambat-Palmer report states [§ 15.4]:

> "The evidence of Dr Birch suggests that [*petitioner ALA*] could be one year older than claimed i.e. aged 14+ at this time and recognises that his presenting age falls within the STD applicable to the methodology applied. Dr McGregor's observations also support [*petitioner ALA's*] presenting age."

The first sentence of the quoted passage means, as I understand it, that petitioner ALA's claimed age in terms of the certified birth date of 5 June 1997 would have been 13.9 years which is within one standard deviation [STD] of the age of 14.8 years as assessed by Dr Birch at her follow-up examination of 5 May 2011. I cannot say whether this is correct since Dr Birch's review report minimises the statistical component of her assessment and does not quote the standard deviation. (Dr Birch's first report gives the weighted average standard deviation as plus or minus 2.1 years.) If the sentence is correct, I do not see that it is useful or that it is something that should be presented, as it appears to be, in a positive light as if supporting petitioner ALA's own account of his age.

[227] As regards the following sentence which states that Dr Macgregor's observations *also* "support the presenting age", Mr Smith QC criticises the independent assessors for assuming that Dr Donald Macgregor, Consultant Paediatrician, carried out an examination in person when petitioner ALA was admitted to hospital with abdominal pains on 27 August 2008

[§ 12.3]. Dr Macgregor's affidavit states: "No member of medical, surgical or nursing staff commented or queried that he seemed physically advanced for his age." I agree with Mr Smith that Dr Macgregor's affidavit does not offer evidence that the consultant personally examined the patient; and given the developmental range for various ages spoken to by Dr Birch, the absence of comment by the staff is perhaps not surprising. (Contrary to what Dr Macgregor's affidavit states, there is no evidence, or none available to me, that the patient's height was recorded - his weight was 47.71 kgs, giving an average age equivalent on Dr Birch's chart of 131/2 years.) What is surprising is the Ambat-Palmer statement, without further comment, about support for "the presenting age", meaning that Dr Macgregor's affidavit supports the birth certificate age, when the authors themselves go on to say that "it would be naïve" to give weight to the birth certificate [§ 15.9]. They conclude that petitioner ALA's birth date was 5 June 1995, making him two years older than his "presenting age".

[228] Returning to the education issue in relation to petitioner ISA, not only is the difficulty identified above not confronted in the Ambat-Palmer report, there is no indication in the report or in Mr Ambat's parole evidence that he and his colleague raised the discrepancy with petitioner ISA. *Prima facie* this represents a breach of the "*Merton* Guidelines" and contradicts the assertion in paragraphs 1.1 and 1.5(ii) that these investigators have complied with their instructions to conduct a "*Merton* Compliant" age assessment [*R on the application of B* v *London Borough of Merton* 2003 EWHC 1969 (Admin) (14 July 2003) at § 55]. The omission is aggravated by the fact that the report expresses the view at paragraphs 8.8 and 15.10 that there will be significant repercussions, meaning I think significant psychological

repercussions, of any decision to alter petitioner ISA's age from the birth certificate age which appears to form part of his identity and self-image.

[229] In submissions, Mr Smith QC criticises Mr Ambat and his colleague on the basis that "they relied heavily on the veracity of the boys [*sic*] themselves". A more accurate criticism would be that the Ambat-Palmer reports purport to accept the petitioners as credible and reliable while reaching conclusions which are inconsistent with the petitioners' account of themselves. For example in the case of petitioner ISA the report, paragraph 4.6 states that petitioner ISA "came across as a credible and amenable interviewee" and, at paragraph 15.11, states: "The current assessors... accept [*petitioner ISA's*] account of his time in education as credible and consistent with his evidenced level of educational ability." As explained above, the independent assessors cannot have accepted the account of petitioner ISA's "time in education" or, if they did accept it, can have accepted it only with a major reservation which ought to have been disclosed. The account given by petitioner ISA is consistent with petitioner ISA's educational ability and his "presenting age" to Mr Ambat and Ms Palmer, conform to his birth certificate, of 12 years and 6 months in May 2011: but it is not consistent with petitioner ISA's age as assessed in the immediately following paragraph of the Ambat-Palmer report, paragraph 15.12, namely 14 years and 6 months.

[230] The discrepancy has led me to re-consider the Ambat-Palmer treatment of the schooling question. The findings about the Nigerian education system are unreferenced. On that basis I infer that they were simply trawled from the internet and that I should not necessarily treat them as authoritative. Even if the description of the system is correct there is no explanation of its relevance to the petitioners' situation: their account is of attending a fee-paying school. Is this part of the public education system? I don't know whether fees are

charged in the public education system. The petitioners apparently attended only intermittently as and when fees were paid. It is not apparent that petitioner ISA was asked directly by Mr Ambat and Ms Palmer whether he had missed some years of schooling after fourth year or whether he was in fourth year when he left Nigeria.

[231] Petitioner ISA told the independent assessors that his final year at school in Lagos was fourth year. He also reportedly recalled that he was so small in fourth year that the older girls - presumably meaning the older girls at primary school aged around 12 years - used to pick him up and carry him about. When petitioner ISA was enrolled in the sixth year at Cleppington Primary School, Dundee, in September 2008 six months after leaving Nigeria, his class teacher James Webb found him to be "noticeably tall" compared with the other children in the class, who, since primary schooling in Scotland starts at age 5, were presumably between 10 and 11 years old. When petitioner ISA was weighed and measured by the GP practice nurse 11 months after that, he had reached the mean height for males aged 15 years 3 months with weight to match, applying the charts used by Dr Birch.

[232] These findings, without further explanation, do not add up. How can it be that petitioner ISA was so small that he could be picked up and carried around by 12-year old girls in 2008 and that he then reached the average height and weight of a 15-year old male two years later in 2010, without, according to Ms Geekie, having grown significantly?
Mr Ambat and Ms Palmer were aware of these matters when they conducted their age assessment interview because they had the respondents' age assessments, the affidavits, the medical records and all Dr Birch's reports. It was incumbent on Mr Ambat and Ms Palmer to probe the issue of the "missing years" and to offer a view on the matter to the Court rather than simply glossing over the issue. It is not enough for Mr Ambat and his co-worker to say:

"Further exploration of this [*schooling in Nigeria*] may reveal more detail about [*petitioner ISA's*] age at the time of his attendance and thus aid in establishing his current actual age." I infer that these independent assessors tried to locate the "school on Lagos Island" and failed to do so: I would have expected them to say something about this and how it might reflect on the credibility of the petitioners' apparently concerted account.

[233] Although each petitioner was interviewed separately for between two and two and-a-half hours, their accounts have been merged into a single narrative. Compare the following identical paragraphs from the respective reports:

> "4.6 In terms of his general demeanour, [*petitioner ISA*] was felt to be a co-operative and compliant child [*sic*] who made a concerted effort [*sic*] to answer any questions posed by the current assessors. When asked to provide additional detail of school friends during his time in Nigeria or the family home, [*petitioner ISA*] came across as a credible and amenable interviewee. Responses to questions designed to test credibility were consistent with the answers provided by his brother where applicable. The assessors recognise that many young people in similar situations have been told what to say by adults and endeavour to comply either to seek approval or avoid repercussions but the impression gained by the assessors was that much of what [*petitioner ISA*] told us appears to be based on fact."

> "4.6 In terms of his general demeanour, [*petitioner ALA*] was felt to be a co-operative and compliant child [*sic*] who made a concerted effort [*sic*] to answer any questions posed by the current assessors. When asked to provide additional detail of school friends during his time in Nigeria or the family home, [*petitioner ALA*] came across as a credible and amenable interviewee. Responses to questions designed to test credibility were consistent with the answers provided by his brother where applicable. The assessors recognise that many young people in similar situations have been told what to say by adults and endeavour to comply either to seek approval or avoid repercussions but the impression gained by the assessors was that much of what [*petitioner ALA*] told us appears to be based on fact."

What makes these passages doubly remarkable is that most observers who have had anything to do with the petitioners describe them as having different personalities, one compliant and the other tending to be uncooperative when challenged. Compare paragraphs 12.1 in each report.

[234] You might expect there to be copy-and-paste errors with this way of working. There are; and only some of them were corrected in oral evidence [petitioner ALA report, paragraphs 15.4, 15.9 and 15.9 un-numbered paragraph]. The nature of the mistakes implies that petitioner ISA's report was composed first. As has already been noted, the report for petitioner ISA, "Education, Employment and Training" section, paragraph 10.4, states: "[*Petitioner ISA*] was attending the fourth year which suggests he was aged 9/10 at this time if he was attending prior to leaving Nigeria in 2008." The report for petitioner ALA, paragraph 10.4, states: "[*Petitioner ALA*] was attending the fourth year which suggests he was aged 10/11 at this time if he was attending prior to leaving Nigeria in 2008." Both statements cannot be right; and elsewhere it is said that petitioner ALA left primary school in fifth year. A repeat error of, I think, a different kind is common to both reports. This is the idea that the respondents believe the petitioners to be five or six years older *than their passport ages*, which would put them both in their twenties at the time of the Ambat-Palmer assessment [ISA report, paragraph 11.2 and 11.4, third un-numbered paragraph; ALA report, paragraph 11.2 and 11.4, third un-numbered paragraph]. These errors suggest to me an underlying lack of confidence on the part of Mr Ambat and Ms Palmer in their own expressed conclusions.

[235] The Ambat-Palmer report on petitioner ISA begins: "The assessors agreed that, based on initial observations of his physical appearance alone, [*petitioner ISA*] appeared to be a

young teenager in the 13-15 years old range" [paragraph 4.4]. Twenty-four pages later the conclusion is reached that, in the absence of documentary evidence, petitioner ISA is 14 years old. In between, although there is a substantial amount of re-examination of the evidence available to the respondents and analysis of the respondents' age assessment, there is nothing in the way of positive information or interpretation to support the Ambat-Palmer assessed age.

[236] As the report is written, the initial observations of physical appearance include an observation that petitioner ISA is "tall, slim and athletically built"; a finding that his facial skin is clear with some evidence of acne and no sign of weathering and ageing; a finding that facial hair growth is minimal and that there is no evidence of shaving; and an observation that there is no enlargement of the Adam's apple. The report then states that a number of findings made by Dr Birch are noted. These include "immature growth of axillary hair, apparent stage of sexual development, dental development." Mr Smith QC criticises Mr Ambat for relying "to a great extent" on the views of Dr Birch. The criticism presumably proceeds on the basis that Dr Birch's findings are completely unreliable; and the degree of reliance by Mr Ambat and Ms Palmer on Dr Birch's findings is not actually clear to me. Nonetheless, in the circumstances, I think it reasonable, given such disclosed acceptance of Dr Birch's findings as there has been, not to give undue weight to the impression formed by Mr Ambat and Ms Palmer.

[237] Essentially, as I see it, the Ambat-Palmer reports conclude where they start with an initial impression influenced to an indeterminate extent by Dr Birch's findings and opinions. I have come to be persuaded that I cannot receive the Ambat-Palmer conclusions as expert opinions. They are impressions to be weighed with all the other impressions as to the

petitioners' ages. I do not exclude the possibility that there may be other cases in which Mr Ambat and Ms Palmer bring expertise to bear in the assessment of disputed ages: but, notwithstanding the highly professional presentation, I cannot discern anything "expert" about their opinions in the present cases.

The evidence of Joanna Wilson and Alison Millar

[238] The respondents' age assessments were carried out by Joanna ("Jo") Wilson and Alison Millar (formerly Smyth). Ms Wilson and Ms Millar gave oral evidence. Jo Wilson (44) has worked with Angus Council Social Work Department since 2004. She is a resource worker in the Throughcare/Aftercare Team. She started her working life as a special educational needs teacher. She then worked for the Benefits Agency and after that as a welfare rights officer. She is not a qualified social worker. The remit of the Throughcare/Aftercare Team is 151/2 to 19 year-olds. Alison Millar (49) is a qualified social worker and Team Manager of the Throughcare/Aftercare Team. She has been with Angus Council since 2003. Before that she was a social worker in the voluntary sector for five years. Prior experience includes being a primary school football coach. She has worked with children and young persons in the 12 to 18 year-old bracket for fourteen years. She has received training in forensic interviewing. She has two grown up sons and an 11 year old stepdaughter. The Throughcare/Aftercare Team took over responsibility for the petitioners from the Intake Team at the beginning of August 2010. Alison Millar assigned Jo Wilson as the petitioners' primary support worker.

[239] Jo Wilson impressed me as a sympathetic and confident witness with a lot of common sense. Alison Millar struck me as being competent but detached. I expected, possibly

unreasonably given other demands on her time, that she would have had greater familiarity with the files. My impression was that her involvement in the age assessments was to lend managerial authority to the exercise. At the time Angus Council Social Work Department had no experience of doing age assessments, no experience of West African children, no experience of trafficked children or of children subject to immigration control. The assessors had no training in age assessment. Ms Wilson and Ms Miller researched the subject on the internet and contacted Chris Perkins, Head of the Asylum Assessment Team, Social Work Services, Glasgow City Council, for guidance. The template used for assessment of the petitioners' ages appears to be the Asylum Seeking Children *pro forma* appended to the "Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers" issued by the London Boroughs of Croydon and Hillingdon (August 2005). The "Practice Guidelines" have been noticed judicially without adverse comment [*R (B)* v *Merton LBC* 2003 EWHC 1689 (Admin) (14 Jul 2003) at §§ 33, 34; *R (FZ)* v *Croydon LBC* at § 8 *per* May PQBD]. My impression is that the pro forma gives a plausible structure to what in many cases is essentially an intuitive and impressionistic exercise.

[240] The assessment form is headed: "Age Assessment of Asylum Seeking Child". The form has the following section headings: (1) Physical Appearance, Demeanour; (2) Interaction of Person During Assessment; (3) Social History and Family Composition; (4) Developmental Considerations; (5) Education; (6) Independent/Self-Care Skills; (7) Health and Medical Assessment; (8) Information from documentation and Other Sources; (9) Analysis of information gained. Beneath each section-heading there are explanatory notes drawn from the "Practice Guidelines" apparently intended to prompt the assessor to elicit the relevant information and to assess it appropriately [*cf.* "side notes" referred to in *R (B)* v *Merton LBC*

2003 EWHC 1689 (Admin) (14 Jul 2003) at § 34]. All sections have been completed. The petitioners make no criticism of the assessment template or of the scope of the assessments in this case.

[241] The last sheet, on page 10, is a copy of the "Form to be handed to the person assessed". This offers the options - "You have been assessed to be over 18"; "You have been assessed to be a child, age [*blank*] years; DOB [*blank*]"; and "Your assessment is inconclusive and further work is necessary" with summary "Conclusions and Reasons" and details of the procedure for challenging the outcome through an internal review. In petitioner ISA's case the selected option is: "You have been assessed to be a child, age 16+." In petitioner ALA's case the selected option is: "You have been assessed to be over 18." At the close of the assessment interviews, Ms Millar told the petitioners that their claimed ages were not accepted and that they were thought to be older. Both petitioners rejected their notification form.

[242] The assessment interviews took place on 16 September 2010. Each interview lasted between 30 and 45 minutes. The interviews would have been longer had the interviewees been forthcoming. Petitioner ISA was the more biddable. Petitioner ALA was less compliant: but neither interview added much. The interviews were a small part of the assessment. The assessors gathered information for a few weeks before the interviews. Information was gathered from many persons familiar with the petitioners. It appears from the affidavits that questionnaires were used. It appears, for example, that the Dunphys and the Mitchells completed questionnaires. The information in the case files was also drawn on to an undisclosed extent. The interviews were an opportunity for the interviewers to ask questions in a structured way and for the petitioners to give information. Open questions were used. No questions designed to test credibility were asked. Alison Millar kept notes of

the interviews in a notebook. The interview notes were shredded once the material had been typed up. The questionnaires remain on file. Ms Wilson stated that neither petitioner provided information of note about their background. She had doubts about their truthfulness. The petitioners' response to Ms Wilson and Ms Millar was: "I don't know" or "I can't remember". For example, petitioner ISA stated that he could not remember the names of school friends or teachers in Nigeria. He described one teacher as tall, with glasses and bald. He could not remember the teacher's name.

[243] In contrast, eight months later, petitioner ISA told the independent assessors that he remembered a Ghanaian teacher called "Uncle Joe" who liked to be addressed as "Mister Guy". He said that his teacher "during his final year which was fourth year" who was known as "Aunty Kate". Ms Stirling suggested to Ms Millar in cross-examination that the reason the petitioners were not forthcoming during the respondents' interviews was that the petitioners perceived that the respondents and Ms Millar personally had a preconception about the petitioners' ages. It was suggested that the different circumstances of the Ambat-Palmer interviews made the petitioners more forthcoming. (These matters were not explored with the petitioners during their evidence.) Ms Millar's response was that the petitioners may have been more forthcoming because the Ambat-Palmer interviews were arranged for the petitioners by their solicitor; and that their attitude may have been shaped by their solicitor's advice. Ms Wilson stated that at the time of the respondents' assessments the team had a very good relationship with the petitioners.

[244] It was suggested to the assessors by Ms Stirling that the petitioners should have been given the benefit of the doubt on the age question. Ms Wilson stated that there was no reasonable doubt about the ages as assessed by her and Ms Millar. Alison Millar was

confident and comfortable with the respondents' age assessment. She accepted that others might have different views. Ms Millar was interested to read Dr Birch's reports. There were parts she did not agree with. The reports did not change her opinion. She was impressed with the layout of the Ambat-Palmer reports. She had reservations about certain parts. Ms Stirling put it to Ms Wilson that Professor Cole had said in evidence that both petitioners were under 18 years of age. Ms Wilson stated that she would stick by the assessment she and Ms Millar had made.

[245] Jo Wilson adopted the assessment forms as her evidence subject to additions and qualifications made in oral evidence. Her initial impression on meeting the petitioners was that they were significantly older than their claimed (birth certificate) ages. The petitioners were assigned to the Throughcare/Aftercare Team because the remit of that team is for the 151/2 to 19 year-old group. She was appointed as the petitioners' support worker. She had intensive direct contact with the petitioners from, she said, the end of July 2010, seeing them three or four hours a week, getting to know them and trying to arrange activities for them. The petitioners had withdrawn since the age assessment process had begun: but Ms Wilson continued to have contact, having seen them last nine days before she gave evidence.

[246] Ms Wilson stated that it had become quite apparent to her and others over a period of time that petitioner ISA was over 16. His demeanour more than anything gave this impression. He was a lot more mature than the other young people with whom the team worked. In cross-examination Ms Wilson was challenged on a number of findings. On the basis of the evidence offered to me, I find that the assessors were mistaken when they stated at sections 7 and 8 that the Practice Nurse thought that petitioner ISA was older than 11 years of age: the Practice Nurse had the impression that petitioner ISA was older than

petitioner ALA and did not express a view about ages. Although the assessment bears to draw on the observations of among others "education professionals" the views of primary school staff in Dundee were apparently not ascertained. My impression is that the assessors gave weight to the views of the petitioners' carers, the Dunphys and the Mitchells: Mr and Mrs Dunphy and Mr and Mrs Mitchell all expressed the view that petitioner ISA was 16 years old. In oral evidence Ms Wilson stated that the determining factor was the observed demeanour of Petitioner ISA by herself and others over a period of time.

[247] The thrust of Ms Stirling's cross-examination of Ms Millar was that petitioner ISA's age had been pre-judged: the petitioners had been assigned to the Throughcare/Aftercare Team on the assumption that they were more than 151/2 years old. The suggestion was also made that by providing support for the petitioners in terms of the Children (Scotland) Act 1995 s. 22 the respondents were attempting to avoid their responsibilities under section 25 to provide accommodation for abandoned children in need. Ms Millar accepted that children in need are allocated their own social workers. Children in need accommodated in terms of section 25 have regular looked-after-child reviews. Children who are "looked after" in terms of section 25 become eligible for "leaving care services" including support until the completion of full-time education [*cf.* Children Act 1989 sections 17, 20 and 22; *R (Berhe and Ors)* v *Hillingdon London Borough Council and Secretary of State for Education and Skills* 2003 EWHC 2075; *H & Ors* v *London Borough of Wandsworth & Ors* 2007 EWHC 1082 (Admin) (23 April 2007)].

[248] The question of "the best interests of the child" was also raised. It was put to Ms Wilson that that the interests of the child are paramount and that the child's views must be taken into account. It was put to Ms Millar that it was in the best interests of the petitioners to be

section 25 looked-after children because in that way the petitioners would gain future rights after the age of 18. (This point was developed by Ms Stirling in submissions.) Ms Millar stated that although the assessment forms contain no reference to "best interests", that matter was regarded as paramount during the assessments. The "best interests" of each petitioner were considered separately. The implication of Ms Stirling's cross-examination was that it is in the best interests of the petitioners to remain in the United Kingdom. Ms Millar was cross-examined as to whether she understood that the "prospects of success" for petitioner ISA remaining in the United Kingdom might be different if he were to be treated as unaccompanied rather than as a dependent of petitioner ALA. Ms Millar quite properly answered that the petitioners had a solicitor to advise them on legal issues. Ms Millar's understanding was that the assessed ages would have no relevance to the outcome of the asylum applications: the assessed ages would be relevant only to the process, for example, as to whether the petitioners would have representation during their interviews. The difficulty with the way Ms Stirling approached the matter is that it exposes a potential conflict between the interests of the two petitioners whom she represents.

[249] My own view is that the respondents, in deciding what services to provide, would have been entitled initially to rely on the ages given when the petitioners entered the United Kingdom. In any event they were bound, in their management of the petitioners' cases, to take account of the ages derived from the petitioners' travel documents. I do not think that this means that they pre-judged the petitioners' ages. The difficulty in placing individuals of unknown age is that there are child protection issues. There was no fostering accommodation available in Angus Council area which did not have children already in the house, either foster children or children of the foster carers. The current carers, Mr and

Mrs Mitchell were formerly approved foster carers. When Jo Wilson first met the petitioners she knew there was an age issue but she did not know that the respondents would have responsibility for assessing the petitioners' ages.

[250] The respondents dealt with the petitioners outside the normal structures on the basis that the petitioners wanted to stay together and that it was not clear that the respondents had any statutory power to provide foster care. Ms Millar stated that the respondents' Social Work Department does not have power to accommodate persons over 18 years of age using Children (Scotland) Act s. 25 powers. (My understanding is that there are exceptional powers in terms of section 25(3).) Persons over the age of 16 years are entitled to apply to the Housing Department for their own independent accommodation. The Throughcare/Aftercare Team supervises the payment of benefits to care-needers in the 16 to 18 year old range. The team works with care-needers from the age of 151/2 because of the importance of transition. Children over 16 years of age are not accommodated by the Social Work Department unless their welfare requires it. If there is a need, children over 16 years of age are accommodated under section 25. According to Ms Wilson when children over 16 require foster accommodation the arrangements are made by the Family Placement Fieldwork Team.

Conclusions and disposal

[251] My findings are that at the time of the respondents' age assessments on 16 September 2010, petitioner ISA was about 151/2 years old and petitioner ALA was about 17 years old, expressing their ages to the nearest six months. On the basis of my findings both petitioners

were under 18 years of age and both petitioners were therefore children within the meaning of the Children (Scotland) Act 1995. It follows that when the petitioners came into the *de facto* care of the respondents five months before, on 9 April 2010, the petitioners were children aged about 15 years and 161/2 years respectively. To put my conclusion about petitioner ISA's age in context, on the assessment date he was, I say, 151/2 years old when he was just short of 12 years old by reference to his birth certificate and just short of 17 years old by reference to his passport.

[252] The most persuasive pieces of evidence are the findings of Dr Birch about the petitioners' growth between 17 November 2010 and 5 May 2011, as those findings are interpreted by Professor Cole and subject to the qualifications made by Dr Stern about the step-wise nature of growth. The lay evidence of Fiona Geekie about growth, or relative lack of growth, provides broad support for the clinical findings. Petitioner ISA's own account that he was "getting taller" *before* he left Nigeria is consistent. I have given some weight to Dr Birch's findings about sexual maturity, again as interpreted by Professor Cole.

[253] I do not accept Dr Birch's findings about "mental development" because I judge to be more persuasive the impressions of persons who have greater familiarity with the petitioners and who have interacted with them in a variety of settings over a period of time. Foremost among these are Mr and Mrs Dunphy, Mr and Mrs Mitchell, Lynn Sandeman, Nicola Simpson, Donna Marie Ross, Fiona Geekie, Nyree Elizabeth Clark and Jo Wilson. Their impressions were that petitioner ISA was 15 or 16 years of age at around the date of the respondents' age assessments. In cross-examination Kenneth Ambat agreed that "the more time you can spend with someone, the better" for age assessment purposes. He agreed too that the petitioners would know that they had an interest in being accepted as younger

than they are and that they have a motive to mislead. He also stated that it is instructive to observe age-disputed individuals when they are unaware. Mr Ambat's own view is that petitioner ISA's birth date could plausibly be estimated to be 5 June 1995. This would have made petitioner ISA 14 years and 3 months old at the time of the respondents' assessment, at which date I find that the petitioner was 151/2 years old.

[254] I have to say in Mr Ambat's favour that he is confident without being dogmatic: he is prepared to accept that he may have misinterpreted evidence, for example the affidavit of Dr Macgregor; and he is prepared to consider alternatives. In answer to a question from me, he said that the reasonable age range for petitioner ISA could extend upwards as far as 161/2 years old at the date of the Ambat-Palmer assessment. However, Mr Ambat believes his assessment of 15 years of age at that date is entitled to weight and has the edge over the respondents' assessment because he and his fellow assessor were given access to all other opinions before making their determination; because he has substantial experience of age-assessing individuals from diverse cultures; and because his experience was combined with that of his co-assessor Rose Palmer who also has substantial experience.

[255] My view is that, in this case, these factors do not outweigh the advantages of long-term contact and varied interactions that have been enjoyed by the carers and by several members of the respondents' Social Work Department. However, my acceptance of the latter evidence is not unqualified. Ms Stirling points out in oral submissions that the respondents' assessment exercise relied exclusively on evidence post-dating the emergence of the age dispute. The age dispute emerged when UKBA disclosed the passport data. The implication is that the respondents' assessors and their informants have been influenced by the passport dates of birth. This may well be correct. I thought that Jo Wilson and Alison Millar in oral

evidence were just a little complacent about their conclusions. Jo Wilson, was rather too dismissive of the proposition, put in cross-examination by Ms Stirling, that there is something to be learned from Professor Cole's evidence about growth velocity (information which was not available to Ms Wilson and Ms Millar before they came into Court).

[256] Ms Stirling faults the respondents' assessment because it ignores the evidence of the primary school staff in Dundee who formed their impressions before the Petitioners' ages were disputed. On the other hand, it might equally be argued that the impressions of the primary school staff were unduly influenced by the birth-certificate ages. The birth certificates were the basis for enrolling the Petitioners in classes P6 and P7. This happened in 2008 before it was known that the certificates were forged and before UKBA had supplied information about the travel documents. I do not think that Ms Stirling can rely on both the affidavit evidence of Ms Maude and Ms Doogan and the Ambat-Palmer reports when the latter state that "it would be naïve to place any significant degree of weighting" on the birth certificate ages.

[257] Further, I am not clear that Edith Maude, Head Teacher at Dens Road Primary School, had significant direct contact with petitioner ALA. She depones that "we had never suspected that petitioner ALA was older than he said he was", which at that time was 11 years old. The Deputy Head Teacher, Isabella Doogan, was of the same view. Clearly Ms Maude and Ms Doogan were affronted by the way petitioner ALA was removed from their school; and I infer that they perceive that the matter reflected on their child-protection competence. Petitioner ALA's class teacher Michelle Munro, on the other hand, accepts that petitioner ALA could have been up to 13 years old, though she says not older. In the same way petitioner ISA's class teacher James Webb accepts that petitioner ISA could have been

up to two years older than his birth-certificated age, which at that time was 10 years old. I reject the evidence of the primary school staff insofar as it tends to support the idea that the petitioners were of their birth-certificated ages or close to those ages.

[258] I also give limited weight to the impression of Alexis Wright that the Petitioners are currently, at the date she gave evidence, aged respectively 12 to 14 years old, Petitioner ISA, and 14 to 16 years old, Petitioner ALA. Ms Stirling for the Petitioners does not found heavily on Ms Wright's impressions as to age; and, though Ms Wright's role in supporting the Petitioners is to be respected, there must be a risk that her advocacy function necessarily compromises her objectivity.

[259] As for the disposal of petitioner ISA's petition, I shall sustain the respondents' second plea-in-law on the basis that the petitioner's leading averment, to the effect that he was born on 6 November 1998, has no acceptable foundation in fact on the evidence presented to me; and on the basis that there is no material error in the respondents' assessment of petitioner ISA's age. No case has been presented that the assessment was procedurally unfair. I shall repel the petitioner's first and second pleas-in-law accordingly. The petitioner's third plea, about the transfer to Glasgow, falls to be repelled on the basis that the issue has been overtaken by events. The respondents' first and fourth pleas fall to be repelled because they have been superseded. The respondents' third plea involves the proposition that petitioner ISA was born on his passport birth date. That plea fails on the basis of my finding as to petitioner ISA's age and I shall repel it. I shall refuse the petition.