



OUTER HOUSE, COURT OF SESSION

[2012] CSOH 135

P1222/10

OPINION OF LORD STEWART

in the Petition of

ALA

Petitioner:

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

and Answers for

Angus Council,

Respondents:

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**Petitioner: Ms Stirling, advocate; Drummond Miller LLP, solicitors**

**Respondents: A Smith QC; Tods Murray LLP, solicitors**

24 August 2012

[1] This is an application for a fact-finding, age assessment judicial review presented by a young Nigerian male visa-overstayer, petitioner ALA. On or about 9 April 2010 petitioner ALA and another young Nigerian male stated to be his brother, petitioner ISA, also a visa-overstayer, came into the *de facto* care of the respondents' social work department in circumstances described in my opinion in relation to petitioner ISA's petition. At that time petitioner ALA claimed to be 12 years old. He was in possession of a birth certificate showing his date of birth as 5 June 1997. The United Kingdom Border Agency [UKBA] visa application record shows that when the application was made the petitioner held a passport giving his date of birth as 5 June 1991. The birth certificate would make him 14 years old at today's date and the passport would make him 20. The passport is genuine and the birth certificate is a forgery: but these facts were not clear to the respondents on 9 April 2010.

[2] The respondents are a local government authority with responsibilities for children in need under the Children (Scotland) Act 1995. In terms of the 1995 Act a "child" is "a person under the age of 18". On 16 September 2010 the respondents carried out an age assessment. They assessed petitioner ALA's age at "18+". In other words petitioner ALA was not accepted by the respondents as being a "child" within the meaning of the Children (Scotland) Act 1995.

[3] Petitioner ALA's application seeks (a) declarator that the respondents' age assessment is "wrong as a matter of fact" and that the age assessment was procedurally unfair; (b) reduction of the age assessment; (c) declarator that the petitioner is a child for the purposes of chapter 1 of Part II of the Children (Scotland) Act 1995, being a person under the

age of 18 years and that he was born on 5 June 1997, or 5 July 1995 or 5 June 1995 or on such date after 9 April 1992 as the court thinks fit; (d) declarator that even if the respondents' age assessment was correct the respondents' decision to transfer the petitioner to the YMCA Glasgow is unlawful; (e) reduction of the decision to transfer the petitioner; and various ancillary orders. Petitioner ISA also seeks judicial review of the respondents' assessment of his age. The applications have been heard together.

[4] Having heard proof followed by counsel's submissions culminating on 28 October 2011 I made *avizandum*. I have now decided to grant the petition for petitioner ALA to the effect of declaring that the respondents' age assessment was wrong as a matter of fact. I shall reduce the age assessment. The *Wednesbury* attack on the fairness of the respondents' age assessment process has not been insisted on. The respondents' decision to transfer the petitioner to Glasgow in the autumn of 2010 has been completely overtaken by events; and counsel for the petitioner made very limited submissions about that matter. My own view on the information put before me is that petitioner ALA was probably about 17 years old at the time of the respondents' assessment which found the petitioner to be "18 +". The difference is material or at least was material at the date of the respondents' age assessment.

[5] There is no known technique or combination of techniques for determining age at a particular moment in time [T Smith and L Brownlees, *Age Assessment Practices: a Literature Review and Annotated Bibliography*, UNICEF Discussion Paper (New York, 2011)]. Margins of *at least* plus or minus two years are routinely quoted. Unusually, in the present case, there have been successive paediatric assessments. The most useful pieces of information available to me are the finding of Dr Birch, paediatrician, about the petitioner's growth over a six-month period and the opinion of Professor Cole, medical statistician, as to the

petitioner's likely age derived from the fact and rate of growth. Dr Birch found the petitioner to be still growing after the date of the respondents' age assessment. On that basis Professor Cole stated that petitioner ALA was under 18 years of age. As a rule human males have stopped growing by the age of 18, the age at which they become statutory adults. On the evidence in this case it is for consideration whether asylum seekers claiming to be children should have their height measured on arrival or presentation and at six-monthly intervals thereafter [see also *AM, R (on the application of) v Solihull Metropolitan Borough Council* (AAJR) (Rev 1) [2012] UKUT 118 (IAC) (14 June 2012), § 17].

[6] I have told the story of petitioners ISA and ALA in my opinion about petitioner ISA's application. The story of the petitioners is worth telling in some detail for the way it illustrates the challenges that can face asylum seekers claiming to be children without reliable age documentation, the challenges that face the public authorities who have to deal with them and the challenges that face judicial decision makers when required to undertake fact-finding age assessment judicial reviews. These challenges arise in large measure from the secretary of state's policy of granting unaccompanied asylum-seeking children [UASCs] so-called discretionary leave to remain until they are adults. By the time they are adults, or are, should I say, definitively determined to be adults, such claimants may hope to have acquired ECHR article 8 (family and private life) rights in the United Kingdom which prevent their removal even if their asylum claims are unfounded. The other advantage of being determined to be a UASC and of being accommodated by a local authority as a child in need is that formerly "looked after" children are entitled to local authority after-care services and support until the age of 25 or so.

## Age Assessment Judicial Reviews

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

[8] The decision of the Supreme Court is not binding as to the construction of the Children (Scotland) Act 1995; and there have to be reservations, with respect, as to whether the reasoning of the Supreme Court is persuasive in relation to the differently-worded Scots statute. The application in Scotland of *R(A) v Croydon London Borough Council* is discussed in my opinion in *L v Angus Council* 2012 SLT 304 at §§ 115-164 and also in my opinion in the petition of petitioner ISA linked to this one. I incline to the view that the question whether an individual without reliable birth documentation is a child at a particular moment in time is a question of judgment rather than a question of fact; that this is recognised in the wording of the Children (Scotland) Act 1995; and that Scottish local authority age assessments are amenable to judicial review only on traditional *Wednesbury* grounds.

*Wednesbury* review was the only remedy in England & Wales until the decision of the Supreme Court in *R(A) v Croydon London Borough Council*.

[9] However, in the present proceedings parties have joined issue on the assumption that the Supreme Court's decision applies and have placed the question of petitioner ALA's age before me as an issue of fact for me to decide on the available evidence. So that is what I have done. The applications of petitioner ISA and petitioner ALA have been remitted for proof together. Parties are agreed that the evidence is to be shared. I refer to my opinion in the case of petitioner ISA for a detailed discussion of the evidence and the legal framework.

### **The respondents' age assessments**

[10] The petitioners, petitioner ISA and petitioner ALA, arrived at Heathrow Airport on a direct flight from Lagos, Nigeria, on 11 April 2008. They were granted entry on accompanied-child, limited-stay tourist visas. Petitioner ISA travelled on a passport showing his date of birth as 06/11/1993, making him 14 years old at the date of entry. Petitioner ALA travelled on a passport showing his date of birth to be 05/06/1991, making him 16 years old at the date of entry. According to the petitioners they came to the United Kingdom with their father and another "boy", whom they did not know and who was passed off as their father's son. The consistent story of the petitioners is that they went with their father and the "stepbrother" to stay with their father's friend in a "tall, brown house" at an unidentified address in London.

[11] In June or July 2008 the father left, stating that he had urgent business elsewhere, otherwise reported as "an urgent family matter", but that he would come back for the petitioners. He reportedly took the petitioners' passports with him; and he never did come back. In about August 2008 the petitioners were collected by someone whom they did not know and taken by bus to Dundee where, they were told, they were going to stay with their aunts. Petitioner ISA was taken to stay with JA, 28 \*\*\*\* Street, and petitioner ALA was taken to stay with NA at 7D \*\*\*\*\*. Both JA and NA worked as carers, usually at night. Both had daughters aged about 4 years old. It seems that neither JA nor NA was lawfully present in the United Kingdom. The petitioners arrived in Scotland carrying birth certificates given to them by their father in London. Petitioner ISA's certificate shows his date of birth as 6 November 1998, making him 9 years old when he arrived in Scotland. Petitioner ALA's certificate shows his date of birth as 5 June 1997, making him 11 years old when he arrived in Scotland.

[12] On 27 August 2008 petitioner ALA was taken to Ninewells Hospital, Dundee, by NA and admitted via casualty to Ward 24 complaining of abdominal pains. The paediatric liaison health visitor was contacted by the ward because of concerns, in view of petitioner ALA's declared, birth-certificate age, about the fact that his carer NA worked nights and the fact that he did not appear to be at school. On 28 August a referral was made to the Dundee City Council School Community Support Service. Both petitioners were enrolled in primary schools in Dundee in the autumn of 2008, classes P5 and P6 respectively on the basis of their birth-certificate ages.

[13] In about November 2008 JA left Dundee with her daughter and petitioner ISA moved to stay with NA. NA claimed to have known the petitioners from birth and confirmed their

birth-certificate ages to the authorities. Concerns about the petitioner's ages emerged when officials in Dundee contacted the United Kingdom Border Agency [UKBA]. In March 2009 the petitioners were transferred to Craigie High School, Dundee, classes S1 and S2 respectively. On 30 July 2009 UKBA telephoned Dundee Council Social Work Department to say that the petitioners' passport dates of birth had been confirmed by officials in Lagos and that it was proposed to remove NA, her daughter and the petitioners from the United Kingdom as a family unit. The family refused the offer of return on flights departing the United Kingdom on 8 August 2009. On 21 August 2009 UKBA detained NA, her daughter and petitioner ISA in Dundee and removed them to Dungavel Immigration Removal Centre. The border agency unsuccessfully attempted to remove the detainees from the United Kingdom on 27 August 2009. My understanding is that by the end of August NA, her daughter and petitioner ISA had returned to Dundee. Petitioner ALA avoided detention.

[14] At some stage the family moved from Dundee to live in a house at Letham in the area of Angus Council, the respondents to this Petition. There is no evidence that the petitioners returned to school. In about March 2010 NA telephoned Angus Council Social Work and Health Department to say that she was about to move to England and was concerned that she might get into trouble if she left the petitioners behind. NA stated that petitioner ISA was 16 and petitioner ALA was 18. She stated that she wanted advice: her partner had left and petitioner ALA was displaying threatening behaviour towards her. She was worried about leaving her daughter alone with the petitioners. Some time before 9 April 2010 Tayside Police contacted Angus Council Social Work and Health Department with information that "two boys" had been abandoned at 2 \*\*\*\* \* Place, Letham, Angus, with no food and no money. The petitioners then came into the *de facto* care of the respondents.



On 11 April 2010 the petitioners were moved to supported accommodation provided by Angus Council Homeless Support Service.

[15] On 19 May 2010 the petitioners were transferred to live with Mr and Mrs Dunphy at their family home in Arbroath. The Dunphys received payment from the council, as I understand it, in terms of section 22 of the Children (Scotland) Act 1995. The payment did not cover the cost. The Dunphys formed the impression that petitioner ISA was 16 years of age and petitioner ALA was 19 years of age. There was friction between the Dunphys and petitioner ALA. On an unspecified date in late August 2010 the petitioners' solicitor provided Angus Council Social Work Department with a copy of the report from an investigator in Lagos which states that the birth certificates are not genuine. Towards the end of August 2010 the social work department arranged for the petitioners to be accommodated by Mr and Mrs Mitchell, Carnoustie. To begin with petitioner ISA was happy to remain with the Dunphys. At the last minute he changed his mind and stated that he wished to go with petitioner ALA.

[16] Because of the uncertainty over the petitioners' ages the respondents felt unable - correctly in my view given among other things the child protection dimension, though this is no reflection whatsoever on the petitioners - to place the petitioners in a foster household where there were children. There were no fostering places available in Angus Council area which did not have children already in the house, either foster children or children of the foster carers. The Mitchells had fostered children in Dundee and Arbroath in the past and consented to be re-vetted. The petitioners remain with the Mitchells. The respondents make support payments to the Mitchells in terms of the Children (Scotland) Act 1995 s. 22. In October 2010 the monthly payment was £350.

[17] Mr and Mrs Mitchell assess petitioner ISA to be 16 years of age and petitioner ALA to be 15 years of age. Like other observers, the Mitchells remark how petitioner ALA has no difficulty reading grown-up books. Mrs Mitchell depones that, if asked about their age, the petitioner's state that they do not know their ages. One of the reasons given by Mrs Mitchell for thinking that the petitioners are younger than they have been assessed to be by the respondents is that they "don't seem to have any idea of what they want to do in life". Mrs Mitchell depones that petitioner ALA "had a lack of maturity compared with our grandson who is 17". According to Mr Mitchell, the petitioners do not shave. They shower two or three times a day. On 24 August 2010 petitioners ISA and ALA were registered with the Abbey Health Centre medical practice in Arbroath. The practice nurse weighed and measured the petitioners. She formed the impression that petitioner ISA was older than petitioner ALA.

[18] In August 2010 the petitioners' solicitor disclosed to the respondents that the petitioners were victims of human trafficking for domestic servitude. The trafficking claim for petitioner ALA stated that he, petitioner ALA, was a 13-year old victim of human trafficking from Nigeria who had been trafficked with his brother to the United Kingdom by their father for the purposes of domestic servitude. It was stated that petitioner ALA had been held in a position of domestic servitude from 2008 until February 2010 when he had been abandoned by his trafficker. It was stated that the matter was brought to the attention of the authorities in 2008 but was not investigated properly by the authorities at that time.

[19] Claims were made on the petitioner's behalf for refugee status on the basis of

membership of a particular social group namely "Nigerian children and former victims of trafficking in Nigeria", for humanitarian protection on the basis that removal to Nigeria would result in breaches of articles 2, 3 and 4 ECHR and for discretionary leave to remain on the basis of article 8 ECHR, for compassionate reasons and "pursuant to UKBA policy on unaccompanied minors returning to Nigeria given that there are inadequate reception facilities". The supporting statement contains a detailed description of a slave-like existence for the petitioner in the NA household. The statement concludes:

"I am 13 years old. I am not 19... If I go back to Nigeria, I would be scared of my dad... We would need to stay away from him... [We] would be on the streets. This is dangerous. People that have power and see you on the street will make you do things for them. They will make you work for them and you will have no choice. The police would not help. They do not care."

The claim for petitioner ISA was along similar lines.

[20] The trafficking claims were submitted on 3 September 2010 and rejected by UKBA on 5 October 2010. The relevance of the trafficking claims to age assessment is that in terms of the Council of Europe Convention on Action against Human Trafficking, article 10(3): "when the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special measures pending verification of his/her age." In terms of article 4(d) a "child" is any person under 18 years of age.

[21] During August and September 2010 UKBA and the petitioners' solicitor asked the respondents' social work department to carry out age assessments. The respondents had no

experience of age assessments and it took some time for the staff concerned, Alison Millar and Jo Wilson, to assemble enough information to allow them to feel confident about proceeding. Alison Millar (49), a qualified social worker, was leader of the Throughcare/Aftercare Team. Jo Wilson (44) was a resource worker with the Throughcare/Aftercare Team. Both had considerable experience of dealing with children and young persons. The assessment interviews were carried out on 16 September 2010. On that date petitioner ISA was assessed to be "a child, 16+" and petitioner ALA was assessed to be "over 18". The age assessments were intimated to the petitioners' solicitor on 24 September 2010. These are the assessments which the petitioners now seek to bring under review.

### **Evidence of the petitioners, issues and preliminary conclusions**

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

[23] I found that petitioner ALA's presentation raised questions. When asked in cross-examination what his date of birth is, he said "5 June 1997". He said he knew it was his

birthday because he was "let off stuff": he only had to carry eight buckets of water rather than ten buckets of water. His "birth certificate" was then put to him. He said: "That's my birthday... 4 August 1997." The latter date is the purported date of registration rather than the claimed date of birth. Ultimately I have decided to make nothing of this: my note may be wrong or petitioner ALA may have been flustered.

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

[25] Observers comment on how guarded the petitioners are. The refrain of the many persons who have tried to find out something about the petitioners is that the petitioners' response is "don't know" or "don't remember". On the face of it their ignorance and lack of recall about their former lives are not believable: but these issues were not tested in oral evidence. Their English is very good and relatively accentless. Three things are very clear: the petitioners do not want to return to Nigeria; they want to be believed about their ages;

and they want to go to school. A striking feature of the case, particularly if the petitioners were aged under twelve years when they arrived in Scotland, is that the petitioners have never been heard to express a desire to return to their family in Nigeria, an attitude which I do not find sufficiently explained by the alleged cruelty of their stepmother.

[26] Two issues about which various views have been expressed are the pitch of the petitioners' voices and whether or not they shave. Mrs Dunphy states in oral evidence that she thought petitioner ALA was shaving once a day. She saw his stubble a couple of times. On one occasion when petitioner ALA was in the bathroom she "heard the sound of shaving". She found a razor in his room. The razor was well used. Mr Dunphy depones that he has observed stubble on petitioner ISA's legs. Mrs Mitchell depones that the petitioners do not shave. They do not have any razors. They shower three times a day. In oral testimony, petitioner ALA says that Mrs Dunphy is lying about razors: she is a control freak, he has never shaved "and that's the truth". Petitioner ALA says that Mrs Dunphy thinks he has shaving kit "'cos one time I took so long in the shower, 45 minutes".

[27] When Dr Birch, paediatrician, first examined petitioner ALA on 17 November 2011 she found that he had "a very little facial hair which is minimally discernible on the upper lip". At review on 5 May 2011 Dr Birch found petitioner ALA's facial hair to have developed a little "with a minute amount of hair on his moustache area and chin with some on the sideburn area (consistent with 14 years of age)". The independent social workers instructed for the petitioners to carry out age assessments express confidence that petitioner ALA does not shave. This is on the basis that he had no shadow when they interviewed him at 4.30 pm on 13 May 2011 and that he had had no opportunity to shave in the course of that day. The difference of views about the pitch of voices and the presence of facial hair bring us into the territory explored by Mr Justice Collins in *A v*

*London Borough of Croydon* [2009] EWHC 939 (Admin) (08 May 2009). At paragraphs 74 and 75

Collins J said:

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

I do not have a reason to disbelieve Mrs Dunphy when she says that she found a razor among petitioner ALA's belongings. I accept her evidence about the razor. The question was not explored in the present cases whether there might be reasons for the petitioners, or either of them, to shave body hair or the hair on their legs rather than facial hair.

[28] One fixed point in the petitioners' story is that they are full brothers, the sons of the same mother and of JOA, though they claim not to know the father's middle name "O\*\*\*\*\*" as recorded by UKBA. The mother's name is given on their birth certificates as RA. The story is that their mother left home when they were very young. Neither has any recollection of their mother. Another fixed point in the petitioners' story is that petitioner ALA is older than petitioner ISA by more than a year. Their birth certificates give their birth dates as 5 June 1997, petitioner ALA, and 6 November 1998, petitioner ISA, which makes petitioner ALA seventeen months or one year and five months older than petitioner ISA. Their

passports give their birth dates as 5 June 1991, petitioner ALA, and 6 November 1993, petitioner ISA, which makes petitioner ALA 29 months or two years and five months older than petitioner ISA. Petitioner ISA says that petitioner ALA has always been - implying from the date of petitioner ISA's earliest memories - his big brother.

[29] The question of relationship is relevant to the issue of age assessment because an age difference of at least ten months would be expected between non-twin full siblings. Some observers think that petitioner ISA is older than petitioner ALA. Ms Stirling asks me to accept that the petitioners' evidence about their birthdays is correct. At least, it is suggested, the day and the month of birth are correct for the reason that the day and the month in the respective birth certificates and passports are identical. I am unwilling to make any such findings. My finding is that the petitioners are full brothers and that petitioner ALA is older than petitioner ISA by something more than a year. I base my conclusion substantially on the oral testimony of the petitioners themselves and what they are reported to have told numerous investigators and observers. There is supporting evidence for the relative age of the petitioners in the growth velocity observations referred to below. I reach my conclusion as a matter of probability, on the evidence parties have chosen to put before me, in the absence of reliable birth documentation, in the absence of acceptable first-hand witness testimony about the petitioners' parentage and birth, and in the absence of DNA testing, any of which might prove me wrong.

[30] When I say "the absence of reliable documentation", it should be understood that I feel unable to rely on the birth certificates or the passports to any extent beyond the fact that they represent petitioner ALA to be more than a year older than petitioner ISA and confirm their relationship. The other uses this material has are to define the outer limits of the age



disputes and to show that deception on someone's part is involved. The birth certificates are admitted forgeries; and the witnesses for the petitioners do not support the ages that would follow from the dates of birth given in the certificates. The preponderance of opinion is that the petitioners are not as old as the passports would make them out to be. I accept the evidence for the petitioners to the effect that official Nigerian passports can be obtained without exhibiting birth certificates and simply on parental say-so as to dates of birth. The respondents' age assessments of 16 September 2010 do not rely on the travel documentation. I accept the submission for the respondents that had the petitioners wished to demonstrate that they are not full brothers they ought to have brought forward DNA evidence.

#### **Age assessment evidence and conclusions as to age**

[31] Going by their birth certificates, as the petitioners do, the petitioners would have been aged 11 years and 10 months old and 13 years and 3 months old at the date of the respondents' age assessments. No other witness giving oral evidence - or none relied on by the petitioners' counsel Ms Stirling - supports the petitioners' birth-certificate ages. Two sorts of skilled witness have been instructed on behalf of the petitioners to assess the petitioners' ages. Dr Diana Birch (64), MB, BS, DCH, MSc (Psych), MFCH, MD, FRIPPH, FRCPC, FRCP, FSAM (USA), MAE, Director of Youth Support, a paediatrician with age assessment experience, examined both petitioners on 17 November 2010 and again on 5 May 2011 and compiled reports which she spoke to in evidence. Independent social workers with age assessment experience, Kenneth Ambat Dip SW, BA SW, MBASW and Rose Palmer Dip SW, Dip HE, BA in European Social Work, MBASW, interviewed the petitioners on 13 May 2011 and compiled a joint report. Kenneth Ambat (44) spoke to the joint report in evidence.

[32] Dr Birch, in her review reports dated 5 May 2011, estimates petitioner ISA to be 14 years and 5 months old and petitioner ALA to be 14 years and 10 months old, meaning that the petitioners would have been respectively 13 years and 9 months old and 14 years and 2 months old at the date of the respondents' age assessments on 16 September 2010 eight months earlier. The Ambat-Palmer reports estimate the petitioners to have been born on 6 November 1996 and 5 June 1995 respectively which would have made them 13 years and 10 months old and 15 years and 3 months old respectively at the date of the respondents' age assessments. The competing possibilities for the petitioners' ages as at the date of the respondents' assessment on 16 September 2010 are shown in the following table:

<b>Age at 16.09.2010 based on:</b>	<b>Petitioner ISA</b>	<b>Petitioner ALA</b>
Birth certificate	11 years 10 months	13 years 3 months
Dr Birch review assessment	13 years 9 months	14 years 2 months
Ambat-Palmer assessment	13 years 10 months	15 years 3 months
Respondents' assessment	16 years plus	18 years plus
Passport	16 years 10 months	19 years 3 months

I have found that petitioner ISA was about 15 1/2 years old at the time of the respondents' age assessment. It follows that, at the same time, his older brother, as I have found him to be, petitioner ALA, must have been at least 16 years and four months old, say at least about

161/2. The differential of 17 months between the birth-certificate ages would make petitioner 16 years and 11 months old.

[33] For the reasons given in my opinion in petitioner ISA's case, which also apply in petitioner ALA's case, I consider the evidence of Dr Diana Birch to be helpful, but only in one or two respects. Dr Birch has found that petitioner ALA grew one centimetre in height in the period of six months between her two examinations. I accept this finding. I accept it for the same reasons as I accept Dr Birch's finding about petitioner ISA's growth. Height growth velocity peaks at about the age of 13 $\frac{1}{2}$  in males and then declines sharply. As a rule growth ceases altogether between the ages of 17 and 18 years. In her review report on petitioner ALA Dr Birch puts it as follows: "The significance in the growth rate lies in the fact that an older boy would grow less or not at all and most growth in stature ceases after the age of 17 but is slow after 16 years." Dr Birch has annualised her finding by doubling it to deduce a growth rate of two centimetres a year. She does this for the purpose of plotting the growth on a standard growth velocity chart which shows growth velocity in terms of centimetres per annum. When she plots the annualised figure on the chart she finds, reading the chart backwards, that petitioner ALA's rate of growth was average for a male of 16.2 years. That is, 16.2 years on Dr Birch's review date eight months after the respondents' assessment.

[34] Commentary on Dr Birch's findings and opinions is offered by the respondents' witness Professor Tim Cole (64), Professor of Medical Statistics at University College London Institute of Child Health. Accepting Dr Birch's finding of growth Professor Cole tells me that petitioner ALA was probably under 18 years old at the time. He goes further and, having looked at all of Dr Birch's findings including the findings as to pubertal staging, postulates,

on the basis of Dr Birch's annualised growth figure, an age of 17 years for petitioner ALA at the time of the review assessment in May 2011. I have reservations about Dr Birch's annualisation of six-month growth figures, for the reasons given in the petitioner ISA opinion. On the whole I think a reasonably safe conclusion is that by May 2011 petitioner ALA had virtually stopped growing and was approaching statutory adulthood. There is lay support, in broad terms, for this conclusion as at 16 September 2010. The respondents' age assessment for petitioner ALA on that date states: "Those who have seen [*petitioner ALA*] whilst playing football in [2008-2009] have noted that he does not appear taller than he did then." I deduce that this statement is based on information supplied by Fiona Geekie a support worker with the Angus Council Social Work and Health Department, Throughcare/Aftercare Team. In the light of all the foregoing information I am inclined to find that petitioner ALA was somewhere between 16 $\frac{1}{2}$  and 17 years old when age-assessed by the respondents on 16 September 2010. Accordingly, he was probably a child.

[35] The clinical finding of growth was not available to the respondents' assessors. They appear to have thought, on the basis of the lay evidence, that petitioner ALA had stopped growing altogether, whereas he had not. That is sufficient reason for finding that their assessment was wrong as a matter of fact; and that it was wrong to a material extent in the sense that the respondents' assessors found petitioner ALA to be an adult when he was probably a child.

[36] Taking a broad view of all other witness impressions about the petitioner's age at the material time, I am persuaded that it would be reasonable to determine that petitioner ALA was nearer 17 than 16 $\frac{1}{2}$  years old. The age assessors made their assessment substantially on the basis of petitioner ALA's demeanour, his reported interactions with others and their own dealings with

him. They had dealt with the petitioners for a period of about six or seven weeks before the assessment interviews. The senior assessor, Alison Millar, was the leader of the Social Work Throughcare/Aftercare Team that assumed responsibility for the petitioners at about the end of July 2010. The other assessor, Jo Wilson, a resource worker in the same team, had been nominated by Ms Millar to be the petitioners' primary support worker. Both of the assessors gave oral evidence in Court.

[37] The more important witness, in terms of direct personal involvement with the petitioners, is Ms Wilson. Ms Wilson adopted the assessment reports as her evidence. She struck me as being a sympathetic, confident and commonsensical witness. She tells me that she had intensive direct contact with the petitioners from, she said, the end of July 2010, seeing them three or four hours a week, getting to know them and trying to arrange activities for them. The assessment report for petitioner ALA concludes:

"[*Petitioner ALA*] does not present as a child, physically, emotionally, socially, academically. He demonstrates the maturity and behaviours of a young man. His demeanour would suggest that he is much older than the 13 years he claims."

The assessment was based on the assessors' direct knowledge and also on the reported "Opinions and observations of previous social workers, carers, support workers, the Practice Nurse and educational professionals".

[38] Apart from "the Practice Nurse" the informants are not identified in the assessment report or in oral evidence. According to Ms Millar, questionnaires were used to gather information. I deduce that information was sought from the individuals who have

subsequently sworn the nineteen affidavits produced by the respondents. This is explicit in some of the affidavits and there is an affidavit from the GP practice nurse. Notwithstanding that Mr Smith QC for the respondents tells me that he does not rely on the respondents' affidavits I have felt entitled to look at them. The affidavits are listed in the Ambat-Palmer reports as documentation perused by the independent assessors instructed on the petitioners' behalf. The report on petitioner ALA states [§ 15.8]: "The evidence of the previous carers, the Dunphys, appears to concur with the information held by UKBA as do the majority of the opinions offered by other members of staff from Angus Council ..." I take this to be a reference to the affidavit evidence.

[39] On the basis of the affidavit evidence I can confirm that the views expressed in the respondents' age assessments are well supported by all members of the respondents' social work department who had close dealings with the petitioners from April 2010. In particular support is given for the view that petitioner ALA was approaching adulthood or was a young adult: I refer to the affidavits of Donna Marie Ross, Alison Leuchars, Lynn Sandeman, Nicola Simpson, Fiona Geekie and Nyree Elizabeth Clark. This was also the impression formed by the previous carers Mr and Mrs Dunphy who accommodated the petitioners from mid-May till the end of August 2010. The Dunphys have older teenage daughters of their own; and they have considerable youth work experience. The Dunphys thought petitioner ALA was 18 or 19 years old. Mrs Dunphy gave oral evidence to this effect.

[40] At the same time I think that the Dunphys and the age assessors' other informants who believe petitioner ALA to have been adult, 18 or 19 years old, in September 2010 have probably been influenced, as Ms Stirling submits, by the passport age. I think this is likely to be the case with the age assessors as well. Otherwise, the age of about 17 years which am

inclined to fix on is, as I say, well-supported by the impressions of the respondents' age assessors and their informants. Notable exceptions are Mr and Mrs Mitchell, the current carers, who depone in their affidavit evidence that they have the impression that petitioner ALA is only 15 years old and that he is younger than petitioner ISA. Since I have found, taking account of contrary views, that petitioner ALA is the older full brother of petitioner ISA, I have to reject the impression evidence of Mr and Mrs Mitchell. The Mitchells have been foster-carers: but unlike the Dunphys, the Mitchells do not apparently have experience as youth workers. Neither Mr Mitchell nor Mrs Mitchell gave oral evidence.

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

[42] Further, I am not clear that Edith Maude (62), head teacher at Dens Road Primary School, had significant direct contact with petitioner ALA. She depones that "we had never suspected that petitioner ALA was older than he said he was", which at that time was 11 years old. The deputy head teacher, Isabella Doogan (61), was of the same view. Clearly Ms Maude and Ms Doogan were affronted by the way petitioner ALA was removed from

their school on age grounds; and I infer that they perceive that the matter reflected on their child-protection competence.

[43] Petitioner ALA's class teacher Michelle Munro (33) accepts that petitioner ALA could have been up to 13 years old, though, she says, not older. In the same way petitioner ISA's class teacher at Clepington Primary School James Webb (33) depones that petitioner ISA could have been up to two years older than his birth-certificated age, which at that time was 10 years old.

[44] Ms Stirling also founds on the affidavit of Dr Donald Macgregor, consultant paediatrician, under whose care petitioner ALA was admitted to hospital with abdominal pains on 27 August 2008. Petitioner ALA's declared date of birth on admission was 5 June 1997 making him 11 years old. Dr Macgregor's affidavit states: "No member of medical, surgical or nursing staff commented or queried that he seemed physically advanced for his age." I agree with Mr Smith QC for the respondents that Dr Macgregor's affidavit does not offer evidence that the consultant personally examined the patient; and given the "normal" developmental range for various ages spoken to by Dr Birch, the absence of comment by the staff, referred to in the affidavit, is perhaps not surprising. (Contrary to what Dr Macgregor's affidavit states, there is no evidence, or none available to me, that the patient's height and weight were recorded during this admission.)

[45] I reject the affidavit evidence of the primary school staff and of Dr Macgregor insofar as it supports the idea that the petitioners were of their birth-certificated ages or close to those ages. I do so on the basis that the impression evidence of those persons cannot compete with the finding of Dr Birch about growth as interpreted by Professor Cole and on the basis that



even the independent social workers instructed for the petitioners estimate that the petitioners were two years older than their birth-certificate ages. Mr Ambat told me in oral evidence that the upper limit of a reasonable age range for petitioner ALA at the date of the Ambat-Palmer assessment in May 2011 was 16 years and 11 months, equivalent to 16 years and three months as at the date of the respondents' assessment on 16 September 2010.

[46] I have also weighed and rejected the impression evidence as to age given by Alexis Wright (31). Ms Wright gave oral evidence for the petitioners and acted as their "supporter" when they gave evidence in court. Ms Wright works for the Aberlour Scottish Guardianship Service. Aberlour is a charity that supports children and young persons who are trafficking victims and UASCs in Scotland. Since October 2010 Ms Wright has acted as the petitioners' "guardian", meaning, I think, "advocate". Ms Wright sees the petitioners at least once a month and speaks with them on the telephone twice a week. Her rule is to accept her clients' ages as claimed. She treats the petitioners as a 12 year-old and a 13 year-old. Petitioner ALA acts like an older brother; and petitioner ISA acts like a younger brother looking up to his older brother. Ms Wright thinks the petitioners are children because of the way they interact. Her assessment is that petitioner ISA is 12 to 14 years old and that petitioner ALA is 14 to 16 years old. Ms Stirling for the petitioners does not found heavily on Ms Wright's impressions as to age; and, though Ms Wright's role in supporting the petitioners is to be respected, there must be a risk that her advocacy function necessarily compromises her objectivity.

[47] As stated above Kenneth Ambat (44) spoke in evidence to the independent age assessment reports which he had co-authored with Rose Palmer. In oral testimony Mr Ambat made some corrections to the report about petitioner ALA. I should mention two.

The last sentence of paragraph 15.4 now reads: "... the outcome of the examinations by Dr Birch appears to suggest that [*petitioner ISA*] is likely to be slightly younger than [*petitioner ALA*]." And at paragraph 15.9, second part, the corrected report now reads: "His voice, demeanour and physical appearance suggest that he is in his early teens and are not felt to indicate that he could be older than 18..." Presentationally Mr Ambat was an excellent witness. In substance I find his evidence unconvincing. The reasons given in my opinion in petitioner ISA's case for finding the Ambat-Palmer report about petitioner ISA unconvincing also apply in petitioner ALA's case.

[48] The single most important point is that the joint authors have clearly decided that there are missing years in petitioner ALA's account: but they do not confront the difficulty. The difficulty is encapsulated in the sentence [§ 10.4]: "[*Petitioner ALA*] was attending the fourth year which suggests that he was aged 10/11 at this time if he was attending prior to leaving Nigeria in 2008." Apart from the mistake - "fourth year" instead of "fifth year" - there is the problem that almost exactly three years after the petitioners left Nigeria the Ambat-Palmer report states: "The current assessors believe that it is likely that [*petitioner ALA*] is a teenager aged approximately 15/16 years of age."

[49] Ultimately, what the Ambat-Palmer report brings to the discussion is evidence of another impression, or two other impressions, as to petitioner ALA's age. Mr Ambat believes the Ambat-Palmer determination is entitled to weight and has the edge over the respondents' assessment. He offers three reasons for me to prefer his determination, namely the fact the he and his fellow assessor were given access to all other opinions before making their determination; the fact that he has substantial experience of age-assessing individuals from diverse cultures; and the fact that his experience was combined with that of his co-assessor

Rose Palmer who also has substantial experience. My view is that, in this case, these factors do not outweigh the advantages of longer-term contact and varied interactions that have been enjoyed by several members of the respondents' social work department and by Mr and Mrs Dunphy. The most important insight offered by the latter evidence is that as familiarity with the petitioners increases, the older they seem to be. In fairness to Mr Ambat and Ms Palmer one piece of information they did not have was Professor Cole's evidence about growth velocities.

### **Disposal**

[50] I have decided that petitioner ALA was, expressing his age to the nearest six months, aged about 17 years at the date of the respondents' age assessment, 16 September 2010, younger than the respondents found him to be, older than is claimed on petitioner ALA's behalf. He was a child; and, at the time he came into the *de facto* care of the respondents, he was a child aged about 16½ years old. In the result I shall repel the respondents' pleas-in-law. I shall sustain the petitioner's first plea-in-law to the effect of declaring that the age assessment by the respondents is wrong as a matter of fact. I shall also reduce the age assessment. I shall sustain the petitioner's second plea to the effect of declaring that when petitioner first received accommodation from the respondents on 9 April 2010 he was a child for the purposes of chapter 1 of Part II of the Children (Scotland) Act 1995. I shall repel the petitioner's third plea on the basis that the issue of transfer to Glasgow has been overtaken by events.