



Neutral Citation Number: [2019] EWCA Civ 872

Case No: C2/2017/2550

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM Upper Tribunal (Immigration and Asylum Chamber)
Judge Storey

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 23/05/2019

Before:

LORD JUSTICE UNDERHILL
(Vice-President of the Court of Appeal (Civil Division))
LORD JUSTICE SIMON
and
LORD JUSTICE BAKER

Between:

BF (ERITREA)	<u>Appellant</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Respondent</u>
-and-	
THE EQUALITY AND HUMAN RIGHTS COMMISSION	<u>Intervener</u>

Mr Richard Hermer QC and Mr Chris Buttler (instructed by Scott-Moncrieff & Associates Ltd) for the Appellant
Mr James Strachan QC and Ms Deok Joo Rhee QC (instructed by the Treasury Solicitor) for the Respondent
Mr Martin Chamberlain QC (instructed by the Commission) for the Intervener

Hearing dates: 19th & 20th December 2018

Approved Judgment

Lord Justice Underhill:

INTRODUCTION

1. The Appellant is a national of Eritrea. On 11 March 2014 he presented himself to police at Tunbridge Wells. He told them that he had arrived in the UK earlier that day in the back of a lorry. He said his date of birth was 15 February 1998, in which case he would have been aged 16. He said that he wanted to claim asylum. He was seen by an assistant immigration officer and a chief immigration officer, both of whom believed that he was substantially over 18: the chief immigration officer described his physical appearance as being that of “an adult in his mid-twenties”. EURODAC inquiries revealed that he had previously claimed asylum in Italy, having arrived on Lampedusa in June 2013.
2. The Appellant was held in immigration detention until 11 September 2014, and again from 7 January to 31 March 2015, pending attempts to return him to Italy under the Dublin III Regulation. The Italian authorities confirmed that their records showed that he had declared to them that his date of birth was 15 February 1988, in which case he would have been 26, and they were accordingly willing to accept his return.
3. However, the Appellant continued to claim that he was a minor, and he was not removed. Formal age assessments were conducted by Newport City Council, who were responsible for his care under the Children Act 1989 if he was indeed a minor, in February and March 2015. In both he was found to be an adult. But a further assessment in September 2015, carried out by two independent social workers instructed by Newport, found his date of birth to be as claimed by him on arrival, i.e. 15 February 1998. That date was accepted by the Council. It has also been accepted by the Home Office as determinative of how he should be treated thenceforward for immigration purposes; but that acceptance is qualified as I explain at para. 6 below.
4. It has for many years been contrary to Home Office policy to detain unaccompanied asylum-seeking children (“UASCs”), subject to some very limited exceptions; and since 28 July 2014 it has been positively unlawful as a result of amendments to Schedule 2 to the Immigration Act 1971 effected by the Immigration Act 2014. Both prior to and following those amendments the Secretary of State has given guidance to immigration officers about how, in that context, to approach claims by asylum-seekers that they are under 18. Chapter 55 of the Enforcement Instructions and Guidance (“the EIG”) is headed “Detention and Temporary Release”. At the time of the Appellant’s detention paragraph 55.9.3.1¹ provided that claims to be aged under 18 should be accepted unless the case satisfied one of four specified criteria. I set out the relevant parts of the paragraph at paras. 18-20 below. For present purposes it is enough to note that criterion C is that:

“their physical appearance/demeanour very strongly suggests that they are **significantly** over 18 years of age and no other credible evidence exists to the contrary [emphasis in original]”.

It was on that criterion that the decision to detain the Appellant was based.

¹ For want of a better term I refer to “paragraph” 55.9.3.1 although in fact it is itself a very lengthy provision containing several unnumbered paragraphs.

5. These proceedings originated on 20 June 2014, in order to procure the Appellant's release from detention on the basis that he was a child, and for damages; it appears, though we have not seen the original grounds, that a general challenge was also made to the lawfulness of paragraph 55.9.3.1. They have had a complicated history, but all that matters for present purposes is that in October 2016 this Court gave the Appellant permission to apply for judicial review on a single ground, namely that what is characterised at para. 3 of his Amended Grounds as a "published policy ... that [the Secretary of State] may treat a person claiming to be a child as an adult if immigration officials think that he or she very strongly looks significantly over 18" is unlawful: the neutral citation for the judgment is [2016] EWCA Civ 1113. The relief sought in the pleading is a declaration that that policy be declared unlawful and that its published embodiment in criterion C under paragraph 55.9.3.1 be quashed.
6. That issue is unrelated to the facts of the Appellant's particular case. Before us both parties sought to rely on different aspects of those facts as illustrating points relevant to the general issue, but we did not find this helpful and it is unnecessary for us to resolve the various points of dispute about how he was treated. I understand that a claim for compensation for unlawful detention may be being pursued in other proceedings, and the Home Office has made it clear that its acceptance of the Appellant's claimed age for some purposes does not involve any concession for the purpose of any such claim (which will not in any event be affected by anything that we decide, for the reason given at para. 11 below).
7. The issue for which permission was given was heard in the Upper Tribunal (Immigration and Asylum Chamber) by UTJ Storey on 24 May 2017. By a judgment promulgated on 1 August 2017 he dismissed the claim. This is an appeal against that decision, by permission of Hickinbottom LJ granted on 6 August 2018.
8. The Appellant was represented before us by Mr Richard Hermer QC and Mr Chris Buttler, and the Secretary of State by Mr James Strachan QC and Ms Deok Joo Rhee QC. The Equality and Human Rights Commission was given permission to intervene, as it did in the Tribunal, and was represented by Mr Martin Chamberlain QC.

THE BACKGROUND LAW

STATUTORY PROVISION

9. I should start by setting out the relevant terms of section 55 of the Borders, Citizenship and Immigration Act 2009, which is the backdrop to the issues in this case. They read:

“(1)The Secretary of State must make arrangements for ensuring that—

(a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and

(b)

(2) The functions referred to in subsection (1) are —

(a) any function of the Secretary of State in relation to immigration, asylum or nationality;

(b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;

(c)-(d) ...

(3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).

(4)-(5) ...

(6) In this section —

“children” means persons who are under the age of 18;

(7)-(8) ...”

10. The power to detain persons pending a removal decision is conferred by paragraph 16 (2) of Schedule 2 to the 1971 Act. Prior to 28 July 2014 the Act contained no special provision as regards minors, but with effect from that date a new sub-paragraph (2A) was inserted by the 2014 Act, as follows:

“But the detention of an unaccompanied child under sub-paragraph (2) is subject to paragraph 18B.”

Paragraph 18B reads (so far as material):

“(1) Where a person detained under paragraph 16 (2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where —

(a) the child is being transferred to or from a short-term holding facility, or

(b) sub-paragraph (3) of paragraph 18 applies.

(2) An unaccompanied child may be detained under paragraph 16 (2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.

(3) The first condition is that —

(a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24 hour period, or

(b) a decision on whether or not to give directions is likely to result in such directions.

(4) The second condition is that the immigration officer under whose authority the child is being detained reasonably believes that

the child will be removed from the short-term holding facility within the relevant 24 hour period in accordance with those directions.

(5)- (6) ...

(7) In this paragraph —

...

“short-term holding facility” has the same meaning as in Part 8 of the Immigration and Asylum Act 1999;

“unaccompanied child” means a person —

(a) who is under the age of 18, and

(b) who is not accompanied (whilst in detention) by his or her parent or another individual who has care of him or her.”

I need not set out the definition of “short-term holding facility”. (Paragraph 18 (3), referred to in paragraph 18B (1), deals with transit arrangements.)

11. In *R (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] UKSC 49, [2013] 1 WLR 2224, the Supreme Court held that the detention of a child who at the time was reasonably believed to be an adult did not constitute a breach of section 55 of the 2009 Act. But that was decided prior to the changes to Schedule 2 of the 1971 Act effected by the 2014 Act; and in *R (Ali) v Secretary of State for the Home Department* [2017] EWCA Civ 138, [2017] 1 WLR 2894², this Court held that paragraph 18B (2) prohibited the detention of a person who was eventually determined by a court or tribunal to be a child irrespective of whether it was reasonably believed at the time of detention that they were an adult. As a result of this decision the lawfulness of the Secretary of State’s policy is irrelevant to any claim which the Appellant may pursue arising out of his detention: that will stand or fall on what his age is eventually held to have been.

MERTON-COMPLIANT ASSESSMENT

12. The question whether a young asylum-seeker³ is under 18 is not important only in the context of detention. In particular, it is determinative of the obligations of local authorities under the Children Act 1989. In that context the courts have given guidance as to the approach to be taken by authorities in assessing the age of migrants claiming to be under 18. The leading case is *R (B) v London Borough of Merton* [2003] EWHC 1689 (Admin), [2003] 4 All ER 280. The essential message can be

² Oddly, in the Weekly Law Reports the claimant’s name has been anonymised as “AA (Sudan)”.

³ I use the adjective “young” in a broad sense to cover not only children but young adults: of course, that begs the question of how you decide which side of the line a particular young person falls, but it is useful to have a non-committal term. (The EIG itself takes the same course.) I will also, for convenience, refer to young people whose age falls for an initial assessment of this kind as “he” because most are indeed male.

sufficiently summarised by reference to (part of) the headnote from the report in the All England Law Reports:

“Except in clear cases, the decision-maker could not determine age solely on the basis of the appearance of the applicant. In general, the decision-maker had to seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information might also be important. If there were reason to doubt the applicant's statement as to his age, the decision-maker would have to make an assessment of his credibility, and ask questions designed to test credibility. ... Medical reports were not likely to be helpful; for someone close to the age of 18 there was no reliable medical or other scientific test to determine whether he was over or under that age.”

I should quote two particular passages from the part of the judgment of Stanley Burnton J where he sets out the background to the issue.

13. First, at paras. 22-24 he says this:

“22. The determination of an applicant's age is rendered difficult by the absence of any reliable anthropometric test: for someone who is close to the age of 18, there is no reliable medical or other scientific test to determine whether he or she is over or under 18. The *Health of Refugee Children—Guidelines for Paediatricians* published in November 1999 by the Royal College of Paediatrics and Child Health states (p 13 (para 5.6)):

'In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15–18, 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* [my emphasis] ... Overall, it is not possible to actually predict the age of an individual from any anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical, family and social history.'

23. Different people living in the same country, with the same culture and diet, mature physically and psychologically at different rates. It is difficult for a layman to determine the age of someone born in this country with any accuracy. A general practitioner is very unlikely to have the knowledge or experience to improve on the accuracy of an intelligent layman. To obtain any reliable medical opinion, one has to go to one of the few paediatricians who have experience in this area. Even they can be of limited help, as in the instant case and is referred to below.

24. The difficulties are compounded when the young person in question is of an ethnicity, culture, education and background that are foreign, and unfamiliar, to the decision-maker.”

14. Secondly, at para. 27, he says:

“Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.”

15. The eliciting of a full history which the *Merton* guidance requires in non-obvious cases necessarily involves an in-depth interview, which is typically carried out by experienced social workers: not only the content of the interviewee’s answers but the manner in which they engage with the interviewer may be important.

THE GUIDANCE

16. There are two Home Office documents giving guidance relevant to this appeal – (a) specific guidance on age assessment contained in an “asylum instruction” (“AI”) called *Assessing Age*, and (b) the relevant parts of the general operational guidance issued to immigration officers, originally known as the Operational Enforcement Manual and now known as the Enforcement Instructions and Guidance, i.e. the EIG already referred to. Since the Appellant’s specific challenge is to a provision appearing in the EIG I will take it first.

THE EIG

17. Section 55.9.3 of the EIG is headed “Unaccompanied Young Persons”. The relevant parts have undergone revision from time to time. In the version which was in force at the time of the Appellant’s detention and of the decision of the Upper Tribunal section 55.9.3 begins:

“As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children (that is, persons under the age of 18) must not be detained other than in very exceptional circumstances. If unaccompanied children are detained, it should be for the shortest possible time, with appropriate care. This may include detention overnight but a person detained as an unaccompanied child must not be held in an immigration removal centre in any circumstances. This includes age dispute cases where the person concerned is being treated as a child.

The very exceptional circumstances in which it might be appropriate to detain unaccompanied children are set out below. In all cases, the decision-making process must be informed by and take account of the duty to have regard to the need to safeguard and promote the welfare

of children under section 55 of the Borders, Citizenship and Immigration Act 2009.”

18. Paragraph 55.9.3.1 – again, in the version before the Upper Tribunal – is headed “Individuals claiming to be under 18”. It begins:

“The guidance in this section must be read in conjunction with the Assessing Age Asylum Instruction (even in non-asylum cases). You may also find it useful to consult Detention Services Order 14/2012 on managing age dispute cases in the detention estate.

The Home Office will accept an individual as under 18 (including those who have previously presented themselves as an adult) unless one or more of the following categories apply (please note this does not apply to individuals previously sentenced by the criminal courts as an adult):

A. There is credible and clear documentary evidence that they are 18 or over.

B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over.

C. Their physical appearance / demeanour very strongly suggests that they are **significantly** over 18 year [*sic*] of age and no other credible evidence exists to the contrary.

D. The individual:

- prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and
- only claimed to be a child **after** a decision had been taken on their asylum claim; and
- only claimed to be a child **after** they had been detained; and
- has not provided credible and clear documentary evidence proving their claimed age; and
- does not have a Merton compliant age assessment stating they are a child; and
- does not have an unchallenged court finding indicating that they are a child; and
- physical appearance / demeanour very strongly suggests that they are 18 years of age or over.

(all seven criteria within category D must apply).’’⁴

(All emphases are in the original.) In short, if a person claims to be a child the default position is to accept that claim. They will only be treated as an adult if one of the specified exceptions apply. As already noted, the challenge in these proceedings is to criterion C.

19. After a short reference to cases where a claim to be under 18 is made by a person already in detention, paragraph 55.9.3.1 continues with bullets specifying actions to be taken if any of criteria A-D apply. I need only note the first, which reads:

“Only if C or D apply: Before a decision is taken, the assessing officer’s countersigning officer (who is at least a CIO/HEO) must be consulted to act as a ‘second pair of eyes’. They must make their own assessment of the individual’s age. If the countersigning officer agrees, the individual should be informed that their claimed age is not accepted.”

(Although that is presented as a consequence of criterion C or D applying, the requirement for a “second pair of eyes” is in fact a precondition for any such decision.)

20. Paragraph 55.9.3.1 then continues with a series of sub-headings. I need only note two. The first, “Individual found to be a child”, spells out the necessary consequence of such a finding, namely that the child “must not be detained or must be released from detention into the care of a local authority and treated as a child”: reference is made to a separate asylum instruction. The second is headed “Section 55 of the Borders, Citizenship and Immigration Act 2009 and the assessing age detention policy”. This begins:

“The assessing age detention policy has in-built protections to ensure it is compliant with the section 55 duty. The threshold that must be met for individuals to enter or remain in detention following a claim to be a child is a high one and is only met if the benefit of doubt afforded to all individuals prior to any assessment of their age is made is then displaced because the individual has met one or more of the categories listed at the start of section 55.9.3.1.”

After a passage which I need not set out, it ends:

“Whilst this policy is set at a high threshold and compliant with the section 55 duty, the Home Office continually monitors the case details of individuals detained under this policy to ensure that, if necessary, the policy could be promptly amended to avoid the detention of children.”

21. Since the decision of the Upper Tribunal in this case paragraph 55.9.3.1 has been revised. Although normally we would be concerned only with the policy as it stood at

⁴ Terminology is rather variable here. The EIG refers to what I (following the parties and the Judge) have called “criteria” as “categories”. The “criteria” referred to in this rubric are, on that basis, sub-criteria.

the time of the decision under appeal, we were invited by counsel to consider in our judgment not only the version considered by the Tribunal but the current version: otherwise our decision would be of historical interest only. I think that in the particular circumstances of this case we should take that course.

22. The parts of the current version equivalent to those quoted at para. 18 above read (with the new material italicised – other emphases are in the original):

“Individuals claiming to be under 18

The guidance in this section must be read in conjunction with the Assessing Age Asylum Instruction (even in non-asylum cases). You may also find it useful to consult Detention Services Order 14/2012 on managing age dispute cases in the detention estate.

The Home Office will accept an individual as under 18 (including those who have previously presented themselves as an adult) unless one or more of the following categories apply (please note this does not apply to individuals previously sentenced by the criminal courts as an adult):

A. There is credible and clear documentary evidence that they are 18 or over.

B. A Merton compliant age assessment by a local authority is available stating that they are 18 years of age or over *which the Home Office accepts after carefully considering the findings alongside any other available sources of information.*

C. *Two Home Office members of staff (one of at least CIO/HEO grade or equivalent) have separately assessed that the individual is an adult because their physical appearance and demeanour very strongly suggests that they are **significantly over 18 years** of age and there is little or no supporting evidence for their claimed age.*

D. The individual:

(all of the following seven criteria must apply).

- prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and
- only claimed to be a child **after** a decision had been taken on their asylum claim, entry to the UK or immigration status; and
- only claimed to be a **child** after they had been detained; and
- has not provided credible and clear documentary evidence proving their claimed age; and
- does not have a Merton compliant age assessment stating they are a child; and

- does not have an unchallenged court finding indicating that they are a child; and
- physical appearance / demeanour very strongly suggests that they are **significantly over 18 years** of age.

As noted above the courts have found that if a person detained as an adult under paragraph 16 (2) of Schedule 2 to the 1971 Act is subsequently either accepted or determined to have been a child, the Home Office will be liable for any period of detention that is not in accordance with the limited circumstances applicable to the detention of such a child. This is irrespective of what was believed when the person was detained even if there was a reasonable belief that they were not a child. It is also very important to remember that liability for detention rests with the Home Office. Therefore the threshold for individuals to enter, or remain in detention following a claim to be a child is high and caution must be exercised in favour of avoiding the risk of detaining a person who is later determined to be a child.”

It will be noted that the requirement for a second pair of eyes originally contained in a separate part of the paragraph has now been incorporated into criterion C itself. The final paragraph is evidently a reference to *Ali* (see para. 11 above).

23. There are no material changes to the passages quoted or referred to at para. 20 above.

ASSESSING AGE

24. Again, *Assessing Age* has been revised since the decision of the Tribunal, but I believe we should consider both versions.
25. In the version current at the time of the Tribunal’s decision paragraph 2.1, which is headed “Initial Age Assessment”, reads (so far as material – all emphases are in the original):

“1. The applicant should be treated as an adult if their physical appearance/demeanour **very strongly suggests that they are significantly over 18 years of age.**

Careful consideration must be given to assessing whether an applicant falls into this category as they would be considered under adult processes, and could be liable for detention.

Before a decision is taken to assess an applicant as significantly over 18, the assessing officer’s countersigning officer (who is at least a Chief Immigration Officer (CIO)/Higher Executive Officer (HEO)) must be consulted to act as a ‘second pair of eyes’. They must make their own assessment of the applicant’s age. If the countersigning officer also agrees to assess the applicant as significantly over 18, the applicant should be informed that their claimed age is not accepted and that their asylum claim will be processed under adult procedures. Form IS.97M should be completed, served, **and signed by the countersigning officer (CIO/HEO grade or above).**

In general, the rest of this instruction does not apply to these applicants, since they fall to be considered under adult processes. Case owners should nonetheless review decisions to treat applicants as adults, if they receive relevant new evidence.

2. All other applicants should be afforded the benefit of the doubt and treated as children, in accordance with the 'Processing an asylum application from a child AI, until a careful assessment of their age has been completed. This policy is designed to safeguard the welfare of children. It does not indicate final acceptance of the applicant's claimed age, which will be considered in the round when all relevant evidence has been considered, including the view of the local authority to whom unaccompanied children, or applicants who we are giving the benefit of the doubt and temporarily treating as unaccompanied children, should be referred.

..."

Paragraph 2.2 refers in some detail to the duty under section 55 of the 2009 Act but I need not set it out.

26. The current version of paragraph 2.1 was first issued in February 2018. We were told by Mr Strachan that it was produced after consultation with the National Asylum Stakeholders Forum, and it is clear that a conscientious effort had been made to give much fuller guidance on the age assessment process, particularly in cases potentially caught by criterion C. It begins:

"Initial age assessment

This page tells you, the assessing officer, about the initial procedure you must follow when assessing the age of an asylum seeker or migrant who claims to be a child or who claims to be an adult and their claimed age is doubted by the Home Office.

All asylum seekers and migrants who claim to be children must be asked for documentary evidence to help establish their age when they are first encountered. This is important for:

- establishing their identity
- ensuring that those who are children are provided with appropriate services
- ensuring that adults are not provided with services for which they are not eligible and suitable
- ensuring that children are not unlawfully detained

As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children must not be detained other than in the very exceptional circumstances specified in paragraph 18B of schedule 2 to the Immigration Act 1971 (see Detention – general guidance). Failure to adhere to the legal

powers and policy on detaining children can have very significant consequences, for example:

- if a claimant is detained, but a court later finds, or the Home Office later accepts that the claimant who the Home Office has treated as an adult was a child, even if it reasonably believed that the individual was an adult, any period of detention whilst that person was in fact a child which was not in line with the restrictions in paragraph 18B of schedule 2 to the Immigration Act 1971, will be unlawful and may well result in the Home Office being liable to pay damages (Court of Appeal in *Ali, R (on the application of) v The Secretary of State for the Home Department & Anor* [2017] EWCA Civ 138).
- such a period of detention can have a significant and negative impact on a child's mental or physical health and development
- detention can be extremely frightening for a child, with their perception of what they might experience potentially informed by previous negative experiences of detention suffered by themselves or by people they know, in their country of origin or during their journey to the UK
- if they believe themselves to be a child, the effect of not being believed by the Home Office and, consequently, being detained, can be very stressful and demoralising
- the serious safeguarding risks of detaining unaccompanied children alongside adults

Home Office policy therefore is to apply the age assessment process in such a way as to guard against the detention of children generally, including accidental detention of someone who is believed to be an adult but subsequently found to be a child.

Age assessments cannot always provide the same degree of confidence about treating an individual as an adult or a child as can be provided by reliable documents. To allow for this, the principle of "the benefit of the doubt" is applied. This means that where there is still uncertainty about whether the individual is an adult or a child, the individual should be treated as a child and referred to a local authority, with a request for a Merton compliant age assessment. This would include cases where their physical appearance and demeanour does not very strongly suggest that they are significantly over 18 years of age.

The initial age assessment stage for cases where the claimed age is not accepted is intended to lead to a decision on how an individual should be treated and is divided into 3 possible outcomes with a number of reasons for arriving at them. Further guidance on how a decision should be made as to which group an individual should fall, is provided later in this section) ..."

27. The three possible “outcomes” are then described, but I need not set them out here. They are followed by a paragraph which reads:

“Further to the above brief outcome descriptions, if an asylum seeker or migrants [*sic*] claimed age is doubted and there is no reliable evidence to support that claim, you must conduct an initial age assessment in accordance with the more detailed guidance in the remainder of the Initial age assessment section.”

28. The remainder of the “Initial age assessment section” begins with a short passage dealing with the untypical case where there is already an age assessment carried out by a local authority. It then turns to the question whether the young person’s “physical appearance and demeanour very strongly suggests that they are significantly over 18” – i.e. whether criterion C is satisfied. It reads:

“You must treat the claimant as an adult if their physical appearance and demeanour **very strongly suggests that they are significantly over 18 years of age** [emphasis in original]. You must give careful consideration when assessing whether a claimant falls into this category. Where they do, they will be considered under the adult processes and could, therefore, become liable for detention. Refer to the introduction of the Initial age assessment section for guidance on the significantly adverse consequences of unlawfully detaining children, on both the child themselves and the Home Office.

If your assessment determines that the claimant’s physical appearance and demeanour very strongly suggests that they are significantly over 18, you must refer the case to another officer to act as a ‘second pair of eyes’. The second officer must be at least either a:

- chief immigration officer (CIO)
- higher executive officer (HEO)
- higher officer (HO).

The second officer must make their own independent assessment of the claimant’s age. Their assessment must be:

- based on at least the same level of information as the assessing officer
- undertaken in the presence of the claimant – for instance, remote assessment based on a photograph of the claimant would not be sufficient as photographs are static, are not 3 dimensional and different lighting, exposure, camera quality and production methods can affect the apparent age displayed
- undertaken after the second officer has interacted with the claimant or after the claimant’s interaction with other Home Office members of staff or other people around them has been observed – an instantaneous visual assessment of the claimant is not sufficient.

The age a person must exceed, to be regarded as significantly over 18, is not specified within this guidance document. This is consistent with the Upper Tier Tribunal's judgment in *BF (Eritrea) v Secretary of State for the Home Department* [2017] JR/8610/2014 which found that:

‘...since the objective of the policy is to identify by way of initial ‘screening’ assessment cases that are outside the category of ‘borderline cases’ it is not apparent that there would be any value in greater precision than such an assessment can deliver’”.

There follow very elaborate passages giving guidance on “Assessing physical appearance” and “Assessing demeanour” which have no counterpart in the earlier version. I reproduce them as an appendix to this judgment. The paragraph ends with a passage headed “The decision”, which reads:

“As shown in *Assessing physical appearance* and *Assessing demeanour*, although levels of maturity can be assessed, maturity is not an accurate reflection of chronological age and maturity itself can be variable. You must also keep in mind that young people may deliberately attempt to present as younger or older than their age.

The policy is specifically designed to allow a large margin of error in favour of the claimant's claim to be a child. It achieves this by requiring Home Office staff to only treat them as an adult on the basis of their physical appearance and demeanour, where they conclude that these indicators very strongly suggest that they are significantly over 18 years of age. This takes account of the challenges in assessing a claimant's age in such circumstances.

Although each claimant's circumstances are unique, when making decisions on age based on the claimant's physical appearance and demeanour, you should utilise your experience of working with asylum seeking children and young people, particularly those:

- with the same ethnicity, nationality and gender
- of a similar age and background
- whose ages have been accepted by the Home Office

If the claimant disagrees with the Home Office determination of adult status, they will be notified in writing within the IS.97M letter that they can approach their local authority for an age assessment as a possible child in need. You must review decisions to treat claimants as adults if you subsequently receive relevant new evidence.”

THE PARTIES' CASES IN THE UPPER TRIBUNAL

29. It was the Appellant's case in the Upper Tribunal, supported by the Commission, that criterion C was unlawful because an assessment of age based on physical appearance/demeanour alone was inherently unreliable and was liable to lead to

children being wrongly assessed as adults and accordingly unlawfully detained. The materials relied on in support of that case can be summarised as follows.

30. First, a witness statement from Kamena Dorling of the Coram Children’s Legal Project, who was Co-Chair of the Refugee Children’s Consortium, explained that it was her view and that of the Consortium generally that the assessment of age on the basis of physical appearance – as permitted both by paragraph 55.9.3.1 of the EIG and by paragraph 2.1 of *Age Assessment* – was insufficient. She refers to and summarises opinions to the same effect expressed by the UN Committee on the Rights of the Child, the UN High Commissioner for Refugees, UNICEF and the European Asylum Support Office, some of which also say that age assessment should be performed only by trained professionals.
31. Secondly, Helen Johnson, the Operations Manager for the Children’s Section of the Refugee Council, gave a witness statement expressing the view that “physical appearance as criteria is far too unreliable to rely on as the basis to determine whether an individual claiming to be a child is a child”. She exhibited a report by the Refugee Council entitled *Not a Minor Offence*, dated May 2012, which made this point among others. The report described some individual cases of children wrongly assessed to have been adults. She also, in that statement and two later statements, identified the proportion of “age disputed young people” referred to the Council who had been assessed by immigration officials to be adults but who were subsequently assessed to be children: I shall have to come back to this evidence in due course.
32. Thirdly, in 1999 the Royal College of Paediatrics and Child Health published a document called *The Health of Refugee Children – Guidelines for Paediatricians*: it will be recalled that this was relied on by Stanley Burnton J in *Merton*. Section 5.6 of this document gives careful guidance on the assessment of age. It observes:

“In practice, age determination is extremely difficult to do with certainty, and no single approach to this is [*sic*] can be relied on. Moreover, for young people aged 15-18, 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.”

It proceeds to explain in considerable detail the difficulties in age assessment, including the absence of any reliable anthropometric measure.
33. Fourthly, in a letter to the Appellant’s solicitors dated 7 July 2014 the Registrar of the Royal College of Paediatricians, Dr Ian Maconochie, confirmed that it remained the College’s view that, as stated in the 1999 report, “assessment of age should only be made in the context of a holistic assessment of the child”. He said that in its view “the guidance to immigration staff that advises visual assessment of age is unsafe and unhelpful”. He observed that in a number of well-documented cases the incorrect assessment of the age of a young person by immigration staff following the existing guidance had led to the unlawful detention of children.
34. Fifthly, on 4 July 2014 the Principal Policy Adviser (Immigration and Asylum) to the Children’s Commissioner, Adrian Matthews, wrote to the Appellant’s solicitors commenting on the guidance given to immigration officers. He did not in fact

comment on paragraph 55.9.3.1 of the EIG but on paragraph 2.1 of *Assessing Age*; but, as we have seen, that is to substantially the same effect. He said that the Office of the Children’s Commissioner “has been very concerned that the policy has [led] and continues to lead to serious breaches of children’s rights”. He annexes documents making various statistical points, but we were not addressed about these.

35. The Secretary of State’s initial evidence as regards the general issues was by a witness statement from Michael Gallagher, a Policy Adviser in the Asylum and Family Policy team in the Home Office. He described the background to the guidance in paragraph 55.9.3.1 of the EIG and argued that it was in appropriate terms. He took issue with the statistics provided by Ms Johnson, and provided various statistics of his own.
36. Mr Gallagher’s evidence prompted a further round of witness statements, two from Ms Johnson and another from him, addressing statistical issues. I will not attempt to summarise them at this stage.

THE DECISION OF THE UPPER TRIBUNAL

37. After dealing with various introductory matters, the Judge at para. 18 of his judgment noted that “a challenge to policy can only succeed if a high threshold requirement is met”, and at para. 19 he expresses his overall conclusion that that threshold had not been met. The structure of the judgment thereafter is that he addresses in turn a series of particular aspects of the case his conclusions on which feed into that decision. I can deal with these quite briefly at this stage.
38. At paras. 20-23 he makes the point that criterion C does not depend on a mere assessment of physical appearance based on visual observation but that it covers also demeanour and the absence of any contrary evidence.
39. At paras. 24-27 he says that criterion C cannot be considered in isolation. He observes that under paragraph 55.9.3.1 read as a whole:
 - (a) there is a presumption that a person claiming to be a child should be treated as such;
 - (b) criteria A-D are not intended as means of resolving doubt but to identify cases where there is no room for doubt; and
 - (c) the guidance is designed for the circumstances of an *initial* assessment, where there has, typically, been no opportunity for a *Merton*-compliant assessment.

He also observes, at para. 27, that “the policy is plainly intended to operate in the context of a screening interview or examination one of whose purposes is to undertake an *initial* age-assessment”. As I understand it, he regarded that as significant because the immigration official would have had at least some basis on which to assess demeanour.

40. At paras. 28-33 he observes that the opening paragraph of paragraph 55.9.3.1 expressly stipulates that it should be read in conjunction with *Assessing Age*, and he sets out some of its relevant provisions. He concludes, at para. 33:

“These interrelated Instructions underline the fact that criterion C is not intended to be applied in a free-standing manner, but in the

context of an initial examination which seeks to establish all relevant evidence available as regards an applicant's age. In making a decision under the policy the officials concerned also have to adhere to a number of safeguards."

41. At paras. 34-40 he refers to the statements in various authorities about the unreliability of physical appearance/demeanour as a basis for age assessment, though he notes that it has never been said to be irrelevant and is indeed a component in a *Merton*-compliant assessment. He notes at para. 37 that:

"Both [Mr Buttler and Mr Chamberlain] during the hearing ... accepted that in "'obvious' cases, e.g. someone over 40 claiming s/he was a minor, the criterion of physical appearance would suffice to determine he was not. Moreover, in an early skeleton argument dated 27 February 2015 Mr Buttler said that if the policy had stated (as it apparently did in an earlier incarnation) that it applied to persons over 30, his rationality challenge could not prosper."

In a footnote he quoted the relevant passage from Mr Buttler's earlier skeleton, as follows:

"The [applicant] accepts that the policy as it used to be applied (viz. does the person look to be in their 30s or older?) would ensure that the risk of children being treated as adults was acceptably low. However, allowing the Respondent to detain persons on the basis that they look 25 carries an unacceptable risk of child detention."

The statement that an "earlier incarnation" of the policy suggested a test of whether the person looked over 30 derives from a reference in MacDonald *Immigration Law and Practice*; but no-one has been able to identify the ultimate source document.

42. At paras. 41-44 he considers the evidence about what guidance is given to immigration officers and what training they receive in age assessment. He refers to several passages in the then current version of *Age Assessment*, including but going beyond what I have quoted above; but they amount only to warnings about the difficulty of the exercise and the need for a combination of techniques of the *Merton* kind. As to actual training going beyond the provision of written guidance, he identifies such evidence as there was, saying (at para. 42):

"Michael Gallagher ... in his witness statement of 23 January 2017 avers that 'Home Office staff receive training in dealing with children, and on the processes to be followed when assessing age'. In her ... witness statement [in response] Helen Johnson avows that to the best of her knowledge such training does not include any treatment on how to assess whether a person 'very strongly appears significantly over 18'."

He concludes, at para. 44:

"Considering the evidence in the round, I conclude that it would be wrong to suggest that case owners lack instructions on the subject of age assessment, but Mr Buttler is right they lack instructions on how

to analyse the physical appearance and demeanour criterion in any detail. That is a failure but I do not consider it is one that renders the policy unlawful and the challenge before me is confined to the policy rather than its application.”

43. At para. 45 he considers whether “the policy could have made mention of a specific age, e.g. 23 or 25 (to reflect the 5- to 7-year margin of error identified by medical bodies)”. But he concludes:

“However, since the objective of the policy is to identify by way of an initial ‘screening’ assessment cases that are outside the category of ‘borderline cases’ it is not apparent that there would be any value in greater precision than such an assessment can deliver.”

It will be recalled that that passage is directly quoted in the current version of *Assessing Age*. The Royal College of Paediatricians guidance is no doubt the source of the Judge’s reference to a five-year margin of error: see para. 32 above. I have not been able to identify from the papers before us the source for his reference to a seven-year margin.

44. At paras. 46-53 he addresses a submission by the Appellant that the amendment by the 2014 Act of Schedule 2 of the 1971 Act (see paras. 9-10 above) of themselves rendered the policy unlawful. At para. 47 he rejects that submission principally on the basis that the issue in *Ali* was different: the question was not whether the Secretary of State’s guidance on determining age for the purpose of detention was lawful, but whether there was strict liability if a child was in fact detained. However, at paras. 47-50 he emphasises the fact that the assessments with which paragraph 55.9.3.1 are concerned are *initial* assessments, which have to be made very shortly after an asylum-seeker is first encountered in order to determine whether immigration detention is appropriate or he should be referred to the local authority as (at least potentially) a child.
45. At paras. 54-60 he addresses a submission by Mr Buttler that criterion C lacked a legitimate policy rationale, and Mr Strachan’s counter-submission that “the consequences of giving too much leeway are as serious as giving too little”. His conclusion, at para. 57, was:

“Weighing up these competing arguments, it seems to me that whilst criticisms can be made and will doubtless continue to be made of the respondent’s detention policy set out in Chapter 55.9.3.1, it cannot be said either to lack a sufficient policy rationale or to place the respondent in conflict with the legislation.”

He reinforces that conclusion by rejecting a submission advanced by Mr Buttler based on a line of authorities beginning with *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112.

46. At paras. 61-63 he considers and rejects a submission that the policy under challenge was “inherently unfair”.

47. At paras. 64-77 he addresses the disputes between the parties about the effect of the statistical evidence adduced by each. He refers to various difficulties with the evidence and concludes, at para. 77:

“Given the evidential and methodological difficulties identified in both the respondent’s and applicant’s datasets, I do not consider I have a sufficient evidential basis on which to draw any definite conclusions as regards whether there is a significant risk of error, let alone a risk that is systematic.”

48. At paras. 78-82 he examines, but finds unhelpful, the provisions of EU asylum law and Strasbourg authority relating to the detention of children.

49. At paras. 83-93 he sets out various particulars of the Respondent’s treatment relied on by Mr Buttler and Mr Chamberlain but finds them unhelpful, observing only (at para. 93) that they “might be thought to afford a vivid illustration of how ‘inexact’ a science such assessment continues to be”.

50. The Judge states his conclusion, with some other observations, at paras. 94-95, which read:

“94. For the reasons set out in the course of identifying and analysing the principal issues addressed by the parties, I conclude that the applicant’s application for judicial review, based exclusively on a challenge to Chapter 55.9.3.1. must fail.

95. Whilst I have concluded that the challenge to the lawfulness of Chapter 55 fails, I have observed in the course of my judgment that failure to monitor a policy can constitute unlawfulness: see the remarks of Baroness Hale in *R (European Roma Rights) v Prague Immigration Officer* [2005] 2 AC 1 62 [91]). I have also observed that whilst the respondent has taken some steps to monitor this policy, she had done so belatedly and largely as a result of directions from the Court of Appeal and this Tribunal. Further, the existing data she has produced regarding the operation of this policy is deficient in more than one respect. It seems to me, therefore, that the respondent should give consideration to putting in place a centralised monitoring mechanism from which it can be clearly seen what are the numbers of persons claiming to be minors assessed as being significantly older than 18 who are detained for that reason but later conclusively established to have been minors at the time of detention.”

THE APPEAL

INTRODUCTION

51. The Appellant pleads three specific grounds of appeal, which go to particular aspects of the Judge’s reasoning. These do not, however, seem to me the best framework for addressing his challenge to the Secretary of State’s policy. I propose therefore to start by examining the issues without reference to the pleaded grounds; but I will come back to them at the end.

THE LAWFULNESS OF CRITERION C

52. I start by identifying the problem which the relevant Home Office policy is intended to address. The law requires a wholly different treatment of young asylum-seekers depending on whether they have passed their eighteenth birthday. This is of course in itself an entirely artificial and inflexible dividing-line, bearing little relationship to the human reality, but it is built into the structure of not only domestic but international law in this area and it has to be applied as best as can be. We are directly concerned only with the Secretary of State's powers of detention; but, as already noted, a number of other rights and obligations also depend on the same distinction – most obviously those arising under the Children Act but also the possibility of return under the Dublin Regulation. The problem is that in the case of many young asylum-seekers there is no objective way of establishing their age. They can produce no documentary evidence of their date of birth; they may genuinely not know it; and even if they do they have an obvious incentive to misrepresent it. There are no medical or scientific means for establishing the age of a young person with any precision. In such cases the necessary determination of whether he is over or under 18 will have to be made on the basis of a subjective assessment. (I should say that in in this context “subjective” is not dyslogistic: it means only that the person making the assessment has to make a judgement without the benefit of documentary or other objective evidence.)
53. The law now proceeds on the basis that the most reliable means of assessing the age of a young person in circumstances where no objective evidence is available is by a *Merton*-compliant assessment⁵. However, it is not practicable for an immigration officer to procure a *Merton*-compliant assessment in the context of an initial decision whether to detain a young asylum-seeker. Such assessments take time to set up, but a decision is needed forthwith: although it may be lawful to detain a child in a short-term holding facility, that cannot be for more than 24 hours (see paragraph 18B of Schedule 2 to the 1971 Act – para. 9 above). At para. 49 of his judgment the Judge said:

“Here the context concerns an *initial* age assessment, typically made on the same day as an applicant applies for or expresses an intention to apply for asylum. Objective assessment in that context has practical limits. It is accepted on all sides that such assessment cannot be made in light of a *Merton*-compliant age assessment unless (by happenstance) one is already available. As was noted by Lord Toulson in *AA (Afghanistan)* [[2013] SC 49, [2013] 1 WLR 2224] at [34] - a proposition unaffected in my judgement by the amendments to Schedule 2 of the Immigration Act 1971 - one cannot ‘make a *Merton* compliant age assessment a precondition of a valid decision under para 55.9.3.1 ...’”.

I agree.

54. Any such initial assessment will be bound in the typical case to depend primarily on what is described in criterion C as “physical appearance/demeanour”, assessed by

⁵ *Merton*-compliant assessments are sometimes described as “objective”, but it is more accurate (at least in the typical case where the interview does not provide any objectively verifiable information) to regard them as providing a sophisticated and disciplined form of subjective assessment.

immigration officers on the basis of contact which is far less substantial than in a *Merton*-compliant assessment. It will be correspondingly more unreliable. The material before the Judge makes clear that the margin of error in any such assessment is very substantial. He quotes a figure of five to seven years. Purely for convenience – and because, as noted, I have not been able to identify the source of the seven-year estimate – I will hereafter refer to a margin of five years; but neither figure can be more than an estimate, and I do not mean to pre-empt any decision that may have to be taken later as to how the size of the margin is best expressed.

55. One solution to the problem would in principle be simply to treat as a child everyone who claims to be one, however implausible such a claim might seem, at least until it is possible to conduct a *Merton*-compliant interview. But neither Mr Hermer nor Mr Chamberlain argued for such a solution. Both accepted, as had also been accepted before the Tribunal (see para. 41 above), that there would be cases where it is so obvious, even on an initial assessment of appearance and demeanour, that a person was over 18 that to treat them as a child would be unjustified. That is of course also in line with the observations of Stanley Burnton J in *Merton*: see para. 14 above. It must be borne in mind that to treat an adult migrant as a child is itself not a problem-free course. It is a considerable burden on local authorities to have to find appropriate accommodation for UASCs, and that resource should not be wasted on those who obviously do not qualify for it. It would bring the system into disrepute with local authorities and their staff and others involved (such as those providing foster care) if people who were obviously adults were accorded treatment and benefits intended for children. It is also of course easier for migrants with no genuine claim for asylum to abscond from a foster home or supported independent accommodation than from immigration detention.
56. In my view it necessarily follows that it cannot be illegitimate for the Secretary of State to have a policy which requires immigration officers to make a detention decision on the basis of an initial assessment of the age of young asylum-seekers in circumstances where a *Merton*-compliant assessment is not available and there is no objective evidence of age, even though such an assessment may of necessity be confined to an assessment of appearance and demeanour.⁶ The extreme argument that decisions based on such assessments are necessarily unlawful cannot be sustained. This does not mean that I attach no credence to the many expressions of expert opinion deprecating such assessments and emphasising their unreliability but only that they cannot be determinative in this particular context. The important point is that, as UTJ Storey emphasises, we are concerned with an initial assessment only. We were not addressed in any detail about the options open to a young person who is assessed to be an adult and detained accordingly but who continues to claim to be a child; but the current version of *Assessing Age* says that in such a case he will be notified in writing that he is entitled to apply to the local authority to be treated as a child in need and for an age assessment (which would have to be *Merton*-compliant) – see the final paragraph of the passage quoted at para. 28 above. On that basis any error in the initial assessment should be capable of being corrected – and, I would hope, with reasonable speed.

⁶ Of course there will be cases where there is other material available which may assist in the assessment even if it is not determinative; and the policy clearly envisages that this will be taken into account. But we are concerned on this appeal with the “pure” case where there is nothing except physical appearance and demeanour.

57. That, however, is only half the story. If it is legitimate for the Secretary of State to make an initial decision based on appearance and demeanour only, it is incumbent on him to ensure so far as possible that such decisions take fully into account the wide margin of error which such decisions will necessarily involve, so that only those young people whose claims to be under 18 are obviously false are detained: in other words, anyone claiming to be a child must be given the benefit of the doubt. That is not only because the detention of a child is now positively unlawful, and any policy must seek so far as possible to avoid the Secretary of State acting unlawfully. It is also clear that it is potentially very damaging for children to be detained as adults, for reasons which are fully developed in the expert evidence but which I need not set out here because they are uncontroversial. All this is accepted by the Secretary of State, who avowedly embraces what he calls “the benefit of the doubt principle”. The essential question raised by this appeal is whether his policy – as embodied in the EIG and *Assessing Age* – properly gives effect to that principle.
58. It is a common sense proposition that the terms of a written policy, and associated guidance, may be ineffective if those who have to implement it are not given appropriate training. However, there is in the Amended Grounds for Judicial Review no challenge to the way in which immigration officers are trained in age assessment: the Appellant’s pleaded case focuses squarely on the terms of the written guidance – and more particularly on paragraph 55.9.3.1 of the EIG. Presumably for that reason, the subject is barely addressed in the evidence. Nevertheless, as appears from para. 42 above, the adequacy of training was the subject of some argument before the Judge, and he expressed the conclusion which I have quoted that there was “a failure” in this regard, albeit that it did not render the policy unlawful. That conclusion is not the subject of any of the grounds of appeal. In those circumstances I need say no more about it. I should, however, observe that Mr Strachan confirmed in his oral submissions that immigration officials receive no specific training in age assessment beyond having access to the written guidance in *Assessing Age*; and this is a matter which the Secretary of State may wish to consider further.
59. This appeal is therefore concerned only with the lawfulness of the Secretary of State’s policy as expressed in the written materials – i.e. paragraph 55.9.3.1 of the EIG and the relevant parts of *Assessing Age* – both as they stood at the time that the proceedings were issued and in their current form. It may be debatable whether the passages in question are more appropriately characterised as “guidance” than as “policy”, but nothing turns on the distinction, since the terms of ministerial guidance are of course judicially reviewable, and I will use either or both terms as seems most apt in the particular context.
60. There was initially an apparent dispute before us as to the criterion to be applied in deciding whether a policy of the kind with which we are concerned is unlawful. Mr Hermer in his skeleton argument relied primarily on the line of cases reviewed in paras. 15-18 of the judgment of Laws LJ in *R (S) v Director of Legal Aid Casework* [2016] EWCA Civ 464, [2016] 1 WLR 4733, but he also referred to the decision of the Supreme Court in *R (UNISON) v Lord Chancellor* [2017] UKSC 51, [2017] 3 WLR 409, and it was on the latter that he principally relied in his oral submissions. That case concerned a challenge to the lawfulness of a Fees Order made by the Lord Chancellor. At para. 87 of his judgment (p. 438B) Lord Reed (adopting the approach of Dyson LJ in *R (Hillingdon London Borough Council) v Lord Chancellor* [2008] EWHC 2683 (Admin)) characterised the essential question as being whether the terms of the Order created “a real risk” of at least some potential litigants being denied

access to justice. Mr Chamberlain in his skeleton argument contended that the most authoritative guidance was now to be found in the recent decision of the Supreme Court in *Re an Application by Northern Ireland Human Rights Commission for Judicial Review* [2018] UKSC 27, [2019] 1 All ER 173. Lord Mance, with whose judgment the majority agreed, said, at para. 82:

“... [I]t is not enough to show that, as a matter of practice or when applied in the light of administrative guidance, legislation has proved prone to give rise to unjustified infringement of a Convention right. The relevant question is whether the legislation itself is capable of being operated in a manner which is compatible with that right, or, putting the same point the other way around, whether it is bound in a legally significant number of cases to lead to unjustified infringement of the right.”

Having referred to a dictum of Aikens LJ that suggested that it was necessary to show incompatibility “in all (or nearly all) cases”, he continued:

“I myself see no basis for so high a numerical test. It cannot be necessary to establish incompatibility to show that a law or rule will operate incompatibly in all or most cases. It must be sufficient that it will inevitably operate incompatibly in a legally significant number of cases.”

Mr Hermer in his oral submissions contended that that formulation was essentially to the same effect as the test in *UNISON*: the key question was whether the Secretary of State’s policy created a real risk that at least some children would be (unlawfully) detained.

61. Mr Hermer was referred by the Court to *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481, [2005] 1 WLR 2219, which is the start of the line of authorities reviewed in the *Director of Legal Aid Casework* case. It concerned a challenge to the fairness of a pilot system of fast-track asylum adjudication (not incorporated in legislation). Sedley LJ, giving the judgment of this Court, said, at para. 7, in a well-known passage:

“We accept that no system can be risk-free. But the risk of unfairness must be reduced to an acceptable minimum. Potential unfairness is susceptible to one of two forms of control which the law provides. One is access, retrospectively, to judicial review if due process has been violated. The other, of which this case is put forward as an example, is appropriate relief, following judicial intervention to obviate in advance a proven risk of injustice which goes beyond aberrant interviews or decisions and inheres in the system itself.”

Mr Hermer submitted that that approach was consistent with that of the two Supreme Court authorities.

62. In his skeleton argument Mr Strachan did not accept that the two Supreme Court authorities relied on by Mr Hermer and Mr Chamberlain were directly applicable to the present case, because they were concerned with legislation rather than, as here, with ministerial policy/guidance. He contended that the correct principles were to be

found in Laws LJ's judgment in the *Director of Legal Aid Casework* case. However the point need not be pursued because in his oral submissions he acknowledged that there was no substantive difference in the various approaches (save possibly that Lord Mance's use, in the second of the passages quoted, of the word "inevitably" might be thought to set a somewhat more stringent test than the earlier authorities).

63. I do not think that it is necessary or useful to analyse the various cases referred to. In my view the correct approach in the circumstances of the present case is, straightforwardly, that the policy/guidance contained in paragraph 55.3.9.1 of the EIG and the relevant parts of *Assessing Age* will be unlawful, if but only if, the way that they are framed creates a real risk of a more than minimal number of children being detained. I should emphasise, however, that the policy should not be held to be unlawful only because there are liable, as in any system which necessarily depends on the exercise of subjective judgment, to be particular "aberrant" decisions – that is, individual mistakes or misjudgments made in the pursuit of a proper policy. The issue is whether the terms of the policy themselves create a risk which could be avoided if they were better formulated.
64. I start with the documents as they were at the time of the Tribunal's decision. I accept that these do contain safeguards aimed at ensuring that a young person claiming to be a child is only treated as an adult where the claim is obviously false. The most obvious such safeguard is the language of criterion C itself (repeated in *Assessing Age* with additional use of bold and underlining), which requires that the young person's appearance and demeanour "very strongly" suggest that they are "**significantly** over 18". That gives some effect to the "benefit of the doubt" principle, though the insistence on a second pair of eyes is also an important safeguard.
65. I have, however, come to the conclusion that paragraph 55.9.3.1 of the EIG and *Assessing Age* do fall short of what is required in one crucial respect, namely that they contain no recognition of just how unreliable the exercise of assessing age on the basis of appearance and demeanour is and, in consequence, how wide a margin of error is required. In truth, all the work is done by the single word "significantly". But that is a word which can be interpreted in many different ways, and its imprecision is not corrected simply by printing it in bold or underlining it. Suppose an immigration officer believes that the appearance and demeanour of a young person whom he or she is assessing very strongly suggests that they are at least 20. It would be perfectly reasonable for them, in the absence of any guidance, to regard that as "significantly" over 18; yet the evidence shows that the margin of error is at least five years and maybe more – that is, an 18-year old young person may "look" as old as 23, or perhaps 25. In my view the need to restrict "criterion C" to obvious cases, or to give the young person the benefit of any real doubt, requires that the guidance should indeed attempt to quantify the extent of the margin of error that must be allowed. Only if the officer is made aware of the extent of the unreliability of the exercise, by reference to specific ages, can he or she make an informed decision about whether a claim to be under 18 is indeed obviously false. There is nothing in either paragraph 55.3.9.1 or in *Assessing Age* which gives guidance of that kind.
66. UTJ Storey addressed essentially this point at para. 45 of his judgment – see para. 43 above – and, as there set out, he held that mentioning "a specific age, e.g. 23 or 25 (to reflect the 5- to 7-year margin of error identified by medical bodies)" would add no real value. That was because (as I read him) an initial assessment that a young person is at least 23 (or 25) can be no more reliable than an assessment that he is under 18. I

respectfully disagree with that reasoning. No doubt it is true that it is no easier to decide whether a young person is over, say, 23 than whether they are over 18. But the purpose in the present context of asking whether they are over 23 is to ensure that it is sufficiently obvious they are over 18. That is a thought-experiment which is commonly regarded as having value, as where shops adopt a “challenge 25” policy to young persons trying to buy alcohol.

67. This reasoning does not dispute the Secretary of State’s claim, in general terms, that the structure of paragraph 55.9.3.1 gives young asylum-seekers the benefit of the doubt in as much as that in non-obvious cases they will be treated as children. Rather, the criticism is that the guidance fails to convey just how doubtful an assessment based on physical appearance and demeanour alone is, and the width of the margin of error that is consequently required.
68. In my view this defect in the policy/guidance gave rise to a real risk of children being (unlawfully) detained. That conclusion would in my view be justified even without evidence of specific cases where that had occurred: in the absence of guidance as to the width of the margin of error there is inevitably a real risk that immigration officers will place too much trust in their own assessment that a particular young person is “significantly” over 18.
69. However, as I have noted, the Appellant did in fact seek to support his case before the Judge by adducing statistical evidence of the frequency with which immigration officials have on an initial assessment “wrongly”⁷ assessed children as being over 18; and the Secretary of State filed evidence in response. The effect of the evidence was helpfully summarised by Mr Hermer and Mr Buttler in tabular form in their skeleton argument. It covers data (collected at various periods falling between 2013 and 2016) relating to six groups of young people who were initially assessed as adults but some of whom were subsequently the subject of *Merton*-compliant assessments. In each group all or most of those who were *Merton*-assessed were found to be children: that is, in the great majority of cases the initial assessment was “wrong”. That cannot be taken as indicating that the same proportions would have been found if the whole group had been *Merton*-assessed – indeed the probability is that the cases so assessed were those where there was most likely to have been an error. Nevertheless the total of “wrong” assessments was 63 out of a total of 276 – or 23%. UTJ Storey, as we have seen (para. 47 above), declined to rely on those figures because of the “evidential and methodological difficulties” to which he referred. Mr Hermer sought to persuade us that he was wrong to do so and that the difficulties were not fundamental. I agree with him to the extent that I do not think the figures can be wholly ignored. The fact, which in itself is unquestioned, that there have been numerous cases where an initial assessment that a young person is an adult has subsequently been found to be “wrong” does lend weight to the probability that some immigration officers have failed to appreciate the width of the margin of error that needs to be applied. But I am wary of putting any more weight on them than that. Since I would, as I have said, have reached my conclusion without reference to them in any event I need not pursue the question.

⁷

I use inverted commas to acknowledge the fact that even a *Merton*-compliant assessment does not represent objective fact. Mr Strachan understandably reminded us that the Appellant in this case had had three apparently *Merton*-compliant assessments and that it was only in the third that he was found to be a child.

70. One point which initially concerned me is that at paras. 47 and 48 of his judgment in *AA (Afghanistan)* Lord Toulson referred to para. 55.9.3.1 of the *EIG* and to *Assessing Age* (which were both in substantially the same form as considered by the Tribunal in this case), describing the latter as “detailed and careful”, and expressed the view that the guidance in them complied with the Secretary of State’s obligations under section 55 of the 2009 Act (see p. 2336 A-B). It might be thought that that conclusion was effectively determinative of the issue before us. However, that very point was taken by counsel for the Secretary of State at the hearing in this Court in October 2016, referred to at para. 5 above – see para. 14 of the judgment of Burnett LJ; and it was not regarded as justifying the refusal of permission. The reason is not fully spelt out, but it appears to be that the argument in *AA* was concerned with section 55 of the 2009 Act and that the arguments on which the Appellant and the Commission now rely were not advanced. In any event, Mr Strachan did not in his skeleton argument or oral submissions seek to revive the argument; and indeed we were not even taken to the relevant paragraphs of the judgment in *AA*.
71. I turn to the documents in their current form. The changes to the *EIG*, and more particularly to criterion C, plainly do not meet the problem identified above. The position about *Assessing Age* is not quite so straightforward. The new material which it introduces does emphasise the importance of seeking to avoid the detention of children, for reasons which are set out clearly and effectively: they include the risk of legal liability on the part of the Home Office (which a cynic might say represented a particular incentive to take care in this context) but they are certainly not limited to that. The detailed guidance on assessing physical appearance and demeanour which I have included in the Appendix is, I am sure, useful in helping to correct some misconceptions about particular features which may wrongly be taken as indicators of adulthood. It is reasonable to suppose that this additional material will tend to make immigration officers more inclined to give young people who claim to be under 18 the benefit of the doubt.
72. However, commendable though those changes are, they do not address the specific deficiency which I have identified in the predecessor documents: that is, that there is no gloss on the phrase “significantly over 18” and, more specifically, nothing to explain the width of the margin of error that has to be allowed for. If, as I would hold, that deficiency renders the earlier version unlawful, that conclusion must carry over into the current version as well.
73. For those reasons I have come to the conclusion that the Secretary of State’s policy regarding the assessment of the age of young asylum-seekers who claim to be under 18, as expressed in paragraph 55.9.3.1 of the *EIG* and the relevant parts of *Assessing Age* (both in the form that they were in before the Tribunal and as they stand now) does not properly identify the margin of error inherent in the conduct of initial assessments of the kind with which we are concerned. In my view it follows that it creates a significantly greater risk than would otherwise arise of children being unlawfully detained as adults.
74. In reaching that conclusion I have not lost sight of the fact that the formulation of policy, and associated guidance, is a matter for the Secretary of State, who has both the constitutional responsibility and the appropriate expertise, and not for the Court. The Court should not intervene simply because it disagrees with particular policy choices made. But I am satisfied that this case goes further than that. The omission to explain the width of the margin of error in an initial age assessment, and

particularly to do so by reference to a specific age-range, was evidently deliberate, at least at the time that the current version of *Assessing Age* was produced (see para. 43 above), but the only reason given for it, based on UTJ Storey's reasoning, is in my view incapable of justifying it; and, as I have said, it creates a real and avoidable risk of children being unlawfully detained.

75. It was common ground before us, and I accept, that it is not appropriate for the Court to specify what a lawful policy would be. But it follows from my reasoning above that a lawful policy would have to make clear the width, in terms of a range of ages, of the margin of error applicable to initial age assessments of this kind. There is nothing outlandish about policy/guidance being expressed in this way: indeed it appears that it may have been done in the past, by reference to an upper limit of 30 (see para. 41 above). It is certainly not for the Court to say what age should be taken as the outer limit of the margin of error, or how any guidance in relation to it should be expressed. Mr Hermer made it clear that he did not regard even an upper limit of 25, based on the seven-year figure referred to in some of the evidence, as giving a sufficient margin of safety. Mr Strachan made it clear that the Secretary of State regarded 30, as apparently proposed by Mr Buttler at an earlier stage of the proceedings, as far too high. The Secretary of State will no doubt wish to review the available evidence and carry out appropriate consultation before making a decision. The margin of error shown by the preponderance of medical opinion will no doubt be his starting-point. Given that those margins are themselves inevitably imprecise and capable of being differently interpreted by different immigration officials, he may wish to err on the side of caution; but it must be for him to decide the point at which the disadvantages of treating as children asylum-seekers who are obviously adults (which are real – see para. 55 above) outweigh the residual risk of an error in the opposite direction. There is of course no obligation to eliminate any risk, however remote, of an aberrant decision.

THE GROUNDS OF APPEAL

76. It is fair to say that the basis on which I would allow this appeal, as explained above, does not neatly correspond to any of the three pleaded grounds of appeal. I think in fact that it fits within the broad framework of ground 2; but even if it does not there is no unfairness in the appeal being decided on the basis that I propose since the issue in question was live before the Upper Tribunal and was fully explored in the oral submissions before us. But it does mean that I need only address other points pleaded in the grounds to the extent that they raise issues on which it would be of value for this Court to express a view. I take them in turn.
77. Ground 1 is that UTJ Storey was wrong to reject the Appellant's submission that the policy/guidance embodied in criterion C was rendered unlawful by the introduction into Schedule 2 to the 1971 Act of paragraph 18B (2), as interpreted in *Ali*: see para. 44 above. The Judge is said to have concluded that the reasoning in *Ali* "did not bite on initial age assessment". I do not think that is a fair characterisation of his reasoning, but in any event I agree with him that *Ali* is not directly relevant to the issue before us. The issue there was about the proper interpretation of paragraph 18B (2) and not about the terms of the Secretary of State's policy. The two are different things. *Ali* establishes that the prohibition on the detention of children is absolute. It follows that the relevant policy must seek to ensure that such detention does not occur, and it is clear that both paragraph 55.9.3.1 of the EIG and *Age Assessment* do indeed have that as their aim (and in fact did so before the enactment of the express

statutory prohibition). But that tells us nothing about whether the particular way in which the policy is framed is lawful.

78. Ground 2 is rather elaborately formulated, but the broad theme is that the Judge should have found that the policy as expressed in criterion C left open an unacceptable risk that children would be detained. I agree with that, for the particular reason explained above. I need not address the various particular articulations of that point in the pleading or in the skeleton argument save to note that in the latter it appears to be suggested that the effect of paragraph 18B (2) is that “there is no margin for error”: that seems to be a reformulation of essentially the same point as is made in ground 1, in which case I would reject it for the reasons given.
79. Ground 3 raises various respects in which the Judge is said to have findings that were unsupported by the evidence. Some of these are concerned with the statistical evidence, and for the reasons given above I need say no more about them. The only other criticism that I need mention is that there is said to be no evidential foundation for the Judge’s finding that the intention of the policy was that the initial assessment would be made in the context of a “screening interview or examination”: see para. 39 above. If the appeal had turned on this point I would not have allowed it. Mr Strachan did not identify any specific evidence on the issue, but he said that the Judge was right to infer that there would in practice always be an interview/examination of some kind, since criterion C operated only where there were no documents or “other credible evidence”, which could only be established by questioning. That seems right. It is in any event implausible to suppose that immigration officials would make decisions on the treatment of a potential UASC without at least some kind of interview – albeit *ex hypothesi* not of a *Merton*-compliant nature; and that is something on which an experienced Upper Tribunal judge would be well-qualified to form a conclusion. The position is in any event put beyond doubt in the current version of *Assessing Age*. The elaborate guidance summarised at para. 28 could not be followed except in the context of an interview of some kind. I note also that it is a requirement that the confirming officer should himself or herself have or observe a degree of “interaction” with the applicant and that they are told that “an instantaneous visual assessment ... is not sufficient”. The suggestion which sometimes appears in the papers that the policy provides simply for officials to “run their eyes over” the young person whose age is in dispute is unsustainable.⁸

THE COMMISSION’S SUBMISSIONS

80. Although the Commission’s submissions, as developed both in Mr Chamberlain’s skeleton argument and in his oral submissions were helpful and well-presented, there is little in them that is not sufficiently covered in what I have already said. He did refer us to both article 5 (1) (f) of the European Convention of Human Rights and the corresponding article 6 of the EU Charter of Fundamental Rights and to some Strasbourg and Luxembourg case-law; but, in circumstances where the detention of

⁸ Mr Hermer submitted that the evidence was that that was nevertheless what had happened in the Appellant’s own case. Mr Strachan disputed that, pointing to a contemporary note referring to him having been “interviewed”. But it is unnecessary to resolve this dispute. As I have already said, we are not concerned with the facts of the Appellant’s case but only with what the policy/guidance requires. It is inevitable that guidance will not always be followed as it should be, but that does not make the underlying policy unlawful; and if it results in the unlawful detention of a child they will have a claim for compensation.

children is in any event unlawful as a matter of domestic law, these did not much advance the argument.

81. Mr Chamberlain did in the course of his oral submissions draw the Court's attention to the fact that paragraph 16 (2A) of Schedule 2 to the 1971 Act, which brings into play paragraph 18B, is expressed to do so only in relation to detention under paragraph 16 (2), and that paragraph 16 (1) gives immigration officers a distinct power of detention of a person who has arrived in the UK "pending his examination [under paragraph 2 of the Schedule] and pending a decision to give or refuse him leave to enter". He did not seek to make any particular submission about the lawfulness or otherwise of the detention of children under paragraph 16 (1) and no point on it had been raised in the Upper Tribunal or indeed in his skeleton argument. In those circumstances I do not think it would be right for us to say anything about it.

CONCLUSION

82. For those reasons I would allow this appeal. I would declare the guidance given in criterion C under paragraph 55.9.3.1 of the EIG, both as it appears there and as reproduced in *Assessing Age*, to be unlawful in both the current and the previous versions of those documents. In the context of guidance of this character, a quashing order might be difficult to formulate, and since it would have no substantial additional value I see no advantage in making such an order.
83. In submissions following the circulation of this judgment in draft the Secretary of State asked that the effect of our declaration, and the quashing of the guidance if so decided, be stayed, or suspended, pending the outcome of an application which he made for permission to appeal to the Supreme Court or, if that were refused, an intended application to the Supreme Court itself. Mr Chamberlain on behalf of the Intervener raised an issue as to whether, notwithstanding the judgment of the majority of the Supreme Court in *Ahmed v HM Treasury* [2010] UKSC 5, [2010] 2 AC 534, we did in fact have jurisdiction to make any such order. It is in my view unnecessary for us to reach a view about that because even if we have jurisdiction I do not believe it would be right to exercise it in the circumstances of this case. The effect of such a suspension would be that for a period of months at least guidance would remain in place which the Court has held to be unlawful, increasing the risk that children will be unlawfully detained during that period. It would only be in very exceptional circumstances that that would be an acceptable course. The Secretary of State in his submissions told us that if a stay were refused he proposed to issue "forthwith" revised interim guidance, pending a definitive replacement policy to be formulated, subject to any appeal, following consultation. That course is plainly practicable and I can see no good reason why it should not be followed. I would add that, although it does not provide for an instantaneous change in the guidance ("forthwith" being an imprecise term), I do not believe that the Secretary of State could legitimately be criticised for that as long as he acts with appropriate urgency in putting the new interim guidance in place.

Lord Justice Simon:

84. As Underhill LJ has identified at [63]-[65] above, the question that arises on this appeal is whether the current version of criterion C of paragraph 55.9.3.1 of the EIG and the relevant parts of the asylum instruction, *Assessing Age*, are unlawful. They will be unlawful if, and only if, they create a real risk of more than a minimal number

of children being detained. The difficulty arises because the operation of any policy relating to the assessment of age, where the date of birth cannot be objectively ascertained, necessarily involves a subjective judgment. The issue here is where and how a line is to be drawn.

85. The evidence shows that age assessment is ‘an inexact science’ and that the margin of error ‘can sometimes be as much as 5 years either side.’ However, this calculation is itself based on a subjective and therefore fallible, albeit more sophisticated, means of assessing age, see the references to the evidence in Underhill LJ’s judgment at [69]. In the present case, as noted at [3] above, the appellant was the subject of two formal (i.e. ‘Merton-compliant’) age assessments in February and March 2015, in both of which he was found to be an adult. Six months later, in September 2015, a different conclusion was reached, and he was found to have been born in February 1998.
86. The criticism of the policy is that it fails to convey the inherent doubtfulness of any assessment which is based solely on appearance and demeanour, and that the width of the potential margin for error is drawn too narrowly.
87. I agree with Underhill LJ that criterion C of paragraph 55.9.3.1, at least in its original form, created a risk of more than a minimal number of children being detained.
88. However, I would approach the present position slightly differently.
89. The current version of the asylum instruction *Assessing Age* provides detailed guidance on how criterion C must be approached.
90. As Underhill LJ has identified at [24]-[28], it warns of the dangers of detaining those who are children in terms of their physical and mental well-being, as well as the potentially liability of the Home Office to pay damages. At [71], Underhill LJ observes that this detailed guidance on assessing physical appearance and demeanour is useful in helping to correct some misconceptions about particular features which may wrongly be taken to be indicators of adulthood. However, it seems to me that the guidance goes further.
91. It highlights that Home Office policy is to apply age assessments in such a way as to guard against the accidental detention of children, and to resolve doubts by treating the individual as a child so that there will be a *Merton-compliant* age assessment.
92. Of particular materiality are the passages giving detailed guidance on *Assessing physical appearance*. These address potentially misleading indicators of age; and warn against drawing false conclusions from genetic background and treating physical development as an indicator of age. They draw attention to the impact of a stressful journey to this country, and to the effects of poverty, illness and lack of nutrition on physical appearance, as well as the impact of physical work as a child on the one hand and the lack of opportunity to take exercise on the other hand.
93. The guidance on *Assessing demeanour*, with its preamble, ‘it is essential to take into account ...’, is also relevant. The potential indicators of age and the risk of making false assumptions are set out. Again, the warnings include false conclusions that may be drawn from lack of eye contact, the individual’s level of understanding of the process, and difficulties arising from language barriers; as well as the possibility that the individual may have had negative experience of authority figures and that a Home

Office official may be seen as such. Finally, there is a particular caution against giving weight to observations of demeanour over a short period of time.

94. In my view criterion C must be read in the light of this current guidance.
95. There are four features of criterion C which have been designed to provide a margin against error arising from the individual's appearance and demeanour: (1) the nature of the impression given ('very strongly suggest'); (2) the margin, ('significantly over 18'); (3) the reservation ('no other credible evidence exists') which might cast doubt on features (1) and (2); and (4) the assessment must be carried out by two (staff-graded) Home Office members of staff who 'separately' make the assessment in accordance with these criteria.
96. The *Assessing Age* guidance is particularly relevant to features (1) and (4); and, if the decision is made that the individual is 'significantly over 18', it must be made separately by 'a second pair of eyes', at either CIO, HEO or HO level.
97. I accept that the use of the phrase 'significantly over 18' introduces a degree of imprecision to the margin, but, in the light of what is necessarily the subjective nature of the assessment, the other features of the policy and the overall guidance provided to those making the decisions, I consider that the appellant has not shown that the policy is unlawful. I would therefore have dismissed the appeal.

Lord Justice Baker:

98. In the absence of objectively verifiable information, any assessment of the age of an asylum seeker is inherently subjective. The risk of an erroneous decision will be reduced by a structured assessment that complies with the guidance in *R (B) v Merton LBC* [2003] EWHC 1689 (Admin), but not eradicated entirely, as the facts of the present case appear to show. The risks are even greater with a superficial assessment based on visual inspection alone. "Except in clear cases, the decision-maker cannot determine age solely on the basis of the appearance of the applicant" (per Stanley Burnton J, as he then was, in *Merton* at paragraph 37). But everyone recognises that a *Merton*-style assessment cannot be carried out on the spot by an immigration officer faced with a newly-arrived or recently-apprehended asylum seeker. At that point, all the officer has to go on is his or her visual inspection of appearance and demeanour.
99. As Underhill LJ observes at paragraph 56 above, it necessarily follows that it cannot be illegitimate for the Secretary of State to adopt a policy which requires the immigration officer to make an interim assessment on that basis alone. But to be lawful, such a policy must plainly accommodate a number of important factors, in particular
 - (1) there is no reliable anthropometric test for determining a person's age;
 - (2) age determination is an inexact science and the margin of error can sometimes be as much as five years either side;
 - (3) the difficulties are even greater when the individual is of a different ethnicity, culture or background;
 - (4) within each culture, people mature at different rates.

These factors are accepted by the Secretary of State who acknowledges that anyone claiming to be a child must be given the benefit of the doubt. But does the policy, as set out in the general operational guidance now known as the Enforcement Instructions and Guidance (“the EIG”), and the specific guidance on age assessment contained in the “asylum instruction” called Assessing Age, meet these requirements? In particular, is criterion C in paragraph 55.9.3.1 of the EIG lawful?

100. I agree with Underhill LJ that the principal flaw in criterion C, both in the version that existed at the time of the hearing before the Upper Tribunal and the revised version subsequently published, is the use of the word “significantly”. Given the evidence that the margin of error may be as much as five years, the word “significantly” is so vague as to give rise to a real risk that young people under the age of 18 will be wrongly identified as adults. I agree with Underhill LJ that an applicant will only be given the benefit of the doubt if the guidance identifies with greater precision and clarity the margin of error that must be allowed.
101. The fact that the initial assessment under criterion C includes demeanour as well as physical appearance does not materially strengthen the policy, since the assessment of demeanour is also carried out by visual observation alone. Similarly, I do not consider that the phrase “very strongly suggests” materially reduces the risk of an erroneous decision. Like “significantly over 18”, that phrase is not further explained or defined in the policy. Furthermore, the fact that, before a decision is taken, the countersigning officer must make his or her own assessment does not, in my judgment, provide any significant additional safeguard. If one assessment of age by visual inspection is inherently unreliable, the fact that a second visual inspection is carried out does not materially increase reliability of the process.
102. Before the Upper Tribunal, the extent of risk that the guidance will lead to an infringement of rights was illustrated by the appellant by reference to a raft of statistical information. For my part, I find considerable support from those statistics for the conclusion that the policy is unlawful. The table helpfully included in the skeleton argument filed by the appellant for this court conveniently summarises that evidence gleaned from six separate analyses, two carried out by the Home Office and four by the Refugee Council. The “bottom line” conclusion is that, of a total of 276 individuals identified as adults under the physical appearance/demeanour test in the six investigations, 63, or 23%, were subsequently assessed as adults under a *Merton*-type assessment. The size of the sample varies significantly across the six investigations as does the percentage of individuals subsequently found to be children – from 5% in one Home Office set to 43% in one of the Refugee Council sets. Even allowing for what UTJ Storey at paragraph 77 describes as “the evidential and methodological difficulties” identified in all of the data sets adduced by the parties, the statistical evidence taken as a whole provides substantial support for the arguments advanced by the appellant and supported by the Commission.
103. The Upper Tribunal was unimpressed by the submission made by Mr Chamberlain on behalf of the Commission that criterion C was incompatible with European and international human rights norms. Whilst acknowledging that Article 5 of ECHR and Article 6 of the EU Charter of Fundamental Rights confer a right not to be detained arbitrarily, the UTJ at paragraph 81 concluded that:

“insofar as [the] case law relates to the issue in this case, the most it shows is that the detention of a person who is in fact a child would be

arbitrary if not based on an objective assessment: see e.g. *Winterwerp v UK* (1983) 5 EHRR CD 305; *Mohamed Jama v Malta* (App 10290/13, 26 November 2015) ...”

As set out above, however, I consider that the assessment of age based on physical appearance and demeanour alone is inherently subjective so that, without safeguards, it would indeed be arbitrary and thus an infringement of rights under both ECHR and the EU Charter.

104. I also accept Mr Chamberlain’s submission to this Court that the Secretary of State’s policy is contrary to EU law because it fails to comply with the mandatory requirements of clarity, predictability, accessibility and the protection against arbitrariness required by the EU Charter, as interpreted by the CJEU in *Policie ČR v Al Chodor* (case C-528/15) [2017] 4WLR 125. That case concerned the criteria under Czech law for determining whether an applicant for asylum was at risk of absconding. Under Article 28(2) of the Dublin III Regulation (establishing the criteria and mechanisms for determining the member state responsible for the member state responsible for examining an application for international protection by a third-country national or stateless person),

“where there is a significant risk of absconding, member states may detain the person concerned in order to secure transfer procedures in accordance with this Regulation, on the basis of an individual assessment and only in so far as detention is proportional and other less coercive alternative measures cannot be applied effectively.”

Article 2(n) of the Regulation provides that:

“‘risk of absconding’ means the existence of reasons in an individual case, which are based on objective criteria defined by law, to believe that an applicant or a third-country national or a stateless person who is subject to a transfer procedure may abscond.”

At paragraphs 40 and 42 of its judgment in the *Al Chodor* case, the CJEU concluded:

“... the detention of applicants, constituting a serious interference with those applicants’ right to liberty, is subject to compliance with strict safeguards, namely the presence of a legal basis, clarity, predictability, accessibility and protection against arbitrariness It is important that the individual discretion enjoyed by the authorities concerned pursuant to article 28(2) of the Dublin III Regulation, read in conjunction with article 2(n) thereof, in relation to the existence of a risk of absconding, should be exercised within a framework of certain predetermined limits. Accordingly, it is essential that the criteria which define the existence of such a risk, which constitute the basis for detention, are defined clearly by an act which is binding and foreseeable in its application.”

105. Under article 7(3) of Council Directive 2003/9/EC laying down minimum standards for the reception of asylum seekers,

“when it proves necessary, for example for legal reasons or reasons of public order, member states may confine an applicant to a particular place in accordance with their national law.”

Mr Chamberlain submits that the *Al Chodor* requirements apply to the formulation of grounds for detention of individuals under UK law, that it is accordingly contrary to EU law for the UK to legislate to prevent detention of child asylum seekers without putting in place effective safeguards, and that the policy in criterion C of the EIG is materially unclear, unpredictable and arbitrary in so far as it relies on a demonstrably flawed and unreliable method of age assessment. I agree.

106. In those circumstances, I conclude that the guidance in criterion C permitting the Secretary of State to refuse to accept an individual’s assertion that he is 18 if “their physical appearance/demeanour very strongly suggests that they are significantly over 18 years of age” is unlawful. I agree with Underhill LJ that the changes introduced in subsequent versions of the EIG and Assessing Age do not address the central flaw in criterion C, namely the phrase “significantly over 18”. I therefore respectfully disagree with my Lord, Simon LJ, that the changes introduced in the current version of Assessing Age materially reduce the risk of children being unlawfully detained.
107. For these reasons, I would allow the appeal.

APPENDIX TO THE JUDGMENT OF UNDERHILL LJ:
EXTRACT FROM AGE ASSESSMENT (2018 version)

Assessing physical appearance

The assessment of an individual's physical appearance may include, but not necessarily be limited to, the following potential indicators of age:

- height
- build
- facial features, including facial hair, skin lines or folds, tone and weathering
- voice, including tone, pitch and expression (particularly in respect of males)

When determining the weight to be applied to these, the subsequent information on the limitations on using them must be borne in mind:

- ethnicity and genetic background can affect physical appearance, for example:
 - o it is normal in some cultures for boys to have facial hair at an early age and for girls to develop at different ages
 - o height is particularly difficult to use as a reliable indicator of age on its own due to being heavily dependent on the height of each parent
- there is considerable range of normal physical development during adolescence, even with those who grow up within the same ethnic, social and economic environment
- the claimant's journey to the UK - for example:
 - o the journey, which may have been long and traumatic with limited opportunities to manage their basic physical health and self-care needs, could have had an aging effect on their appearance
 - o with good care and some recovery time, the claimant's physical appearance may appear younger within a short period of time
- many asylum seekers have been subjected to poverty which could result in a lesser physical maturity than would be normally expected of their true age
- nutrition (even if they did not suffer deprivation) and illnesses can affect physical appearance
- children in some countries are more likely to have engaged in physical work from an early age than children in more industrialised nations – in these circumstances calloused hands are less likely to be evidence of maturity
- opportunities to exercise – for example, a person who exercises regularly may display muscle definition more associated with older people

Assessing demeanour

It is essential to take account of how the person presents and their attitude, and relate this to the culture of the country of origin and events preceding your interaction with them, for example, their experiences during their journey to the UK. Demeanour is not in and of itself determinative of age, but can be relevant when considered with the claimant's physical appearance. The assessment of their demeanour may include the following observations, although when determining the weight to be applied to these, the subsequent information on the limitations on using them must be fully taken in to account:

- mannerisms
- body posture

- body language
- eye contact
- attitude towards and interaction with the assessing officers and other officials
- choice of clothing and how it is worn
- how the claimant copes with the assessment - for example, the level of confidence or nervousness displayed

The following information is relevant to the assessment of, and the assignment of weight to, the above potential indicators:

- trauma, post-traumatic stress disorder (PTSD) and depression may affect the claimant's demeanour and this will be particularly prevalent for those who have been tortured
- some young people take on responsibilities normally associated with adulthood at an earlier age, for example due to the culture in the country of origin or individual circumstances – in some instances this may result in a demeanour which appears older than their true chronological age
- the effect of the claimant's culture on their interaction with you, for example: some people consider direct eye contact to be impolite
- the journey, which may have been long and traumatic, could have left the claimant exhausted, emotional and malnourished
- the claimant's interaction with those around them will be affected by their level of understanding of what is going on and language barriers
- as a Home Office official, you are an authority figure and their views of those in authority could be informed by potentially negative experiences with officials in the country of origin and in countries visited during their journey to the UK – this may result in them being nervous or uncomfortable in your company
- the claimant may not have had a choice in their clothing - for example, their clothing could have been issued to them by a charitable organisation during their journey to the UK or following arrival
- observations of demeanour made over a short period of time, such as during asylum registration, will limit the weight that can be applied to them.