



**In the Upper Tribunal  
(Immigration and Asylum Chamber)  
Judicial Review**

JR/1947/2020

In the matter of an application for Judicial Review

The Queen on the application of  
(on the application of AB)  
(by his Litigation Friend Francesco Jeff)  
(ANONYMITY DIRECTION IN FORCE)

Applicant

versus

Kent County Council

Respondent

**ORDER**

**BEFORE Upper Tribunal Judge Stephen Smith**

HAVING considered all documents lodged and having heard Mr P. Rule of counsel, instructed by Instalaw, for the applicant and Ms C. Rowlands of counsel, instructed by Invicta Law, for the respondent at a hybrid hearing on 31 August and 1 September 2021; and having considered the written submissions from each party concerning costs, received on 21 September 2021; and having heard oral costs submissions from Mr Rule and Ms Rowlands upon handing down the judgment on 24 September 2021

**IT IS DECLARED THAT:**

1. The applicant was born on 1 January 1999, for the reasons given in the judgment handed down on 24 September 2021.

**Costs**

2. The applicant shall pay the respondent's reasonable costs of this claim from 24 January 2020; such costs not to be enforced without the leave of the Tribunal. The applicant having the benefit of cost protection under section 26 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, the amount that he is to pay should be determined on an application by the respondent under regulation 16 of the Civil Legal Aid (Costs) Regulations 2013.
3. The order of Mrs Justice Thornton DBE dated 23 January 2020 that the respondent shall pay 90% of the applicant's costs prior to the date of that order is set off against the applicant's liability to the respondent under paragraph (2) of this order, above.
4. There is to be a detailed assessment of the applicant's publicly funded costs.

**Reasons**

5. The respondent has succeeded in establishing that the applicant was not a child and that he had reached the age of majority before arriving in this country. The applicant

pursued this claim despite having been an adult at all material times. Costs follow the event and there is no reason why the respondent should not, in principle, benefit from a costs award in its favour, subject to the usual costs protection enjoyed by publicly funded applicants. There is no basis to make no order as to costs on account of the respondent's conduct; while the so-called "short form" assessment was found to be unlawful, it was not quashed, and Thornton J accepted that it provided relevant material for the local authority to build upon (see [58]). Both the High Court (see [55]) and this Tribunal (see [81]) rejected Mr Rule's criticism of Mr Stringer's personal conduct. There is nothing in the overall conduct of the respondent council that merits a departure from the usual approach.

6. The respondent has applied for its earlier payment of costs (see [4] of Thornton J's order) to be set off against that of the applicant pursuant to this order. The applicant advanced a range of submissions seeking to resist set-off. Mr Rule submitted that set-off would be an unlawful violation of the costs protection enjoyed by the applicant, who cannot afford to pay the costs order. He also submits that set-off would undermine a "concluded order" of the High Court, in circumstances when Thornton J was invited to reserve the question of costs until the overall outcome of the case, but declined to do so. She treated the question of costs in the Administrative Court as separate and concluded. Nor was payment deferred. The proceedings before the Administrative Court are concluded, he submits. Not only are the proceedings now at an entirely different stage, but it would be inappropriate and improper for this Tribunal to "interfere" with the order. The authorities concerning set-off and legally aided litigants do not assist the respondent, for they merely provide that set-off may operate as a 'shield' to future liability for damages, rather than requiring a legally aided litigant to make a payment of costs. In *Hicks v Russell Jones & Walker* [2001] C.P. Rep 25 at [11] to [13], the Court of Appeal made clear that dealing with costs in an earlier separate part of the proceedings "is fatal" to any attempt at set-off in a legally aided case (see [17] of Mr Rule's costs submissions received on 21 September 2021).
7. I accept the respondent's submissions that the costs order made by the Administrative Court at an earlier stage in these proceedings should be set off against the applicant's liability for costs at this stage, for the following reasons.
8. First, I reject the submission that the proceedings are now separate to those before the Administrative Court. The proceedings are the same proceedings. As set out at paragraph 6 of my substantive judgment, these proceedings are a continuation of those heard by Thornton J. The Statement of Facts and Grounds relied upon by the applicant before the Administrative Court was the only Statement of Facts and Grounds in the proceedings: see paragraph 7 of my judgment. In her order of 23 January 2020, Thornton J granted permission for the applicant to challenge the ensuing *Merton*-assessment through a fact-finding hearing in this Tribunal (paragraph 6) and "transferred" the matter to this Tribunal (paragraph 7) for the (same) matter to "proceed". So much is recognised by Mr Rule at paragraphs 9 and 10 of his skeleton argument dated 11 August 2021. The proceedings before this Tribunal are a continuation of those commenced in the High Court.
9. Secondly, where an application for judicial review is transferred to the Upper Tribunal under section 31A of the Senior Courts Act 1981, pursuant to section 19(3)(c) of the Tribunals, Courts and Enforcement Act 2007, "any steps taken, permission given, leave given or orders made by the High Court in relation to the application are to be treated as taken, given or made by the Tribunal". It follows that the order of Thornton J dated 23 January 2020 is to be treated as though it were made by the Upper

Tribunal in these proceedings. These are the same proceedings, with the same procedural history, and the orders made in the High Court have been deemed by section 19(3)(c) of the 2007 Act to be orders of this Tribunal, made within the confines of the same proceedings.

10. Had Thornton J wanted to avoid the implications of section 19(3)(c) of the 2007 Act, she would not have transferred the matter to this Tribunal. By doing so, she placed at this Tribunal's disposal the full panoply of powers, rights and privileges of the High Court as conferred by the 2007 Act. To the extent Mr Rule's submissions, either to Thornton J (see [10] of his costs submissions before the Administrative Court dated 22 January 2020) or before this Tribunal are inconsistent with the above statutory framework, they are misconceived.
11. It is nothing to the point, as submitted by Mr Rule, that the nature of this stage of the proceedings is of a different character to that of the proceedings before the High Court. The fact-finding hearing took place within the confines of the same overall proceedings.
12. Thirdly, I reject the submission that ordering set-off would violate the applicant's costs protection that he enjoys under the Legal Aid, Sentencing and Punishment of Offenders Act 2012. As held in *Hicks v Russell Jones & Walker* at [11]:

"It is clearly established that a set-off of costs, where costs orders have been made both ways in a case involving legal aid, does not amount to a payment of costs by a legally aided litigant: see the decision of this court in *Lockley v National Blood Transfusion Service* [1992] 1 WLR 492".

13. *Hicks v Russell Jones & Walker* is not authority for the proposition that "the prior final dealing with costs in an earlier separate part of the proceedings is fatal to any attempt at set-off in a legal-aid case" (Mr Rule's costs submissions, paragraph 17). The Court of Appeal simply applied the general rule in CPR47.1 that the costs of any proceedings or any part of the proceedings are not to be assessed by the detailed procedure until the conclusion of the proceedings, and declined to order an assessment at the conclusion of appellate proceedings concerning a preliminary issue as to strike out in relation to which the defendants had not succeeded, ahead of the substantive trial resuming before the trial judge. The point of principle in *Hicks v Russell Jones & Walker* is that a set-off of costs does not offend the costs protection enjoyed by a legally aided litigant. The case-specific decision of the Court of Appeal on the facts of those proceedings is of second order importance.
14. In *R (oao Burkett) v Hammersmith and Fulham LBC* [2004] EWCA Civ 1342; [2005] C.P. Rep 11 at [50], the Court of Appeal held:

"...a set-off does not place the person against whom it is asserted under any obligation to pay, but merely reduces the amount that he can recover..."
15. I accept that the payment has already been made by the respondent to the applicant. However, I do not consider that that is a barrier to ordering set-off to take place. An accounting exercise is required, whereby a sum already paid to the applicant's legal team may have to be returned. That the applicant's legal team has already received the funds is not a barrier to the power to make an order of this sort existing; I have been taken to no authority to that effect.
16. Mr Rule's reliance upon *Maloba v Waltham Forest LBC (Law Society intervening)* [2007] EWCA Civ 1234 is misplaced. In *Maloba*, a local authority appealed against a

homelessness appeal allowed by the County Court under section 204 of the Housing Act 1996, and against the order of costs made by the judge against the council. The council submitted that there should be a “general practice” in allowed appeals under the 1996 Act that any order for costs made against the council should be subject to a stay until after the redetermination of the homeless application and any subsequent appeal from it (see [66]). The court rejected the submission that such a general practice should be adopted (see [71]). Having outlined the leading authorities on set-off, the Court of Appeal held that the procedural context in those proceedings was different. The council in *Maloba* had not won on any issue and did not have a costs order in its favour. That, of course, is in contrast to the instant proceedings, where the respondent council *does* have a costs order in its favour, and has ‘succeeded’ in establishing that the applicant was not a child as he claimed to be (albeit that the terminology of ‘success’ must be approached with a degree of caution in age assessment proceedings, as the Tribunal’s fact-finding function is non-adversarial). Properly understood, *Maloba* did not concern a set-off situation, but a challenge to a case-specific decision by a judge not to stay the effect of his order, and the Court of Appeal’s rejection of the broad submission that costs orders in all allowed homelessness appeals should always be stayed. *Maloba* is of no assistance.

17. In my judgment, therefore, the availability of set-off is not a matter which should be determined by whether a paying party at one stage of the proceedings had already made a payment or not. That is a restriction that does not feature in any of the authorities to which I have been taken.
18. I therefore reject Mr Rule’s submissions that the power to set the respondent’s earlier costs liability off against the applicant’s liability does not exist.
19. The question then arises as to whether it is appropriate to exercise the power to set off the respondent’s costs liability to the applicant against his liability to the respondent. In my judgment, it is unquestionably appropriate. The applicant was a 20 year old man when he arrived in this country, yet has maintained throughout the course of these lengthy legal proceedings that he was a child. In doing so, he caused the respondent council not only to incur its own costs, but also rendered them liable for his costs incurred when falsely purporting to be below the age of majority. While there is no question that I should revisit the substance of Thornton J’s judgment, in my judgment it would be unjust for the respondent’s costs liability to the applicant not to be set off against the applicant’s costs liability to the respondent. As held in *Burkett* at [50], the applicant would be under no obligation to make any payment himself; the amount he is entitled to recover pursuant to the order of Thornton J is simply set-off against his own costs liability to the respondent. That Thornton J’s order may already have been paid by the respondent to the applicant is not a reason to decline to order set-off; these are the same proceedings, and, by definition, Thornton J’s order concerned only a preliminary stage of the lengthy proceedings which continue in this Tribunal.

### **Permission to appeal**

20. I decline to extend time for an application for permission to appeal to be made to the Court of Appeal. The parties have had the draft judgment in this matter since 8 September 2021. It was handed down at a hearing on 24 September 2021, at a hearing adjourned from 21 September 2021 in light of both counsel serving extensive written costs submissions only minutes before that hearing, necessitating an adjournment. There has been ample time to formulate a written application for permission to appeal and I see no good reason to extend time.

21. Turning to the applicant's application for permission to appeal made orally at the hand down hearing, I decline permission to appeal for the reasons given at the hearing. The proposed grounds of appeal unarguably amounted to a series of disagreements of fact and weight and did not arguably disclose an arguable error of law, or some other reason why the Court of Appeal should be seized of this matter.

Signed: *Stephen H Smith*

**Upper Tribunal Judge Stephen Smith**

Dated: **24 September 2021**

**The date on which this order was sent is given below**

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**For completion by the Upper Tribunal Immigration and Asylum Chamber**

Sent / Handed to the applicant, respondent and any interested party / the applicant's, respondent's and any interested party's solicitors on (date): *27 September 2020*

Solicitors:

Ref No.

Home Office Ref:

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**Notification of appeal rights**

A decision by the Upper Tribunal on an application for judicial review is a decision that disposes of proceedings.

A party may appeal against such a decision to the Court of Appeal **on a point of law only**. Any party who wishes to appeal should apply to the Upper Tribunal for permission, at the hearing at which the decision is given. If no application is made, the Tribunal must nonetheless consider at the hearing whether to give or refuse permission to appeal (rule 44(4B) of the Tribunal Procedure (Upper Tribunal) Rules 2008).

If the Tribunal refuses permission, either in response to an application or by virtue of rule 44(4B), then the party wishing to appeal can apply for permission from the Court of Appeal itself. This must be done by filing an appellant's notice with the Civil Appeals Office of the Court of Appeal **within 28 days** of the date the Tribunal's decision on permission to appeal was sent (Civil Procedure Rules Practice Direction 52D 3.3).



Case No: JR/1947/2020

**IN THE UPPER TRIBUNAL**  
**(IMMIGRATION AND ASYLUM CHAMBER)**

Field House,  
Brearms Buildings  
London, EC4A 1WR

21 September 2021

**Before:**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**

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**Between:**

**THE QUEEN**  
**(on the application of AB)**  
**(by his Litigation Friend Francesco Jeff)**  
**(ANONYMITY DIRECTION IN FORCE)**

**Applicant**

**- and -**

**KENT COUNTY COUNCIL**

**Respondent**

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**Mr P. Rule**  
(instructed by **Instalaw**) for the applicant

**Ms C. Rowlands**  
(instructed by **Invicta Law**) for the respondent

Hearing date: 31 August – 1 September 2021

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**J U D G M E N T**

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**Upper Tribunal Judge Stephen Smith:**

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1. AB is a citizen of Afghanistan. He claims to be 17 years old, having been born in 2004, nominally in January of that year (that being the month ascribed to him). That claim is disputed by the respondent council which considers the applicant to have been born in at least 2001, if not 1999. It is the role of this tribunal in these age assessment proceedings to determine the applicant's probable age and date of birth.

*Procedural background*

2. AB came to the attention of Kent County Council following his clandestine arrival in this country by lorry on 26 July 2019. He was assessed by two officers of the council to be aged between 20 to 25 years old, with no date of birth ascribed. Mr Alex Stringer was one of those assessing social workers on that occasion. He appeared before me as a witness in these proceedings. The assessment on that occasion was abbreviated and was not conducted in a so-called "*Merton* compliant" manner, the term now given to the form of assessment outlined by Stanley Burnton J in *R (oao B) v London Borough of Merton* [2003] EWHC 1698 (Admin); [2003] 4 All ER 280.
3. AB subsequently issued proceedings to challenge the above so-called "short form" assessment of his age. On 20 August 2019, Mr Justice Nicklin granted AB permission to apply for judicial review and ordered the respondent to take AB into care attending the determination of his claim.
4. AB's challenge to the short form assessment was heard at a substantive judicial review hearing on 9 – 10 December 2019 by Mrs Justice Thornton DBE. Judgment in favour of the applicant was handed down on 23 January 2021; it is reported at [2020] EWHC 109 (Admin) and [2020] 4 All E.R. 235. The court found that the short assessment featured a number of flaws, which I outline below, and ordered the Council to conduct a full *Merton*-compliant age assessment. The short form assessment was not quashed. Thornton J accepted the submission advanced by Ms Rowlands, who also appeared before me, that, despite its flaws, the abbreviated assessment "provides relevant material for the local authority to build upon" (see [58]). I return to the judgment of Thornton J below.
5. A *Merton*-compliant assessment was conducted by two independent social workers on 27 and 28 February 2020. That assessment concluded that the applicant was 19 years old, with a date of birth of 1 January 2001.
6. These proceedings are a continuation of those heard by Thornton J. At [5] of her order giving effect to her judgment, she granted permission for a fact-finding hearing by the Upper Tribunal "to the extent necessary" and made further provision for the matter to be transferred to this tribunal, following the *Merton* assessment. It is in those circumstances that this claim for judicial review resumed before me.
7. There has been no application to amend the grounds for judicial review from those which were originally advanced before Thornton J. The Statement of Facts and

Grounds is, therefore, out of date insofar as it relates to the short-form assessment which has already been found to be unlawful (although not quashed). Instead, the parties have prepared agreed statements of facts and issues; the primary issue for me to determine is the applicant's probable age and date of birth. To the extent necessary to reach findings on that issue, I will analyse the credibility of the applicant's account of the same, the weight to be placed upon the *Merton* age assessment, and any third party evidence.

8. On 25 August 2021, I granted a late application by the applicant to rely on the report of a Mr Ahmed, which I set out below.
9. The fact-finding hearing took place before me at Field House on 31 August and 1 September 2021. The proceedings took place in hybrid form; all parties save for Mr Stringer attended the proceedings in person. Mr Stringer gave evidence and observed the remaining proceedings remotely.
10. The applicant gave evidence and participated in the proceedings in Dari. At the outset, I established that the applicant and interpreter could understand one another and communicate through each other. I understand that the applicant's private interpreter was present in court throughout the proceedings. Mr Rule confirmed that no interpretation difficulties had arisen, although, as set out below, at various points it was necessary for Ms Rowlands to simplify the language of questions put to the applicant during cross-examination.
11. I treated the applicant as a vulnerable participant within the meaning of the Joint Presidential Guidance Note No. 2 of 2010. I ensured the proceedings featured regular breaks and took account of the applicant's vulnerability in my assessment of his evidence.
12. I heard evidence from the applicant, HR, and Mr Stringer. Mr Rule relied on his skeleton argument dated 11 August 2021 and Ms Rowlands relied on her skeleton argument dated 18 August 2021.

### **Factual background**

13. AB is from Baghlan in northern Afghanistan. His case is that he attended a government school in Afghanistan, starting in year one when he was around seven years old. He cannot remember what calendar year that was. He has little memory of what he learnt at school in Afghanistan.
14. AB claims to have left Afghanistan in around 2016 when he was approximately 11 years old and in year four at school. He travelled to the UK through Iran, Turkey, Greece, Serbia, Hungary, Austria, Germany, and France. He reached Austria in 2016. There, he claimed asylum and told the authorities that his date of birth was 1 January 1999. His claim was refused and in 2019 he appears to have faced removal proceedings. At that point he left Austria for this country. He claims to have been under the control or guidance of his cousin throughout his time in Austria and



subsequently, including when he informed the authorities in Austria that he was born on 1 January 1999. His case is that his cousin either made him give that date of birth to the authorities, or provided it on his behalf, but that he was, in fact, much younger at the time. He claims his cousin gave an older date of birth to avoid them from being separated.

15. In his first witness statement, AB explained that he always knew his age in Afghanistan, because his mother and father told him. They said it was important that he knew his age. He thinks that it said he was born in 2004, maybe in the fourth month, but he cannot be sure. He had a *Taskera* but lost it in Iran. While he had always known his age while in Afghanistan, it was not until shortly before he left Austria that his father told him, by telephone, that he had been born in 2004. His age was recorded in the Qu'ran, his father said. While in Austria, AB would speak to his parents frequently. He has since lost touch with them.
16. AB was first encountered by Home Office immigration officers in the early hours of 26 July 2019, having arrived clandestinely. The officers who initially engaged with the applicant appear to have accepted his claim to have been a child. He was initially accepted into the Home Office's Kent Intake Unit ("the KIU") as a newly arrived unaccompanied asylum-seeking child. His details were passed to the respondent on that basis.
17. Mr Alex Stringer, who works for the respondent as a Service Manager for Unaccompanied Asylum Seeking Children ("UASC"), reviewed AB's details, including a photograph of him, electronically. He formed the initial view that he was significantly over the age of 15. Later that day Mr Stringer met AB at a UASC facility in Dover known as the Atrium, staffed by the Refugee Council. Mr Stringer arranged for a Farsi telephone interpreter through the KIU. The applicant's first language is Dari, although he understands some Farsi. Mr Stringer interviewed the applicant with a colleague from Kent County Council, Melissa Carter, following which the Chief Immigration Officer ("CIO"), Ms Nicholls, and the KIU safeguarding lead, Ms Mead, met with the applicant without Mr Stringer or his colleagues present. The CIO and KIU safeguarding officer concluded that the applicant was significantly over the age of 18. Mr Stringer and his colleague formed the same view.
18. During his time at the Atrium, the applicant had been cared for by Roland Carter of the Refugee Council. Mr Carter, who was not called as a witness by either party, has extensive experience of dealing with UASC, in particular with Afghan boys. He was with AB from his arrival at the atrium at around 8AM until he left at 5.30PM. Mr Carter writes in his statement dated 2 August 2019 that he had no reason to question AB's age based on his behaviour outside of an interview setting and his physical appearance. The applicant was slight in stature and extremely thin. He was too small properly to fit even the smallest clothes that were provided by the Atrium. Mr Carter informed Mr Stringer of his views.
19. At around 4.45PM that day, having secured the agreement of senior colleagues in the Council and that of Ms Nicholls and Ms Mead of the Home Office, Mr Stringer

and Ms Melissa Carter met with AB to inform him that they had assessed him to be an adult, and that he would be returned to the KIU to be supported as an adult.

*The short-form age assessment*

20. It was during Mr Stringer's second meeting with AB on 26 July 2019 that the conclusions of the short form age assessment were presented to him. The assessment has not been quashed, and Thornton J held that it may provide relevant material which could be built upon, so I will outline its contents. The assessment the process adopted by the respondent that day to ascertain AB's age, and his involvement in the process. It records that AB was asked questions about his physical presentation and demeanour and notes that Mr Stringer had shared his own observations concerning AB's physical presentation and demeanour with him. It states that Ms Nicholls was "fully satisfied" that the applicant was "significantly over 18 years of age", and Ms Mead is recorded as having said, "I do not believe that he is 15 years as claimed and would place him at around 20 – 21 years."
21. The assessment continues to note that AB had established facial hair growth across his jawline and around his mouth, and acne scarring on his cheeks that presented as being well established and having occurred some time ago. There were faint lines around his eyes and his Adam's apple was visible. AB was recorded as being calm and assertive when discussing his age and circumstances, and even presented as being irritated by the questioning. His eye contact was sustained. Mr Stringer's observations to that effect corresponded to similar observations recorded by Ms Nicholls and Ms Mead, who also described AB as "confident" because he was able to challenge them openly when questioned about his age. In their view, that was not consistent with the behaviour and demeanour to be expected of a 15 year old child.
22. The short form assessment continues to state that, although puberty can occur at different times for young people:

"it is consider [sic] to usually occur in a particular order with the head, hands and feet growing first before the legs and arms in the trunk of the body. This sequence of growth... [AB] appears to have experienced physical development in all these parts of his body and also appears to be accustomed to his current body shape/size, which indicates to me that he is a young person who has already progressed some time ago through puberty and his physical development to adult hood."
23. The assessment concluded that AB's physical appearance and demeanour was consistent with someone aged between 20 and 25 years, rather than 15 years. He presented "very clearly as an adult well over the age of 18 years old". For that reason, considered the assessment, a full *Merton* assessment was not required.
24. In early August 2019, the applicant was referred by Migrant Help, a charity supporting asylum seekers and refugees, to Derby City Council. It is not clear how

that happened, in light of the earlier determination that he was not a child; I have not been provided with any evidence. On 2 August 2019, two social workers from that council met with AB, and decided that he presented neither as an adult nor as a child. Given the doubt, it would be necessary to conduct a full *Merton*-compliant age assessment, the Derby social workers concluded. However, Derby City Council subsequently became aware that Kent Council had already conducted an age assessment in respect of AB, and thus terminated the foster care placement that had been provided for him without conducting the *Merton* assessment, on 13 August 2019.

*The judgment of Thornton J*

25. It is not necessary in this judgment to recite the full criticism of Kent County Council's short form assessment which features in Thornton J's judgment. For present purposes, a brief summary will be sufficient. At [48], the court noted the contrasting opinion of Mr Carter concerning AB's age, formed in light of his extensive experience working with Afghan minors. The respondent's short form analysis made no reference to the "cultural specifics of Afghan boys". That was despite the acknowledgement in *Merton* at [24] that the margin for error in age assessment increases when the young person in question is of an ethnicity, culture, education, and background that foreign and unfamiliar to the decision-maker. In relation to the short form assessment's conclusion that AB was "accustomed to his current body shape/size", Thornton J drew on the judgment of Collins J in *A and WK v London Borough of Croydon and others* [2009] EWHC 939 (Admin) at [56]:

"...What is meant by the observation that he appeared to be comfortable in his body? It is difficult to follow what this does mean and how a discomfort with a changing body can manifest itself."

26. As to the observation that AB presented "irritated by the questioning", it was not clear how that advanced the decision-making further. Both adults and children were capable of being irritated. Whereas the assessing social workers regarded AB's irritation as a sign of his maturity, Mr Carter regarded his irritation as being evidence of precisely the opposite. AB had immediately fallen asleep when he arrived at the Atrium and had been woken up at various points in order to be interviewed throughout the day. In Mr Carter's opinion, his behaviour was consistent with that of a child.
27. Although the respondent's notes of the interview with AB record that he was questioned about how he knew what his age was, his credibility was not mentioned in the decision letter. That contrasted with the guidance in the original *Merton* case given by Stanley Bunton J that:

"Given the impossibility of any decision-makers being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16-20, it is necessary to take history from him or her with a view to determining whether it is true. That will

enable the decision-maker in such a case to decide that the applicant is a child.” See [28].

28. Having asked the applicant questions which went to his credibility, it was incumbent upon the assessing social workers to reach a view on that issue in the decision letter, and to have addressed the margin for error in doing so, yet they did not: [56].
29. The age range ascribed to the applicant by the short form assessment, namely 20 to 25, was too close to the “cut off point” of 18 years for the Council not to give AB the benefit of the doubt. The respondent’s short-form assessment was based on AB’s physical appearance and demeanour “failed to adequately acknowledge the potential margin for error and give AB the corresponding benefit of the doubt” [57].

*The Merton assessment*

30. Pursuant to the judgment of Thornton J, two independent social workers assessed the applicant’s age on 27 and 28 February 2020. The assessment was conducted in Dari in the presence of an appropriate adult from the Refugee Council. The ensuing *Merton* assessment outlines the questions which were put to the applicant concerning his personal details, his account of how he knows his age, the languages he speaks, his religion, his health, family members, reasons for leaving Afghanistan, education, employment, leisure, physical and development and appearance. The assessment considered the short form assessment undertaken by Kent County Council on 26 July 2019, and some of the materials generated by the applicant’s asylum claim, including his “statement of evidence”. The meeting on 28 February 2020 is described as a “follow-up meeting” in the age assessment and focuses on the applicant’s account of his age while living in Austria, and his circumstances in Afghanistan before his departure.
31. The assessment outlines a number of background facts concerning Baghlan province in Afghanistan, Afghan identity documents and primary and secondary education in Afghanistan. The operative analysis of the applicant’s age begins at page 54. It commences with a description of the applicant’s demeanour during the age assessment meetings. He is described as having demonstrated “disinterest through playing with small pieces of paper... and dismantling a paper cup...” One feature of the first day’s interviews with the applicant was that he wanted to finish early for lunch, namely at 12 p.m., rather than 12.30 p.m. That was cited as evidence of his disinterest in the process. He is said to have provided limited eye contact and focused instead on his own actions. He spoke with a quiet, mumbled voice, and at times the interpreter had to ask him to speak up. However, notes the assessment, “when he detested certain response [sic] from the assessor, his demeanour and tone of voice significantly changed to the point of challenging the assessor.”
32. The assessment describes the applicant’s physical appearance and clothing. It describes the applicant’s visible body and facial hair, including what is described as

a “faint shaving shadow” above his top lip, and notes that he has a prominent Adam’s apple.

33. The applicant’s evident irritation by the questioning concerning his age, and his confidence and assertiveness in response, were regarded by the assessing social workers as demonstrating the applicant’s “mature” responses. While those behaviours could have been explained by the applicant being tired and anxious due to his experiences prior to his arrival in the UK, in the opinion of the assessing social workers they were “signs of disinterest” and demonstrated that the applicant sought to minimise the importance of the age assessment. The applicant is said to have provided limited information concerning his age or the timeline of age-related events, which the assessors considered to be an attempt to deflect the applicant’s true age. The applicant was described as selective to the point of being uncooperative when the assessors sought detailed information, making it difficult to ascertain what was “fact or fiction”.
34. In relation to the applicant’s physical appearance, although there were age lines and acne scarring, that may have been attributable to his birth and early life in a warmer climate than Europe.
35. There were some contradictions in the applicant’s account of how he knew his age, the assessment considered. Whereas he claimed on 26 July 2019 that his mother had informed him of his age 2 years previously, during the assessment in February 2020, he claimed that he had been informed by his father only eight months previously. That was “questionable”, considering the applicant had been in Austria for three years prior to his arrival in this country.

## THE LAW

36. The legal principles applicable to the determination of age assessments are now well established.
37. The Children Act 1989 imposes certain duties upon local authorities in relation to children within their area who are “in need”. See, for example, section 17, which imposes a general duty on every local authority to safeguard and promote the welfare of children in within their area who are in need by providing a range and level of services appropriate to those children’s needs. Section 20 obliges every local authority to provide accommodation for any child in need within their area who appears to require accommodation as a result of there being no person who has parental responsibility for the child (amongst other factors). A paradigm example of the practical application of these duties arises in the case of unaccompanied asylum seeking children. They have no one else to look after them, nowhere to go, and no way to support themselves. The Children Act 1989 obliges local authorities to act in such cases.
38. Difficulties arise when it is not clear whether a person is a child or not. By section 105(1) of the 1989 Act, “‘a child’ means... a person under the age of eighteen”. The

common law has evolved such that the task of determining factual disputes between those who claim to be children and local authorities is to be resolved by an application for judicial review on a precedent fact basis. Applications are brought in the Administrative Court and, by convention, are transferred to the Upper Tribunal.

39. In *R (A) v London Borough of Croydon* [2009] UKSC 8 [2009] 1 W.L.R. 2557, Lady Hale held that the issue of whether a person is a child or not is a question of fact, for the court to decide upon an application for judicial review. Having considered the value judgements to be made by local authorities when addressing the question as to whether a child is “in need” or not, she said, at [27]:

“But the question whether a person is a “child” is a different kind of question. There is a right or a wrong answer. It may be difficult to determine what that answer is. The decision-makers may have to do their best on the basis of less than perfect or conclusive evidence. But that is true of many questions of fact which regularly come before the courts. That does not prevent them from being questions for the courts rather than for other kinds of decision-makers.”

40. In his concurring opinion, Lord Hope said, at [51]:

“It seems to me that the question whether or not a person is a child for the purposes of section 20 of the 1989 Act is a question of fact which must ultimately be decided by the court. There is no denying the difficulties that the social worker is likely to face in carrying out an assessment of the question whether an unaccompanied asylum seeker is or is not under the age of 18. Reliable documentary evidence is almost always lacking in such cases. So the process has to be one of assessment. This involves the application of judgment on a variety of factors, as Stanley Burnton J recognised in *R (B) v Merton London Borough Council* [2003] 4 All ER 280, para 37. But the question is not whether the person can properly be described as a child... The question is whether the person is, or is not, under the age of 18. However difficult it may be to resolve the issue, it admits of only one answer. As it is a question of fact, ultimately this must be a matter for the court.”

41. There is no burden of proof in age assessment cases: see *R (CJ by his litigation friend SW) v Cardiff City Council* [2011] EWCA Civ 1590 at [21] (“...once the court is invited to make a decision upon jurisdictional fact it can do no more than apply the balance of probability to the issue without resorting to the concept of discharge of a burden of proof...”). As this Tribunal held in *R (AM) v Solihull Metropolitan Borough Council (AAJR)* [2012] UKUT 00118 (IAC) at [12]:

“There is no hurdle which the claimant must overcome. The court will decide whether, on a balance of probability, the claimant was or was not at the material time a child. The court will not ask whether the local authority has established on a balance of probabilities that the claimant was an adult; nor will it ask whether the claimant has established on a balance of probabilities that he is a child.”

42. There can be difficulties in assessing the age of a putative child. *In R (B) v London Borough of Merton*, Stanley Burnton J held at [28]:

“Given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the decision maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other.”

43. At [37], he said:

“...except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must 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 may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.”

44. This was developed in *R (AM) v Solihull MBC* [2012] UKUT 118. At [15], the Vice President of the Upper Tribunal (Immigration and Asylum Chamber) said:

“...almost all evidence of physical characteristics is likely to be of very limited value. That is because, as pointed out by Kenneth Parker J in *R (R) v Croydon* [2011] EWHC 1473 (Admin) there is no clear relationship between chronological age and physical maturity in respect of most measurable aspects of such maturity.”

45. At [16] he added:

“...individuals who raise questions of the assessment of their age typically have a history, or claimed history, beginning with childhood and early youth in a country of relative poverty, continuing with a long and arduous journey that is claimed to have taken place during their mid-teens, and concluding with a period living in a country of relative affluence such as the United Kingdom. So far as we are aware, no, or no sufficient, work has been done to identify what affect such a history might have on their physical maturity at various dates. In particular (although we accept that we are relying more on instinct than anything else) physical maturity may be attained more slowly in conditions of poverty and malnutrition and that on arrival such a person may look less physically mature than his chronological age might suggest. After his arrival it may be that physical changes take place more quickly than they would otherwise do, but it may (or may not) be that a person with such a history is less physically mature than anybody might expect for his age.”

46. The Vice President addressed the relevance of mental maturity and demeanour at [19]:

“So far as mental development is concerned, it is very difficult indeed to see how any proper assessment can be made from a position of ignorance as to the individual's age. Most assessments of mental development are, in essence, an assessment of whether the individual is at average, or below or above average, for his chronological age.”

47. He continued:

“So far as demeanour is concerned, it seems to us that there may be value to be obtained from observations of demeanour and interaction with others made over a long period of time by those who have opportunity to observe an individual going about his ordinary life. But we find it difficult to see that any useful observations of demeanour or social interaction or maturity can be made in the course of a short interview between an individual and a strange adult. There may of course be cultural difficulties in such an interview but there are the ordinary social difficulties as well.”

48. The views of social workers gleaned from formal interactions with an applicant are unlikely to mitigate those difficulties:

“20. The asserted expertise of a social worker conducting an interview is not in our judgement sufficient to counteract those difficulties. A



person such as a teacher or even a family member, who can point to consistent attitudes, and a number of supporting instances over a considerable period of time, is likely to carry weight that observations made in the artificial surroundings of an interview cannot carry.”

49. There must be no “predisposition, divorced from information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child...” Physical appearance and demeanour are only likely to be relevant in an “obvious” case, in the absence of compelling evidence to the contrary. See *Merton* at [38].
50. In an age assessment judicial review application, the role of the Upper Tribunal is to arrive at an assessment of the applicant’s age by reference to all material and evidence in the case, applying the balance of probabilities standard of proof. In contrast to conventional judicial review proceedings, the focus of my consideration is not whether the respondent reached a decision which was unlawful on public law grounds, but rather to find, as a matter of fact, what the applicant’s probable age is. Neither party is subject to the burden of proof.

## DISCUSSION

### *The benefit of the doubt*

51. Mr Rule submitted that I should give the applicant the benefit of the doubt, in reliance upon *A v London Borough of Croydon* and *WK v Kent County Council* [2009] EWHC 939 (Admin) at [40], per Collins J, as endorsed by Simon Picken, QC, as he then was, sitting as a Deputy Judge of the High Court in *VS v Home Office* [2014] EWHC 2483 (QB) at [78(7)]. While as set out below I adopt a sympathetic approach towards AB’s evidence, Mr Rule’s reliance on the judgment of Collins J is misplaced. The authorities concerning the benefit of the doubt principle in the context of a disputed age claim address the role of the assessing social workers during the *Merton* assessment, rather than a tribunal or court in an age assessment judicial review. At [40] of *A and WK*, Collins J summarised evidence before the court on that occasion from the assessing local authority that, in its conduct of *Merton*-compliant age assessments, it extends the benefit of the doubt to the individual concerned. Similarly, at [78] of *VS* the deputy judge was summarising the principles applicable to the conduct of *Merton* age assessments by a local authority, in the context of a damages claim for false imprisonment which in part turned on assurances given by the relevant local authority to the Home Office concerning the age of the detained individual.
52. As noted by Thornton J at [38] of her judgment, in *R (oao AS (by his litigation friend Francesco Jeff)) v Kent County Council (age assessment; dental evidence)* [2017] UKUT 446 (IAC), this tribunal considered the extent to which the benefit of the doubt principle extends to age assessment judicial review applications: see [17] to [21]. In the interests of brevity, I quote only [20] and [21]:

“20. We consider, on reviewing the case law, that application of the benefit of the doubt is nothing more than an acknowledgement that age assessment cannot be concluded with 100% accuracy, absent definitive documentary evidence, and is in the case of unaccompanied asylum-seeking children who may also have been traumatised, unlikely to be supported by other evidence. On that basis, its proper application is that where, having considered the evidence, the decision maker concludes there is doubt as to whether an individual is over 18 or not, then in those circumstances, the decision-maker should conclude that the applicant is under 18.

21. Thus, the benefit of the doubt is not of use where a specific date or age has to be determined except insofar as it requires a sympathetic assessment of the evidence as indicated in *R (CJ) v Cardiff CC* [2011] EWCA Civ 1590.”

I have approached the evidence of AB on a sympathetic basis, additionally calibrating my assessment of its credibility by reference to his vulnerabilities. In any event, as will be seen, this is not a case where I had doubt concerning whether AB was over or under the age of 18, such that the applicant does not enjoy the benefit of the doubt in the sense it was summarised at [20] of AS.

#### *Merton assessment: weight*

53. It is also necessary to address the role of the *Merton* age assessment. Ms Rowlands submits that it is a document that carries “substantial weight”, and that I should only depart from the opinion of the experienced age assessors for good reason. Putting to one side for the moment Ms Rowlands’ contradictory submission that I should *not* accept the *Merton* assessment’s conclusion that the applicant was born in 2001, and should instead find he was born in 1999, in my judgment the *Merton* assessment provides no such starting point. While these are judicial review proceedings, the issue with which I am concerned is one of precedent fact; I am to reach my own findings, having heard the evidence, as to the probable age of the applicant. The age assessment, of course, is part of the evidence, but it enjoys no special status. The authorities relied upon by Ms Rowlands in her skeleton argument in support of this proposition do not assist her; at paragraph 41, Ms Rowlands cites the *Solihull* case at [10]. That paragraph concerns the continuing validity of unchallenged age assessments, which is a different matter. The preceding paragraph, [9], rejects a submission that an age assessment, once challenged, attracts no weight. That, I can readily accept; an age assessment is evidence of the considered view of two (usually two) experienced social workers, but attracting *some* weight is a different matter from attracting *substantial* weight. The *Merton* assessment forms part of the evidence in the case, to be considered in the round; no more, no less.

#### *Findings of fact*

54. In the analysis that follows, I do not set out the entirety of the evidence I have heard and considered, nor the submissions made. Rather, I will summarise the salient aspects of the evidence and submissions to the extent necessary to reach and give reasons for my findings. Naturally, I considered the entirety of the evidence, in the round, to the balance of probabilities standard before reaching my decision.
55. There are some matters which I exclude from my analysis. For example, Ms Rowlands submitted that the shape of AB's face, in contrast to the rounder form of that of the witness HR, who has recently turned 18, is a factor demonstrating that he has attained the age of majority. As I made clear at the time, I have little hesitation in rejecting this speculative submission which was not grounded in evidence. Nor do I draw an adverse inference against the applicant that he has not provided evidence of his height over the course of the two years of his residence in the UK; there is no scope for adverse inferences in a process where neither party bears the burden of proof.
56. By way of a further preliminary observation, it is necessary to recall that those in the position of this applicant, regardless of their age, are likely to be victims of a degree of trauma arising from the perilous journey conducted over a course of many months, and the uncertainty arising from the dispute concerning their age. Having treated the applicant as vulnerable at the hearing, I have calibrated my analysis of the credibility of his evidence by reference to the well-established difficulties vulnerable witnesses often encounter when subjected to the stress and pressure of cross-examination, and generally in relation to recounting their histories.

#### *Medical evidence*

57. I commence by addressing the extent to which the medical evidence provides a concrete basis to conclude that the applicant experiences specific mental health conditions which would require further allowances to be made when assessing his evidence, over and above those outlined above.
58. There are three items of medical evidence in these proceedings. First, there is the formal record of an assessment conducted under the Mental Health Act 1983 ("the 1983 Act") in July 2020. The assessment was conducted following a referral by the police following the applicant's removal to a place of safety under section 136 of the 1983 Act, following an attempt the applicant made to set fire to his room in the Millbank Centre on 27 July 2020. AB was found in his room with a noose around his neck, in an apparent attempt to hang himself. It does not appear that any criminal charges were brought, and no further action appears to have been taken. I have not been provided with any police records. The relevance of the incident for present purposes is simply that it led to the applicant being assessed by two "approved mental health practitioners" for the purposes of the 1983 Act, Mr Simon Nicholls, and Dr Uwadoka, along with a Dr Boggaram from the Child and Adolescent Mental Health Service ("CAMHS"), and another CAMHS official.

59. In summary, the applicant attempted to set fire to his room and was found by staff with a noose around his neck attempting to hang himself. Those conducting the 1983 Act assessment accessed the applicant's GP records, spoke with his social worker, Lily Holmes, and also spoke with the manager of the Millbank Centre. Ms Holmes is recorded as opining that the applicant considered the Millbank Centre to be the source of his problems, adding that he thought that, if he were to move, he would feel less depressed. Ms Holmes, by contrast, felt that even if the applicant were moved, his problems would not be resolved, although her view was that he did not experience a formal mental disorder. The centre manager considered the applicant to be at risk of suicide and noted that many of his friends had moved on. The conclusion of the assessment was in the following terms:

"There was a consensus opinion between the assessing team that [A] had no mental disorder and was using manipulation to get his perceived needs met. There were no issues of lacking capacity. He is making unwise decisions regarding his fire-setting and suicide attempts. We told him our opinion and he said 'so long as I'm healthy' [...] I explained he could be arrested if he set a fire again and it was clear he understood the consequences of his actions. The police also spoke with him and reiterated the risks of fire-setting and the rest with possible criminal charges and deportation. They also felt he understood. In response to the police [A] said 'if I am arrested another day, I'd rather that' but would not explain any more detail.

In coming to this decision, I took into account the guiding principles of the [1983 Act]..."

60. The second item of medical evidence is a letter from a Shalini Mehta, a children's psychological therapist with the Refugee Council. The applicant was referred to the therapeutic service within the Refugee Council on 30 September 2020, in connection with his high levels of anxiety, self-harming and the suicide attempt. In a letter dated 8 June 2021, Ms Mehta states that Ms Holmes, the applicant's social worker, had reported that the age assessment process had had a major impact on the applicant's everyday life and mental health. Ms Mehta states in her letter that she is unable to provide a formal clinical diagnosis of the applicant's mental health but recorded that in her opinion he experienced symptoms consistent with post-traumatic stress disorder which included flashbacks, sleeping problems, stress, irritability, and anger management issues. She conducted 12 therapy sessions with the applicant over the *Zoom* video conferencing platform. On the second page of her letter, Ms Mehta writes that during the therapy sessions, she never had any reason to doubt the applicant's age, and that he presented as younger than his "stated/assessed" age.
61. The third item of medical evidence is the report of Mr Nomir Ahmed, a chartered counselling psychologist. According to Part 2 of his report, Mr Ahmed was instructed to diagnose any mental health conditions experienced by the applicant, and to comment upon how that diagnosis would affect the applicant's presentation

and behaviours, and other matters including the applicant's ability to recall and retain information, and in particular dates, times and events, and his ability to answer questions. The report also addressed additional support the applicant may require during the age assessment process.

62. The Ahmed report does not set out the materials that were provided to the author by those instructing him. It is not clear whether Mr Ahmed had the benefit of the applicant's assessment under the 1983 Act, for example, nor the extent of the other materials generated by the applicant's engagement with Kent County Council or other relevant professionals. The report makes no reference to the applicant's current living arrangements. The late reliance by the applicant upon the report meant that it was not possible for Mr Ahmed to attend the tribunal to give evidence. There is some force to the submission made by Ms Rowlands that it was not possible to explore with Mr Ahmed under cross examination the impact of the uncertainty arising from the age dispute on the applicant's mental health, which is significant as his psychological therapist, Ms Mehta, suggested that it was precisely the age assessment process that was causing the symptoms displayed by the applicant (although I stress that that was a non-clinical opinion).
63. The conclusions of the Ahmed report are at odds with the conclusions of the approved mental health assessors who examined the applicant in July 2020. Whereas in the 1983 Act assessment there was consensus among a number of approved practitioners that the applicant did not have any mental health conditions, and was using manipulation to meet his perceived needs, Mr Ahmed concluded that the applicant experiences severe depression (see paragraph 8.7), moderately severe anxiety (paragraph 8.8), and meets the criteria for a probable diagnosis of PTSD (paragraph 8.10). That led to an overall conclusion by Mr Ahmed that the applicant meets the criteria for a diagnosis of PTSD, as well as a major depressive episode. The impact of that diagnosis, writes Mr Ahmed at paragraph 9.9, is that the applicant experiences memory dysfunction relating to his inability to recall important aspects of the trauma. That, opines Mr Ahmed, may explain why the applicant has found it difficult to provide clear and consistent answers in the course of the legal proceedings to which he is a party. Further, at paragraph 9. 8, Mr Ahmed concludes that the applicant is not feigning his symptoms.
64. It is necessary for me to resolve the conflict between the 1983 Act assessment, on the one hand, and those of Ms Mehta and Mr Ahmed, on the other, and the impact of that conflict on the evidence in these proceedings and my assessment of it.
65. First, as accepted by Ms Mehta, she was unable to provide a clinical diagnosis. She is not qualified to do so. It is of some significance, however, that in her non-clinical opinion, she identifies the uncertainty caused by the age assessment process as being a contributing factor to the applicant's conditions. As set out above, the uncertainty and stress arising from being involved in legal proceedings of this nature, with the ensuing consequences, have the potential to place individuals under great pressure.

66. Ms Mehta's opinion as to the applicant's age was formed over the course of 12 *Zoom* therapy sessions, and so her interactions with him have necessarily been limited. Further, she does not explain the operative reasoning underlying her opinion that he is a child in any depth; her analysis appears to accept that it may be said that there are bases upon which to conclude that the applicant presents as an adult, and she seeks to refute those suggestions (such as by attributing his "perceived understanding and assumed maturity in certain areas" to his "early challenging life", and also the impact of "cultural pressures", such as his perceived sense of responsibility towards his younger siblings), without providing reasons for her conclusion that he *is* a child. Her focus on why he is *not* an adult.
67. Secondly, somewhat surprisingly, the documents provided to Mr Ahmed as part of his instructions were not listed in his report. Either Mr Ahmed was provided with the 1983 Act assessment, and failed expressly to take it into account, or he was not provided with it. Either way, the report's omission from the matters Mr Ahmed considered is highly significant, and his report attracts less weight as a result. For example, whereas Mr Ahmed considered the applicant was not feigning his symptoms, the 1983 Act assessment specifically records the consensus among the assessors that the applicant was being manipulative and seeking to meet his perceived needs through his behaviour. While Mr Ahmed would not be bound by the 1983 Act assessment, he would nevertheless have to reconcile its opposing conclusion with his own.
68. I therefore prefer the 1983 Act assessment. It reflects the medical consensus among a number of approved mental health practitioners, reached following consideration of the applicant's GP records, and discussion with his social worker and the Millbank Centre manager.
69. Of course, as set out above, I accept that the applicant will have experienced a degree of trauma from his journey to the United Kingdom, and the uncertainty of these proceedings will undoubtedly be a large cloud hanging over him. Allied to that, he has made a claim for asylum which, although the substance of that claim outside the scope of these proceedings, there can be little dispute that many asylum seekers experience anxiety and depression arising from the circumstances of their claim, and the corresponding uncertainty they experience while waiting for their claims to be resolved. In addition, the current situation in Afghanistan is likely to cause any citizen of that country distress when recalling events during their childhood. And notwithstanding the reasonable adjustments I sought to make during the hearing itself, there were still points at which the process clearly caused the applicant confusion. Ms Rowlands, in particular, had to be reminded to ask shorter questions, and to simplify the terminology that she used (for example in relation to whether he had appealed against the refusal of his asylum claim in Austria). It was clear at times that the applicant was struggling to follow, and my intervention was required to ensure his full participation and understanding.
70. I therefore make allowances in my assessment of the applicant's evidence to account for those factors, albeit not to the extent Mr Ahmed's report suggests that I

should, for the reasons given above. I also approach his evidence in a sympathetic manner, as Mr Rule submitted I should.

*Demeanour and physical appearance*

71. I will deal first with the evidence and the submissions which I consider to be of a neutral character, relating to the applicant's demeanour and appearance.
72. Mr Rule placed great emphasis on what he claimed to be the immature behavioural traits of the applicant. In a detailed written schedule, Mr Rule highlighted extracts from the applicant's social care notes which he submitted demonstrated the behaviour of a child, rather than that of a young adult. These included having a messy and smelly room, punching a wall of the Millbank Centre, sleeping in late, smoking in his room, claiming to miss his social worker, Ms Holmes, needing strict guidance as to how to spend his clothing allowance, avoiding key worker sessions, going out for lengthy periods, without explaining where he is going, breaching so-called "lockdown" guidance which suggested that daily exercise should be limited to one hour, failing to observe social-distancing guidance, being fussy with his eating, allowing his friend HR to do all the cooking and being content with assuming the role of cleaning and washing up afterwards, declining to engage in Pancake Day celebrations, not wanting to set up a laptop, declining to go to Red Cross lessons, relating well to other young people, needing assistance with how to wash and dry clothes, being nervous in a language assessment and similar traits.
73. By contrast, Ms Rowlands submitted that many of the above examples demonstrate that the applicant was, in fact, older than a child. In her submission, the applicant was behaving as one would expect an adult to conduct themselves when subject to rules, accommodation and support targeted at those aged under 18. In his initial interview with Mr Stringer on 26 July 2016, the applicant suggested that he should be accommodated with a family, or on his own. There was an assertiveness to the applicant's behaviour, submitted Ms Rowlands, which revealed that he was in excess of his claimed age.
74. In my judgment, it is clear that the applicant had some prior knowledge of the sort of provision that is made for UASC in the UK. The applicant has presented at times as a determined individual, with clear ideas of what he expected. However, that is hardly surprising; the applicant's journey was facilitated by an agent, and in his second witness statement, he reveals that he received a degree of coaching from the agent as to what to say upon his arrival. HR's evidence was that his own agent had provided him with false identification documents, such was the assistance available to those seeking clandestine entry to the UK. That this applicant was coached would not distinguish him from the vast majority of other UASC who arrive in this country, and nor does the fact he sought accommodation of a particular nature clearly render him an adult.
75. Ms Rowlands relied on the fact that social workers at the applicant's current accommodation have observed him delivering leaflets for a local takeaway, and unpacking boxes in a shop, as though working there. The applicant revealed to one

of his social workers that he has undertaken some work because he wants more money. Again, that takes matters no further. Those in the 15 to 17 years age bracket often work in manual, low-skilled jobs, just as those over the age of majority do. Nor do I accept that it necessarily follows that the applicant's defiance of the prohibition against working to which asylum seekers are subject renders him an adult. I have been taken to no evidence that minors do not flout that prohibition, and my experience sitting in the Immigration and Asylum Chamber does not suggest otherwise.

76. In my judgment, therefore, the above behavioural traits do not tell one way or the other. While I accept that some of the applicant's behaviour may reveal a lack of maturity, I reject the submission that it demonstrates the applicant's age in one way or another. It is readily possible to envisage young people both under and over the age of 18 acting in the manner outlined above. As Mr Rule realistically accepted during his submissions, my analysis of these features of the applicant's behaviour is a question of weight. He did not submit that the only rational conclusion to be drawn in relation to them was that the applicant must still be a child; by the same token, neither did Ms Rowlands submit that these behavioural traits admit only of the conclusion that the applicant is the age the council seeks to assign to him. The weight to ascribe to the applicant's behaviour is a largely neutral factor, to be considered in the round with the remaining evidence.
77. Of course, demeanour and behaviour can be a guide to assessing age: so much is clear from the guidance summarised in Mr Rule's skeleton argument, and in key authorities in the jurisdiction, such as the judgment of the Vice President in the *Solihull* case. But it is important to recall the limitations of demeanour-based evidence. As the Vice President noted, observations gleaned from limited, formal interactions are unlikely to be of significant assistance. An opinion formed on the basis of observations and interactions with the individual concerned over a "considerable period" (*Solihull*, at [20]) is likely to carry weight that observations made in the artificial surroundings of an interview cannot carry. That is a reality that even the asserted expertise of a social worker cannot overcome, held the Vice President.
78. The above observations are consistent with the conclusions of the full age assessment insofar as demeanour and physical presentation are concerned. The assessment observed that the applicant's assertiveness was beyond that which would be expected of a 15 year old.
79. In relation to the applicant's physical presentation, the conclusions of the *Merton* assessment are similarly neutral. He had been shaving for two to three years, he claimed, and his presentation was consistent with that narrative. Similarly, the apparent age of the skin on his face, and acne scarring, was consistent with one born and brought up in a warmer climate, the assessment noted.
80. Against that background, I turn to the evidence of Mr Stringer. He is, as Thornton J noted at [4] of her judgment, an experienced social worker. He formed an early view that the applicant presented as being significantly over the age of 18, despite



the fact he had initially been accepted by the Home Office to be a child and being processed accordingly. His interventions led to the short-form assessment concluding that the applicant was not a child, and the initial decision to treat him as such being reversed.

81. Mr Rule was highly critical of Mr Stringer's conduct on 26 July 2019, largely because, based 'only' on a photograph of the applicant, which he viewed remotely, he initiated a process which ultimately led to the applicant being treated as an adult by an assessment later found to be unlawful by the High Court. In my judgment, Mr Rule's criticisms of Mr Stringer's personal conduct on 26 July 2019 were unfounded and must be distinguished from the deficiencies in the short-form age assessment found by the High Court. For example, it is nothing to the point that Mr Stringer initially contacted a more senior official on 26 July 2019 before taking steps to revisit the applicant's age. For an official to contact a more senior official before taking such steps, as Mr Stringer did, is hardly reprehensible conduct. It is good administration and certainly does not reveal any form of ill-will, as Mr Rule appeared to submit. Nor do the steps Mr Stringer later took that day to secure consensus that the applicant was not a child merit criticism of his personal conduct.
82. Under cross-examination, Mr Stringer's emphasis on the safeguarding responsibilities inherent to his role was compelling, and entirely consistent with the difficult decisions which face those in his and similar positions who are charged with assessing whether to treat a putative child as a child, or as an adult. The consequences of treating an adult as a child were highlighted by the Supreme Court in *R (oao BF (Eritrea)) v Secretary of State for the Home Department* [2021] UKSC 38 at [54]. Lord Sales and Lord Burnett held that there were "sound policy reasons why adults should be treated as such and not as children". In his oral evidence, Mr Stringer highlighted the safeguarding concerns that would additionally arise from placing an adult in accommodation with children under the care of the local authority, many of whom are, by definition, amongst the most vulnerable children in society.
83. It appears that Mr Rule sought to advance similar criticism of Mr Stringer's personal conduct before the High Court, which was rejected by Thornton J at [55]: "I am not however persuaded by Mr Rule's criticisms of Mr Stringer's conduct or his submission that the location of the interview was inappropriate..." I, too, reject the criticisms advanced before me. I reject Mr Rule's submission that the weight Mr Stringer's evidence attracts is diminished on account of his personal conduct.
84. In cross-examination, while accepting the deficiencies in the short-form age assessment he drafted, Mr Stringer maintained his view that the applicant was, and had been at all material times, an adult. In addition to having interviewed him on 26 July 2019, Mr Stringer has met or interacted with the applicant on a number of occasions. In his second statement, dated 24 May 2020, he stated at [25] that he had met the applicant on at least 12 further occasions, from passing greetings lasting for around 2 minutes in and around the Millbank Centre, to 45 minute encounters. In his third statement, dated 3 November 2020, Mr Stringer outlined a further meeting he conducted with the applicant, concerning information received from the

Austrian authorities to the effect that the applicant had declared a date of birth of 1 January 1999 when he claimed asylum there. At paragraph 10 Mr Stringer wrote of the meeting:

“Having met [the applicant] on multiple occasions in different settings and circumstances since his arrival to the UK, this meeting affirmed my original decision that [the applicant] is an adult and not a child. I remain of the view that he is an adult aged between 20 and 25 years of age.”

85. In my judgment, Mr Stringer’s interactions with the applicant, and the conclusions he has formed as to his age, attract a degree of weight greater than the minimal amount that would ordinarily be ascribed to the views of assessing social workers formed only on the basis of formal interactions in the artificial surroundings of an age assessment interview. Mr Stringer’s unchallenged evidence was that he had met with the applicant on a number of other occasions, over a considerable period of time. His interactions with the applicant have been varied and over a period of time, and his evidence therefore attracts a degree of weight on that basis, albeit not determinative weight.
86. Contrary to Mr Rule’s submission, the fact that Mr Stringer has maintained his views as to AB’s age is not a ground for criticism; the impact of the earlier proceedings on Mr Stringer was apparent from his evidence, and it is clear that his maintained view is a considered view, formed on the basis of his professional judgment.
87. I turn now to the evidence of Roland Carter. In his statement dated 2 August 2019, Mr Carter said:

“Based on my first observations of [A] I had no reason to question his age, he was very quiet, appeared to be very slight in stature and quite thin... He immediately went to sleep when he arrived in our office. When he woke up he showered and changed into the clothes we provide for new arrivals. He requested smaller trousers which I was not able to provide as he was smaller than a size S kids clothes. I turned on our Xbox for him to play and he was very excited, miming to me that he enjoyed driving games. He spoke very few English words and was cautious and polite around me. He followed me into the kitchen when I went to make him some food and generally seemed more comfortable with me present and being left on his own in a new environment. I found all of this to be consistent with behaviour I have previously observed in Afghan minors and our Dover office.”

88. In light of his experience, and the context of his interactions with the applicant, Mr Carter’s opinion that the applicant was a 15 year old boy on the day in question attracts weight. His was an opinion formed in less formal surroundings, where the

applicant is likely to have been more at ease than he was during the repeated interviews to which he was subject that day.

89. However, the weight Mr Carter's evidence attracts is tempered by the following factors. First, Mr Carter did not know at the time that the applicant had spent three years living in Austria, claiming to be a child upon his arrival there, but on the basis of a date of birth that would place him as an adult by the time he left in 2019. I accept that the applicant has given reasons for initially concealing the Austrian leg of his journey, and the 1999 date of birth he gave to the authorities there (factors to which I will return), but for present purposes it suffices simply to state that there was a significant part of the applicant's history of which Mr Carter was unaware, and which on any view would have been a relevant factor for him to consider. Secondly, the opinion formed by Mr Carter was in the context of his interactions over the course of only a single day. While those interactions gave Mr Carter the opportunity to see the applicant in a far less formal environment than the interviews also conducted with the applicant that day, they are nevertheless limited because they were only over the course of a single day. Thirdly, there is no updated evidence from Mr Carter. While that would be understandable in the event that he had had no further contact with the applicant, he appears to have had a degree of contact since; I was informed at the conclusion of the hearing that Mr Carter had been one of a number of members of the public present in court throughout the hearing. Mr Carter was not called by either party to give evidence. I am, therefore, without the considered and updated view of Mr Carter (assuming that he had had further interactions with the applicant since 26 July 2019 other than in the margins of the hearings before me). That, of course, does not undermine the credibility of Mr Carter's written evidence, but it does mean that his evidence amounts only to a snapshot of his opinion formed after a single day's contact in July 2019, following which there have been developments in the factual matrix, in particular the details provided by the Austrian authorities, and the applicant's three years' residence in that country, of which Mr Carter was unaware.
90. It follows that Mr Carter's evidence attracts weight but, when his evidence is assessed in light of what is now known about the applicant's chronology, it is of lesser assistance than otherwise may have been the case.
91. I also heard evidence from HR, a citizen of Afghanistan born in 2003. He is the applicant's closest friend, having got to know him at the Millbank Centre. He has always considered the applicant to be his claimed age, mainly due to the applicant's slight stature and appearance. HR and the applicant have spent a considerable period of time in each other's company; when they both lived in Millbank, they saw each other daily. HR claims to have overheard the applicant speaking to his father in Afghanistan during a call which took place after the *Merton* age assessment in which the applicant's father confirmed to him that he was 15 years old. HR overheard the contents of the call because he was in the same room. I return to this evidence below.
92. In my judgment, the evidence of AB's physical appearance is largely neutral. His physical appearance is within the territory where there is a significant margin for

error. In his second witness statement, Mr Stringer outlines a series of measurements of the applicant's height taken over a three month period. The measurements were very similar and did not appear to reveal any growth over the period, leading Mr Stringer to conclude that the applicant had stopped growing. That aspect of Mr Stringer's evidence attracts little weight. As held in *Solihull* at [18], for evidence of height to attract weight, it would need to cover at least an 18 month period. In any event, there were clearly inaccuracies in the measurements taken by Millbank staff, as they fluctuated: 156.1cm on 22 August 2019, 156.7cm on 25 September 2019, 156.4cm on 11 November 2019, and 156.1cm on 24 November 2019. The height evidence attracts no weight.

*AB's "history"*

93. The analysis in the preceding paragraphs underlines the need, identified by Stanley Burnton J at [28] of *Merton*, to take a history from the individual concerned. The applicant has given an account of how he knows his age on several occasions; when first interviewed by Mr Stringer, later that day to Mr Carter, during the *Merton* age assessment, in his witness statements prepared for these proceedings, and in his oral evidence before me.
94. There are certain aspects of the applicant's history which I need not address. He was questioned in the *Merton* assessment, as well as in the proceedings before me, about whether his claimed date of birth was calculated by reference to the solar Islamic calendar, the Gregorian calendar, or the lunar calendar. His understanding of the differences between each was limited, and nothing turns on this. Similarly, analysis of his age while at school in Austria do not take matters further; it was put to the applicant in cross-examination that he was placed at an adult learning college by the Austrian authorities. There is no background evidence before me concerning the school in question and the ages of its intake.
95. I find that the applicant has given inconsistent accounts of how he knows his age and of significant age-related events in his history, and that his evidence concerning his age lacks credibility. For the reasons set out below, an examination of the applicant's history, taken in the round with the remaining evidence, reveals that he was not born in 2004 as he claims, and that he is, in fact, an adult with a date of birth of 1999.
96. When first interviewed by Mr Stringer on 26 July 2019, the applicant both claimed that his father had informed him four months previously that he was 15 years old, and also that he had been told his age, in Afghanistan, when he was 13, in the context of being vaccinated. He later sought to clarify his position by saying that he had been asked four months previously, on his journey to the UK, what his precise age was, and it was for that reason that he contacted his father to find out. This conversation was, of course, conducted without the applicant revealing to Mr Stringer that he had resided in Austria for three years, and could not have been travelling to the UK at the time of the conversation, even allowing for a lengthy journey from Austria to this country. Having spent three years in Austria was, of course, inconsistent with the account the applicant gave of having been told by his

mother, when he was aged 13 and still in Afghanistan, that he needed to be vaccinated. On the case he now advances, he was already in Austria when he was 13, having left Afghanistan when he was 11. Of course, people lie for many reasons, and the applicant has explained that his tired, scared, and vulnerable state at that point led him to conceal the Austrian aspect to his history. The interview was conducted in Farsi, rather than Dari, which is the applicant's preferred language. I take these factors into account.

97. In the *Merton* age assessment, which was conducted in February 2020, the applicant said he had been told his by his age mother and father "eight months ago", when he was leaving Austria, two days before his actual departure. He was going to be deported, he said. His father told him that he had been born in 2004 and was 15 years old. As for his age in Austria, the applicant said that he did not know; he had been under the control of his cousin at the time, who provided his age to the authorities. When asked by the social workers for his age when he left Afghanistan, the applicant said he did not know.
98. The applicant did have a cousin in Austria; so much is clear from information subsequently provided by the Austrian Federal Office for Immigration and Asylum's Dublin Unit, in a response provided under Article 34 of Regulation 604/2013 (the Dublin III Regulation) dated 11 September 2020. The Dublin Unit's response also states that the applicant's date of birth was recorded as 1 January 1999, and that the applicant entered the country on 1 June 2016, claiming asylum the same day. The applicant would have been a child at the time, on that date of birth.
99. I consider it to be unlikely that the Austrian authorities would have accepted the applicant to be a child on the basis of information solely provided by another family member, without any examination of the applicant or an attempt to verify the information with him personally, given he would have been 17 on his then claimed date of birth. The Austrian authorities are bound by the processes of the Common European Asylum System which places the best interests of the child at the heart of the examination of asylum claims made by children. It would be striking if the Austrian authorities accepted the applicant to be a 17 year old child by reference solely to information provided by a third party. I accept, however, that the phenomenon of children being coached to give misleading information to the authorities in "transit" countries is real, and that it is plausible that the information given to the Austrian authorities by the applicant could have been the subject of coaching by another, including his cousin. I also accept that it would have been possible for the applicant and his cousin to pose as father and son, given, as confirmed by the Austrian Dublin Unit, his cousin was born in 1982. I will return to this point.
100. Throughout the age assessment interview, particularly at the meeting on the second day, the applicant either struggled to answer questions about his knowledge of his date of birth and age or was evasive. When pressed as to his date of birth, he claimed not to know it (see Volume 2/page 50). When asked about contact with his family, despite having previously claimed to have been in regular contact with his

parents, he claimed no longer to be able to contact them. Their phone was off, he said, in response to questions on the topic. Looking at the applicant's social care notes, losing contact with his family in Afghanistan is not an issue which he reported to his key and social workers as troubling him, as one would expect if the applicant's ability to contact his parents was impaired as he claimed. Ms Mehta makes no reference to the applicant having raised this as an issue in the course of the therapy sessions she provided for the applicant.

101. I note that HR claims to have overheard the applicant speaking to his father on the telephone while they both still lived at the Millbank Centre concerning the applicant's age; in cross-examination, he said that the conversation took place *after* the age assessment. In re-examination, HR was less clear as to when the telephone call took place; he had not recorded the date of the conversation but was able to say it was after two age assessment results had been provided to other residents at the centre. In what amounted to a leading question, Mr Rule said to HR that he "wanted to remove the guesswork" as to when the conversation took place, which may have planted some doubt in HR's mind about whether he was guessing or not; he certainly had not said that he was guessing. While Mr Rule's re-examination attempted to distinguish between the age dispute arising from applicant's short form assessment and the full assessment, HR provided no further clarity. He was unable to say when the other residents' age assessments took place, simply stating that he, HR, was feeling under pressure at the time. Mr Rule's questions appeared to be intended to capture whether HR's reference to the call taking place "after" the assessment simply meant during the period in which the applicant's age was disputed by the respondent, rather than after the *Merton* assessment. HR's further answers did not shed further light on that issue; taken in the round, I consider that HR's evidence was that the applicant spoke to his father *after* the *Merton* assessment. He had ample opportunity during re-examination to clarify that he meant the call took place during the currency of the applicant's general "age-disputed" status but did not. I reject Mr Rule's closing submission that HR's evidence was that the conversation took place during the overall currency of the applicant's dispute with the respondent concerning his age; the conversation took place after the *Merton* assessment, during which AB had claimed to have no contact with his family in Afghanistan. The applicant did not give the age assessors the full picture of his contact with his family and has not given me the full picture either.

102. The applicant provided a different account in his statement prepared for these proceedings. Rather than being told at a specific point shortly before his departure from Austria, the applicant stated at paragraph 5:

"I have always known my age whilst I was growing up because my mother and father told me. They would tell me that it is important that I know my age. I do not think you know a reason to know your age, it is your age, and you should note."

103. In my judgment, that is a further and significant inconsistency. Whereas the applicant had previously claimed to have been told his age at distinct points in the past, for specific reasons, in his statement he claims always to have known his age,

having been told while he was growing up, on the premise that it was important to know his age.

104. Under cross-examination, the applicant's account was closer to that he gave during the *Merton* assessment, although his recollection was punctuated by claims not to remember key details, when faced with questions which highlighted the inconsistencies in his account. He said he could not remember what he had told Mr Stringer about having been informed of his date of birth by his father four months before arriving in the UK in July 2019, which would have been in March 2019. He could not remember whether he was told his age by his father either when he was in Austria or the UK, which contrasts with (i) his statement, in which he said he always knew his age growing up, and (ii) his accounts of having been told his age by his mother (to get vaccinated aged 13, in Afghanistan) and his father (before his arrival in the UK, in Austria) previously.
105. While recalling the applicant's vulnerability and making allowances for his ability fully to recollect his history, the overall picture that emerges from the applicant's oral evidence is of an individual presented with the consequences of having given different accounts of how he knew his age, on different occasions, to different people. He has not given the full picture of the contact he has with his parents; HR's evidence, as I have found, was that AB spoke with his father *after* the *Merton* age assessment result, thereby undermining the applicant's claim to have lost contact with them during the assessment process. Nothing turns on HR having overheard the applicant's father confirm his age as being 15; HR was not party to the conversation, and the mere fact that the applicant's father is thought to have said to the applicant that he was 15 is not capable of curing the defects in the applicant's account set out above. The significant feature of HR's evidence is that the conversation took place after the *Merton* assessment. There was contact between the applicant and his family in Afghanistan at a time when the applicant said he had lost contact with them. His claims, underlined in cross-examination, to be unable to secure a copy of his *Taskera* or other documents verifying his age, lack credibility. HR's opinion as to AB's age was based almost entirely on his physical appearance and slight stature, without taking into account his history, and attracts little weight.
106. The applicant has been in contact with his parents at key stages of the age assessment process. In contrast to HR, who obtained a copy of his own *Taskera* from his family in Afghanistan, and other documents such as educational certificates of attainment, this applicant has not obtained documents that may have assisted his case (and had not obtained such documents at a time before the Taliban overthrew the government in Afghanistan; I accept that recent events would make current contact difficult, but on AB's case he lost contact with them some time ago, a claim I do not accept). AB has not obtained a copy of the record he claims his father kept of his age, which is said to have been written in the Qu'ran. While he is not subject to a burden of proof to establish his age, the lack of documentary evidence, notwithstanding his contact with his family at the relevant times, is nevertheless a factor that goes to the weight his evidence attaches.

107. The *Merton* assessment social workers concluded that the applicant turned 18 in 2019 when he was to be “deported” from Austria (by which I take them to mean that he was subject to removal proceedings or some other obligation to leave). They did not have the benefit of the Austrian Dublin Unit’s record of the applicant having given a date of birth in 1999 which states that his claim was “finally rejected in the second instance” on 24 July 2019. I reject the applicant’s evidence that his cousin had a monopoly in all dealings with the Austrian authorities on his behalf, with no involvement from him. The date of birth given rendered the applicant a child upon arrival in 2016, with the effect that his claim to have made himself appear older under the direction of his cousin so as not to be treated as a child lacks weight; he would have been treated as a child on the date of birth he provided. The applicant was not required to leave Austria upon becoming an adult, as the *Merton* assessors speculated, but rather when his asylum claim was finally determined, over two years after attaining the age of majority, following three years’ residence. The Austrian authorities’ knowledge of the applicant’s date of birth was in the context of his relatively lengthy residence there; he did not, for example, provide the date of birth as part of a fleeting encounter to secure immediate free passage to another country (as can often be the case in proceedings such as these), with no opportunity for the asylum authorities to follow up or otherwise act upon his date of birth. Rather his claim for international protection was examined by the Austrian authorities, and only finally rejected following some form of repeat consideration.

### *Conclusion*

108. Drawing the above analysis together, having considered the entirety of the evidence in the round to the balance of probabilities standard, and doing the best I can and adopting as sympathetic approach towards the applicant as possible, I consider the applicant’s probable year of birth to be 1999. While many of the factors relied upon by each party were neutral, AB’s account of being told his age, and informed of his date of birth, lacks credibility on account of its inconsistencies. So too does his claim to have lost contact with his family at the time of his age assessment. While Mr Carter’s evidence and experience is superficially attractive, it is subject to the weaknesses set out above, and so carries less weight. The other factors relied upon by both parties are largely neutral and are of little assistance to my core analysis. A date of birth in 1999 is consistent with the information AB provided to the Austrian authorities, and consistent with their treatment of him. I reject the applicant’s evidence that he was under the control of his cousin at the time such that he provided a misleading date of birth. The date of birth he provided to the authorities in Austria was accurate.

109. I find that the applicant’s date of birth is 1 January 1999.

### **SUMMARY OF DECISION**

110. It is determined that the applicant's date of birth is 1 January 1999 so that on arrival in the United Kingdom on 26 July 2019, he was 20 years of age.