Upper Tribunal
(Immigration and Asylum Chamber)

R (on the application of SS) v London Borough of Croydon (AAJR) [2012] UKUT 00139(IAC)

IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Heard at Field House

on 2 nd , 3 rd and 6 th February 2012

Before

Upper Tribunal Judge Latter

Upper Tribunal Judge Southern

The Queen on the application of

SS

(by his litigation friend Helen Johnson)

Claimant

- v -

THE LONDON BOROUGH OF CROYDON

Defendant

Representation :

For the Claimant: Mr Azeem Suterwalla, instructed by Harter and Loveless, Solicitors

For the Defendant: Mr Andrew Lane, instructed by L.B Croydon

DETERMINATION AND REASONS

Introduction

1.
In these proceedings the claimant challenges an age assessment carried out on behalf of the defendant on 9 th September 2010 whereby it was concluded that the claimant was at that date 17 years of age with a nominal date of birth identified as 1 st January 1993. His case is that he is two years younger, with a nominal date of birth asserted to be 1 st January 1995 although, as we shall see, one of the few things that is agreed between the parties is that, whatever the claimant's year of birth is, he was almost certainly not born on the 1 st of January. The acceptance of that fact makes what is already a very difficult task, the establishment of the claimant's true date of birth, even more so because, even if a year of birth is identified as being the most likely to be correct, that finding still leaves a wide margin within it as to the claimant's precise age.

2.
Put another way, the difference between the positions taken by the parties is this: as at the date of the hearing before us the defendant asserts that the claimant is 19 years old whereas the claimant insists that he is 17 years old and so still a minor entitled to the level of services provided by the Defendant that flows from him being a minor.

The claimant's account of his life in Afghanistan

3.
The claimant is a citizen of Afghanistan. That much, at least, is not in dispute. He was born and was raised in a village in Laghman Province with his parents and younger sister. He attended a nearby school from the age of 6 until he was, on his account, about 12 years old. At some time in 2008 his father decided to cease working for the Taliban and instead stay at home with his family. Shortly after his father had obtained an identification document, or tazkira, for the claimant, the Taliban came and took him from his home, presumably in retaliation for his withdrawal from service with them, and his body was returned to the village soon afterwards.

4.
A few months later, while the claimant was at school, the Taliban came to his house looking for him, saying that they wanted the claimant to join them. His mother denied knowledge of his whereabouts and the Taliban left. However, they retuned on another day when, again, the claimant was at school. They slapped and threatened the claimant's mother when she denied knowing his whereabouts, saying that the whole family would be killed if she did not give him up.

5.
Immediately after this, fearing for her son's safety, his mother took him and his sister to the home of a maternal uncle, about an hour's journey away, where they remained while he made arrangements to take the claimant to Pakistan where an agent was to be found to bring him to the United Kingdom. While the claimant and his maternal uncle stayed in a rented room in Pakistan, waiting for the arrangements for an agent to be finalised, his mother and sister remained with the family of his maternal uncle where, as the claimant confirmed in evidence before us, they remain being looked after by this uncle. After about five months in Pakistan, the maternal uncle brought the claimant back to see his mother in Afghanistan for two or three days before returning with him to Pakistan where he commenced a four month long journey that brought him to the United Kingdom, arriving in this country concealed in the back of a lorry on 7 th September 2009. He claimed asylum the following day, having spent his first night in this country with a stranger he met after decamping from the lorry that brought him here, that anonymous good Samaritan also bringing him to the place where he was to make his asylum claim.

History of Proceedings

6.
There have, in fact, been two age assessments carried out by the defendant. Both are examined in detail below. The first was carried out on 22 nd September 2009, shortly after the claimant's arrival in the United Kingdom. The conclusion of that assessment, that the claimant's date of birth was 1 st January 1993, was challenged by an application for permission to seek a judicial review of it. That challenge was supported, inter alia by a report of Dr Diana Birch, although no reliance is now placed upon that evidence and we have not been asked to consider it. In response to that application, the defendant agreed to withdraw the first age assessment and to make it afresh. That was done, as we have mentioned above, on 9 th September 2010, although the two social workers carrying out that

assessment reached the same conclusion, which was that the claimant's date of birth was said to be 1 st January 1993.

7.
Meanwhile, the claimant's asylum claim was being processed. By letter dated 23 rd October 2009 UKBA rejected the asylum and human rights claim, explaining why it was not accepted that the Claimant had given a truthful or accurate account of his experiences in Afghanistan and rejecting his claim to be as young as he claimed to be. However, referring to the age assessment that had taken place, it was accepted that the claimant was still a minor and so he was granted discretionary leave to remain, for that reason, until 1 st July 2010.

8.
Regrettably, there is an error in paragraph 12 of the refusal letter of 23 rd October 2009. The age assessment referred to was the first one that was carried out on 22 nd September 2009 and which reached the conclusion that the claimant was to be regarded as being 16 years old with a date of birth of 1 st January 1993. Therefore, the statement that:

"You have been age assessed by social services to be 14 years old. You have therefore been granted discretionary leave for three years…"

is, transparently, an error as the period of leave granted until 1 st July 2010 was around 9 months and not three years and took the claimant to what would have been the age of 17 ½ if he had been born on 1 st January 1993.

9.
Before the period of discretionary leave expired, the claimant applied unsuccessfully for further leave to remain, on a basis similar to his original asylum claim. His appeal against refusal of that application to vary his leave was dismissed by an immigration judge after a hearing on 21 st February 2011. The immigration judge rejected the claimant's factual account and found as a fact that he was not a refugee who would face a real risk of persecutory ill-treatment on return to Afghanistan for any reason whatsoever. He also rejected the claimant's assertion to be a minor, finding as a fact that he was, at the date of that hearing, an adult with the date of birth of 1 st January 1993.

10.
But, by the time of the hearing before the immigration judge of the asylum appeal, the Claimant had already been granted permission to seek a judicial review of the second age assessment decision, upon which the immigration judge had relied, in part, in reaching those conclusions. In granting permission on 25 th January 2011 and transferring proceedings to the Upper Tribunal, Miss Geraldine Andrews QC, sitting as a judge of the High Court, said:

"In my judgement there is a realistic prospect that at a substantive fact-finding hearing the court will reach a relevant conclusion that the Claimant is currently under 18 years old."

11.
And thus the matter now comes before us to carry out that fact finding exercise. All that is to be added in order to complete this summary of the procedural history is that the claimant has been refused permission to appeal to the Upper Tribunal against the decision of the immigration judge, both by the First-tier Tribunal and by the Upper Tribunal itself.

The legal framework

12.
Given that it is agreed and common ground between the parties that the legal framework applicable to our assessment is clear and settled, a jointly adopted position with which we agree, it is not necessary for us to carry out an extensive analysis of the authorities. In R (CJ) v Cardiff City Council [2011] EWCA Civ 1590 Pitchford LJ observed that :

1.
In R (A and M) v Croydon and Lambert Borough Councils [2009] UKSC 8 , [2009] I WLR 2557, the Supreme Court settled the question whether, in the event of a challenge to the decision of a local authority as to the claimant's age, the High Court was required either to reach its own decision as to the claimant's age or, alternatively, the challenge was by way of review of the local authority's assessment on Wednesbury principles alone. Baroness Hale gave the leading judgment with which the other members of the Supreme Court agreed. At paragraphs 26 and 27 Baroness Hale explained the difference in approach required for the evaluative judgment whether a child was "in need" within the mean of section 20 of the 1989 Act and the decision upon the precedent question of fact whether the individual concerned was a child. She said this:

"26. … the 1989 Act draws a clear and sensible distinction between different kinds of question. The question whether a child is "in need" requires a number of different value judgments … but where the issue is not what order the court should make but what service should the local authority provide it is entirely reasonable to assume that Parliament intended such evaluative questions to be determined by the Public Authority, subject to the control of the courts on the ordinary principles of judicial review. Within the limits of fair process and " Wednesbury reasonableness" there are no clear-cut right or wrong answers.

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."

Lord Hope, in his concurring judgment, said at paragraph 51:

"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. Section 105 (1) of the Act provides: "in this Act … 'child' means, subject to paragraph 16 of Schedule 1, a person under the age of 18". 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."

The evidence

13.

There is a good deal of evidence before us. The documentary evidence is contained within two agreed bundles and reference to those is to ether bundle A or B and page number. The claimant, as well as raising general criticisms of the age assessments carried out, relies upon:

a.
His own evidence;

b.
The tazkira;

c.
An expert's report confirming the apparent authenticity of the tazkira

d.
The evidence of a neighbour, Mr Franco Bruni, who offers his view as an experienced parent upon the claimant's likely age;

The respondent, in support of its case that it has correctly assessed the complainant's age, relies upon the two age assessments mentioned above and the evidence of five witnesses:

a.
Nimesh Patel, one of the two assessors responsible for the first age assessment;

b.
Peter Tucker, one of the two assessors responsible for the age assessment under challenge in these proceedings;

c.
Doris Besong, the claimant's key worker,

d.
Reni Ravi, of the respondent's Unaccompanied Minor's Team;

e.
Tina Tessie Newall, the claimant's social worker

14.
We propose to approach our assessment of the evidence in the order suggested by Mr Suterwaller. We will consider first the weight to be placed upon the claimant's own evidence before making what we can of the evidence relating to the tazkira and then considering the evidence of the "lay witnesses" before finally considering the weight to given to the two age assessments themselves, having regard, of course, to the evidence of the authors of those reports called before us.

<u>The evidence of the claimant.</u>

15.
The claimant has set out his account of events and what he wishes to say about his likely age on a number of occasions:

a.
A witness statement dated 7 th October 2009 prepared with the assistance of Refugee and Migrant Justice, who assisted him to present his asylum claim ("Asylum statement" found at C42);

b.
The first of two witness statements prepared for judicial review proceedings, dated 22 nd March 2011 (“first statement” at A104);

c.
Oral evidence given on 21 st February 2011 at the hearing of his asylum appeal, as recorded by the immigration judge in his determination (C143);

d.
The second statement prepared for these proceedings, dated 10 th May 2011 (“second statement” at A121)

e.
In oral evidence before us, on 2 nd February 2012.

16.
The claimant has made clear that he himself had no reason to be aware of his age or his date of birth before being told about this shortly before his departure from Afghanistan. In his first statement he said:

“I have never known the date or month of my birth. Birthdays are not celebrated in my culture and births are not registered in Afghanistan.”

We know from the evidence now before us that is not entirely correct, as some hospital births in certain areas may lead to a registration, but we certainly accept that, so far as the claimant is concerned, there was no reason for anyone to be concerned about his date of birth and that it was not registered.

17.
While we are not concerned in these proceedings with the claimant’s claim to be at risk in Afghanistan from the Taliban, we do need to look at his evidence generally to reach conclusions about his credibility as that will inform our assessment of what he says himself about his age.

18.
There are a number of difficulties with the evidence of the claimant himself. We take into account the fact that, whatever age we find him to be, he was a minor on arrival. But even having made allowance for that, it cannot be overlooked that he has given an inconsistent and contradictory account about matters which, if he were describing events that had actually occurred, and had occurred when he said they had, it would have been reasonable to expect him to be able to give a consistent account.

19.
The claimant’s account of his education in Afghanistan is important because it is capable of being a useful reference point for the purpose of making judgements concerning age. The claimant says that he started school when aged six and remained there for six years. It can be deduced that he would, on that account, have been around twelve years old when he finished school.

20.
The claimant’s account of attending school is relevant also to the chorological integrity of his description of the circumstances that led to his departure from Afghanistan.

21.

In his oral evidence the claimant told us that he had attended the same school 6 days a week from the age of six until he was forced to flee with his mother and sister to his uncle's house after the second visit by the Taliban to his home. They spent only a few days there before he was taken by his uncle to Pakistan where they remained for five months before commencing the four month long journey to the United Kingdom. Thus, as we know that he arrived here on 7 th September 2009 we can deduce that he would have last attended school, on his account, nine months earlier, which would be, approximately, at the beginning of January 2009.

22.
The difficulty with that is that if his asserted date of birth of 1 st January 1995 were accepted he would have been just 14 years old and not twelve years old when he last attended school. That is hard to reconcile with his evidence that he attended school for six years from the age of six.

23.
We will examine the tazkira in more detail below. But, on its face, it can be seen that this document must have been issued after 22 nd July 2008 because that is the date of a document produced as part of the process of application. The tazkira contains an entry in a field: "Date of birth and age" which is translated as "According to his appearance 13 years old in 1387 (2008)". Thus, this evidence, relied upon by the claimant, also sits uneasily with his claim to have been twelve years old when he last attended school some four or five months later.

24.
Whatever be the correct position with regard to the claimant's age when he started and finished his education in Afghanistan, his evidence of his attendance at school raised a number of credibility issues. One issue that had been raised previously was why, if the Taliban came twice to his home looking for him, only to find him not there, they did not look for him in the local school.

25.
The claimant told us in oral evidence when asked how long it took him to get to school that it took him "approximately one hour since leaving home". He would make that journey on foot or on "a small cycle". But the claimant had said when interviewed for the purpose of the first age assessment that on school days he returned home for lunch. When it was pointed out that involved a two hour round trip to enable him to take his lunch at home the claimant said that in fact the school was quite close, perhaps five or ten minutes away, which is why he was able to come home for lunch. Asked to explain the contradiction in his account of the journey to school he said that the earlier estimate of an hour was the time from when he got up in the morning, including the time it would take for his mother to give him a bath.

26.
The initial estimate of an hour's journey to school was said to be the time taken "since leaving home". We conclude that the claimant first put forward an account of a lengthy journey to school which he knew to be untrue in order to explain why the Taliban, if they were looking for him during the day when children might be expected to be at a nearby school, did not look there. The claimant told us in oral evidence that he was aware that the Taliban visited his school and so it seems clear that they would be well aware of its existence.

27.
There are other difficulties about the claimant's evidence of his attendance at school. He said in oral evidence that he attended school between 9 am and 4 pm but when interviewed for the first age assessment soon after his arrival in the United Kingdom (B330) he said that school started at 8 am

and finished at 11.30 am. When asked to comment upon that contradiction the claimant simply denied having told the social worker what is recorded in the age assessment report. As we shall see, though, there are difficulties with that age assessment report and so if this stood alone we would have no regard to it.

28.
There is one piece of evidence that helps to fix a date. If the tazkira is accepted to be a genuine document, since it refers on its face to a document dated 22 nd July 2008 it must have been obtained after then. Also, the claimant's very first account, provided at the asylum screening interview on 8 th September 2009, was that the tazkira was issued to him "one year ago", ie in about September 2008. For the purpose of putting this information into a useful form we take 1 st September 2008 as a possible date upon which the tazkira may have been obtained. If that were so, then if the claimant's date of birth were 1 st January 1993, as the defendant asserts, then he would have been 15 years old when obtaining the tazkira and if his date of birth were 1 st January 1995, as had been claimed by the claimant, then he would have been 13.

29.
In either event, it seems improbable that the need to obtain the tazkira was, as the claimant has said, because the school had asked him to produce it. As mentioned above, the claimant would have left school by August 2008 if he had done so when aged 12. Also the claimant had been attending this school for six years, he was living in the same village at a house just five or ten minutes walk away, he had not been asked to produce such a document at any time previously and, as he confirmed in evidence, this was not something that all children at the school, or even all the children in his class, had been asked to do.

30.
We reject the claimant's evidence that the tazkira was obtained because the school demanded it or that it was required to enable him to continue his education. We are satisfied that he had reached the end of his school education and that his father decided to obtain it as it would be required as he made his way in the world, whether in Afghanistan or elsewhere. We heard from the claimant, for example, that it was necessary for him to produce the tazkira when travelling with his uncle between Afghanistan and Pakistan.

31.
Further support for that conclusion is found in the inconsistent account the claimant has given about the death of his father and the consequent threat from the Taliban being the reason for leaving school. He has said both that he stopped going to school after his father's murder (first statement A105) and, in oral evidence, that he did go back to school after his father's murder but left school a few months later after the second visit from the Taliban in their attempt to recruit him. Given the enormity of the event of the death of his father, we find it hard to accept that the claimant would be in doubt as to whether or not he continued to attend school thereafter.

32.
Another piece of relevant evidence, disputed by the claimant, is that Peter Tucker, who was a co-author of the second age assessment report, says that the claimant said (see A144) that his mother told him in November 2008, just before he travelled, that he would be 14 years old in one month's time that is in December 2008. If correct, that would indicate a date of birth of in December 1994.

33.

The claimant was asked at some length when giving oral evidence, about the circumstances in which he came to be aware of what he now says is his date of birth, or at least what he says is his year of birth. As with many areas of his evidence, when pressed as to detail significant inconsistency and contradiction emerged in his account.

34.
The claimant has said that he first discovered his year of birth, and so his age, when his father took him to get the tazkira, which would be, on the claimant's account, a few months before he was forced to flee from Afghanistan to escape the attentions of the Taliban. But he has also said that the first time he discovered his age was when his mother told him, just before he left Afghanistan. He said in his witness statement (A106):

"… I previously only knew I was a child and not how old I was…"

Plainly both accounts cannot be correct. When asked to explain this contradiction in his evidence the claimant said that because his father is no longer alive he listens to his mother. He said he could not remember what his father had told him. That, clearly, is not correct because he set out what his father told him when providing instructions for his witness statement which he subsequently signed, confirming the contents to be true.

35.
There are other difficulties with the reliability of the claimant's account of his experiences. As to how he became aware of the risk from the Taliban he said in oral evidence that it was his mother who first told him he was in danger and, in his asylum interview that it was his maternal uncle who told him, saying also that as he was young they did not want to tell him. Also, as mentioned above, his account hitherto has been that he lost contact with his mother and uncle soon after his arrival, shortly after contacting them by telephone to arrange for the tazkira to be sent to the United Kingdom yet his evidence before us was that his mother and sister continue to live in the home of his maternal uncle, which he could not know if he had lost contact with them.

36.
The claimant has also provided a contradictory account of how he came into possession of the tazkira in the United Kingdom. In his first witness statement he said:

"My mother had given the document to my maternal uncle who in turn gave it to his friend who was travelling to the UK. He contacted me on my mobile phone and we arranged to meet at a local bus stop where he handed me the document…. I have not seen my uncle's friend again…"

But his first account, given during the asylum interview was different:

"It was not sent to me directly, it was sent to my maternal uncle's address from where I collected it."

We do not accept that the claimant would be unsure whether he collected this document from an address that had been provided to him or whether he obtained it at a meeting arranged at a bus stop. We are satisfied that the claimant has not given a truthful account of how he obtained the tazkira.

37.
The claimant gave evidence at some length before us about his ability to cope as a young man living in semi independent accommodation. He spoke of problems he experiences with budgeting and cooking meals for himself and explained about how he had dropped out of college because he had not attended

sufficiently, due to problems in sleeping. This, it is said on his behalf, is evidence of a lack of maturity that supports his claim to be younger than has been assessed.

38.
Drawing all this together, we find that the claimant has chosen to put forward an account that is sufficiently flawed by contradiction and inconsistency such as to be unreliable as to the accuracy of what he says. We are entirely satisfied that he himself simply does not know what age he is and that whatever information his parents may have given him, they also did not know his precise date of birth but his mother appreciated that it was important for her son to make clear on his arrival in the United Kingdom that he was a minor.

The tazkira

39.
This, of course, is a piece of documentary evidence that says something about itself and so is not dependant upon what we make of the claimant's own credibility. In reaching conclusions about the authenticity of this document we are assisted by the report of an expert, instructed jointly by the parties, Mr Iain Shearer.

40.
Certainly, Mr Shearer is well placed and qualified to express a view on the authenticity or otherwise of the tazkira. The opening section of his report establishes that. That is, no doubt, why he was identified by the parties as an appropriate person to be appointed on a joint basis to express an expert view on the authenticity of the document.

41.
Unfortunately, undeterred by the limited scope of the carefully expressed instructions, agreed after discussion and correspondence between the parties, and noted at paragraph 4 of his report:

"I was commissioned [by both parties] …… to authenticate documents provided to them by [the claimant]."

Mr Shearer took to himself the task not just of doing that which he was asked to but also to go on to express his own view of the claimant's credibility, generally providing support for all the claimant claimed in respect of his experiences in Afghanistan. He then went further even than that, offering the opinion that if returned to Afghanistan, quite apart from the risk from the Taliban, the claimant may be forced to seek employment as a "Bacha Baze" or "dancing boy" in order to provide for himself, thus putting himself at risk of sexual abuse: something that no one had suggested, so far as we are aware, was considered by the claimant or his advisers to be even a remote possibility.

42.
He should not, of course, have done so and neither party has asked us to place reliance upon Mr Shearer's views other than in respect of the tazkira itself. We have no difficulty in agreeing with that approach because, although it is plain that Mr Shearer was provided with a copy of the determination of the immigration judge who, having heard oral evidence from the claimant and submissions from both parties in the asylum appeal, rejected the claimant's account as untrue, he took no account of the decision of the immigration judge or the reasons set out for reaching it. That calls into question the value of Mr Shearer's views upon the claimant's credibility but that concern does not, in our judgement, infect his expert view of the document itself, for the reasons that follow.

43.

In the course of his work Mr Shearer has examined many tazkiras. Based on that experience, and upon his professional expertise in this area, he has identified a number of characteristics or features of this document that establish, comfortably, that we should accept it to be a genuine and authentic document, issued to the claimant by the appropriate authorities in Afghanistan. Its appearance and content are as Mr Shearer would expect. The paper and printing is of "typically poor quality". The two ink stamps are as Mr Shearer would expect them to be, as is the variety of hand writing styles on the document and the finger mark. Of particular significance, in our view, is that Mr Shearer identifies that there is a signature on the rear of the photograph affixed to the document, something he has never before seen on a forged Afghan document. The photograph itself is of the quality and type that Mr Shearer would expect to see and there is no issue with the serial number shown on the tazkira.

44.
Further, the timing of the obtaining of the tazkira is appropriate, given the conclusions we have reached about the claimant having left school. Mr Shearer reproduces an extract from a report commissioned by the Canadian Ministry of Immigration, presumably quoted with approval of what is said:

"Procedures for applying for a tazkira: a tazkira can be obtained as soon as the birth of a child is registered at the population office but some people request their tazkira when they are adults – especially those who live in the countryside"

45.
Thus, we proceed to examine the information provided on the face of the tazkira, accepting that this is a genuine and authentic document.

46.
In fact, this document takes us not very much further. It does not purport to confirm the claimant's date of birth and does not even suggest that the claimant's father offered one. The claimant can tell us nothing of what was said during the process of obtaining it because, as he confirmed in his oral evidence, he simply presented himself and then withdrew, leaving his father to conduct whatever exchange took place with the official.

47.
All we know, therefore, is that an unidentified official, about whose experience in these matters we know nothing, expressed and recorded the view of the claimant's age that:

"According to his appearance 13 years old in 1387 (2008)"

48.
It can be deduced from this that either the claimant's father did not offer an asserted year of birth, leaving it for the official to reach his own conclusion based upon a quick look at the claimant, or if the claimant's father did offer a date or year of birth the official did not see fit to record that in the tazkira. The assessment made by this unknown official of the claimant's age is, then of little assistance. Indeed, Mr Shearer himself observes at paragraph 13 of his report that:

"… age – especially for Afghan males from rural areas – can be very hard to gauge from appearance alone."

49.
Mr Suterwalla argues that an Afghan official is better placed to judge the claimant's age than those who sought to do so in this country. We do not accept that submission. There is simply no information

available about the experience or expertise of the official, nor is there any evidence as to what information was provided to him on the basis of which to form a view which is, presumably, why the estimated age is said to be based upon the claimant's appearance rather than on any other information provided at the time the tazkira was requested.

The evidence of Mr Franco Bruni

50.
It is submitted on behalf of the claimant that the evidence offered by Mr Bruni is valuable because, as an experienced parent with a large number of children including of a similar age to that claimed by the claimant who has had a regular opportunity to observe the claimant interacting with his own children, he is well placed to offer an informed view of the claimant's likely age.

51.
Mr Bruni is an Italian citizen who gave oral evidence before us with the assistance of an interpreter. It was plain from watching and hearing him give evidence that his English is not good or fluent and it is not suggested that he shares a common language with the claimant. At the commencement of his oral evidence he said that he adopted his witness statement, made on 4 th May 2011 and that the contents were correct. He insisted that, on the basis of his observations, the claimant could not be more than 17 years old.

52.
Unfortunately it soon became apparent that the contents of that statement were not correct. He said in the second paragraph of the statement that he had known the claimant for the past 8 months, which would mean that he had known him since early September 2010. But in fact, as Mr Bruni was to confirm, he first met the claimant after Christmas 2010, late in December. Also, when asked in cross examination to explain what led him to regard the claimant as immature, he said:

"What is "immature". I do not understand"

We conclude from this that Mr Bruni was willing to sign a statement, and then assert that the contents were true when in fact the contents were not true and it contained expressions that he did not understand the meaning of. We are mindful of the fact that oral evidence was given with the help of an interpreter but so also was the statement constructed with the help of an interpreter.

53.
We have no doubt that Mr Bruni wishes no more than to be of assistance to the claimant, who has established a particular relationship of friendship with one of his daughters. But we are unable to accept that his evidence amounts to more than an expression of support for whatever the claimant asserts. At its highest, we can say that nothing in his evidence undermines the claimant's case.

The evidence of Tina Newell

54.
We next heard from Tina Newall, employed by the defendant as a Senior Social Worker and who has worked with the claimant in that capacity since 2 nd March 2010. She adopted her witness statement (A136) in which she said that she maintained regular contact with the claimant who she described as a polite and respectful individual. In oral evidence she said that she saw him every six to eight weeks. She said:

“He has demonstrated that he is able to manage money, cook a balanced meal, clean his home and maintain personal hygiene. He does on occasions need prompting to clean his home and cook meals for himself.”

She went on to say:

“I have not observed any behaviour by [the claimant] that depicts that he has been wrongly aged assessed…”

55.
From her answers in cross examination we learned that this witness also carries out age assessments. Mr Suterwalla submitted that we should give her evidence only limited weight because her views “are expressed in negative terms”. That is, she does not assert that he has been correctly assessed as to age but that she has not seen evidence to suggest he has been wrongly assessed. We do not accept that submission. This is a measured and reasoned view, expressed by a professionally qualified person who has experience in her own right of the process of age assessment. Her view is evidence supporting the defendant’s case, to be considered in the round with all the other evidence.

Evidence of Doris Besong

56.
This witness is a keyworker who has been working in that capacity with the claimant since 12 th October 2009 and so who may be considered to have had a good opportunity to observe the claimant and to form views about him, given that she sees him every week.

57.
Ms Besong adopted her witness statement (A131) in which she records that she had observed some “childish behaviour” by the claimant. Expressing rather a different view than was provided by Ms Newell, she said that the claimant still appears to be “incompetent” in the areas of cooking and cleaning his accommodation. She said:

“I cannot determine his age in definite terms but would say he probably between the ages of 16-18 year (sic)”

58.
She went on in the statement to describe how, not having had any experience of house-work before arriving in this country, he did not have good cooking, cleaning or budgeting skills and has acquired them only slowly. He was said not to have had any sexual relationships at the date of her statement in May 2011 although she told us in oral evidence that he now has entered into such a relationship.

59.
In cross examination she agreed that his present appearance was consistent with an age between 17 and 19 years of age and that it was difficult to pinpoint an age within that range and she described the physical changes in his appearance that she had noticed. She declined to accept the suggestion that his propensity to miss appointments, because he preferred to play cricket, indicated childishness, preferring to categorise it as a lack of responsibility.

The evidence of Reni Ravi

60.
Without intending any discourtesy or disrespect we can deal with the evidence of this witness shortly. Ms Ravi is a Team Leader in the defendant’s Unaccompanied Minors Team who, in carrying out that

role, holds regular discussions with Ms Newall, the claimant's social worker. But her evidence was based not upon any contact with the claimant but upon an understanding of conversations with Ms Newall that transpired not to be altogether reliable. We agree with Mr Suterwalla that this evidence advances neither party's case and that no weight should be given to it.

The first age assessment

61.
The first age assessment was carried out on 22 nd September 2009, which was about two weeks after the claimant's arrival in the United Kingdom. The age assessment report is before us (B324) and we heard oral evidence from one of the two social workers responsible for producing it, Mr Nimesh Patel. Mr Suterwalla points out that this assessment was withdrawn by the defendant which he argues indicates that by doing so the defendant accepted that it could not be evidence in respect of the claimant's age. But a major reason for the withdrawal of that report was the submission of a report from Dr Birch, which is no longer relied upon by the claimant. Therefore we do not accept the submission that no weight should be placed upon it for that reason. But, as we shall see, there are other reasons why this evidence may be thought to add weight to the claimant's case, rather than to advance the defendant's case.

62.
The age assessment is set out in an eight page long form, divided into sections for comment under various headings, indicating the structure of the interview, and a two page long summary of the key points relied upon in reaching the conclusion that the appellant was, at the date of that assessment, 16 years old and not 14 years old as he claimed to be.

63.
The reasons for that conclusion include the following: The claimant's physical appearance and demeanour suggested that he was older than he claimed; he had well defined features, indicating maturity and his "deep voice" indicated that it had broken. He had "fully developed hair" which was "closely shaven" and "his stubble appeared to be very new. He was considered to be a confident young man "free to discuss with people of authority". He gave lengthy explanations for simple and straightforward questions. The report opines that "overall the way [the claimant] presented himself in terms of body language and his mannerisms indicate that he is older than 14 years of age".

64.
As Mr Suterwaller pointed out, it was hard to reconcile an assertion in the report that the claimant was "non specific about the age and date of birth of his sibling and parents" with the record on the following page of the report that the claimant in fact gave ages for his siblings and parents, in line with the information he had given at his asylum screening interview.

65.
Mr Patel was cross examined at some length about this age assessment report, as a result of which Mr Suterwalla raises a number or criticisms which he argues should lead us to place no weight upon it.

66.
First, it is said that there was no clear evidence that Mr Patel was sufficiently trained to carry out the assessment. That submission appears to be based upon Mr Patel's inability to confirm his attendance on any particular course. But, considered as a whole, his evidence does establish that training was a continuing professional obligation which he complied with, even if he was unable to confirm his attendance on any particular course.

67.
But Mr Suterwaller is on stronger ground in pointing out that there was no independent adult present during the assessment, as there should have been, and that the handwritten notes taken during the interview should have been preserved but were not. The latter omission is regrettable but not, in our judgement, one that means that the report is on that account alone fatally compromised. The typed report was prepared almost contemporaneously and we must assess the reliability of this evidence in the same way that any evidence is assessed.

68.
Having said that, difficulties with Mr Patel's report have been disclosed. He was unable to explain, without the handwritten notes, what were the lengthy answers the claimant had given which led him to believe the claimant was being evasive, a factor relevant to his assessment of maturity. His assessment of implausibility relating to the claimant's account of his departure being necessary even though the Taliban would not kill young children, when he himself was claiming to be a child, had no regard to the fact that the claimant had in mind that his eight year old sister remained.

69.
The latter point is of significance because it was established that, although the conclusion of the assessment was discussed with the claimant and he was told how he could challenge it if he wished to, he was not given the opportunity to comment upon adverse findings before the final conclusion was reached, as he should have been. Had that happened, the point about the sister may well have been made and so the implausibility point not relied upon in the overall assessment of maturity and so age. A similar observation might be made about the point concerning the age of his parents and siblings.

70.
In the course of a lengthy and rigorous cross examination, Mr Patel accepted that there were some errors in the reasoning that led to his conclusion on the claimant's age. His honesty and integrity in doing so rather than simply seeking to defend that which had been written does him credit. Ultimately, he accepted that there were two reasons that actually underpinned his conclusion; appearance and demeanour and the fact that the claimant gave lengthy answers to apparently straightforward questions, although he could not now say what they were.

71.
Ultimately, Mr Patel conceded that it was "not impossible" that the claimant could be an age between 14 and 16 years, that it was "possible" that he was 15 years old at the date of that assessment. The last question and answer in cross examination of Mr Patel might usefully be reproduced:

Q. So, if you had given him the benefit of the doubt you would have accepted his claimed age of 14?

A. Yes.

72.
It must be recognised that the evidence of Mr Patel is not distilled into this response alone. His evidence is to be considered as a whole.

<u>The second age assessment</u>

73.
The second age assessment was carried out on 9 th September 2010 and reached the same conclusion as did the first assessment, that the claimant's date of birth was 1 st January 1993 so that he was then 17 years old. The difficulty of the task facing the assessors is indicated in the summary report:

“Assessors would like to emphasize that [the claimant] did not provide much specific information for chronological purposes. Therefore, assessors had no choice but to rely mostly on [the claimant’s] physical appearance, demeanour, presentation and other factors to aid the decision making process.”

74.
The assessors accepted that the claimant had a “youthful appearance” and looked younger than 18 but lines on his forehead, visible larynx, build and height, depth of voice, the fact that there was evidence of regular shaving and their assessment of his overall demeanour led them to conclude that he was older than his claimed age of 15.

75.
One of the authors of that report, Mr Peter Tucker, gave oral evidence before us. He adopted his witness statement (A142) in which details of his qualifications and experience as a social worker dealing with young people are set out.

76.
Referring to the caveat mentioned above concerning the limited evidence upon which the assessment could be based, he made clear also that as only a photocopy of the tazkira was available they could not rely upon its authenticity.

77.
Questioned about the process of producing the report Mr Tucker made clear that the claimant had opportunity to comment upon the reasons that were to be key to the conclusion reached. There was an initial meeting on 9 th September 2010 and the evidence obtained was then reflected upon. A second meeting was arranged on the 15 th September when the reasons that had been written down were gone through with the claimant “line by line, saying this is the reason we think this…” and any contradictions were identified to him. He was then invited to sign the report, which the claimant declined to do. We do not accept Mr Suterwalla’s submission that the assessment was flawed because provisional adverse findings were not put to the claimant.

78.
Put another way, having had the advantage of hearing oral evidence from Mr Tucker about his approach to carrying out the age assessment, we accept that he would have taken full account of anything further the claimant had said in response to disclosure of the reasoning and intended conclusion upon his age.

79.
Nor do we accept, for the reasons given above in respect of the first assessment, that the fact that the handwritten notes were not retained, as they should have been, necessarily requires no or little weight to be given to this evidence.

80.
In cross examination it was suggested to Mr Tucker that he was simply wrong to say that the claimant had disclosed during the age assessment interview that his mother had told him shortly before he left Afghanistan that he would be 14 years old in the following month, that is, in December 2008. As the hand written notes of the interview had not been retained, or at least were not available, it was put to Mr Tucker that this part of his evidence was just not reliable. But Mr Tucker was adamant that this is precisely what the claimant had said. He did not need to have his memory refreshed or reinforced by the handwritten notes that were not now available. He had an independent and distinct recollection of the claimant having said this. We accept this to be the case.

81.
Mr Tucker made clear also that this was a “holistic process” by which everything was considered together. But his evidence does disclose some issues giving rise to concern. We doubt that it was appropriate to hold against the claimant what appeared to be a simple error in once providing the year of his birth or that the date of birth, 1 st January, was offered when that was, plainly, a “nominal” date of birth settled on by those conducting the screening interview on arrival. It is also difficult to understand the certainty with which this witness insisted without compromise that the claimant’s physical appearance did not admit any possibility that his claimed age of 15 years and 9 months at the time, given that it was accepted that he was under the age of 18 and the evidence we have heard from Mr Patel, set out above. While we accept he sought to carry out a holistic assessment that might have supported his final conclusions it is hard to see how a starting point based upon physical appearance alone must have established an age in excess of 15 years and 9 months. The difficulty in maintaining such a position was neatly summarised by Blake J in R (NA) v London Borough of Croydon [2009] EWHC 2357 (Admin) at para 27:

“It is common ground, and clear throughout all the materials and the authorities on this topic, that physical appearance alone is a notoriously unreliable basis for assessment of chronological age. The extensive literature and guidance on the subject says so. Indeed anyone with ordinary non-expert knowledge of young people whether as a parent or otherwise, knows how difficult it is to make such assessment from appearances alone. In any event, submits the claimant, it was accepted that the claimant looked young.”

Closing submissions

82.
We do not need to set out in detail the helpful closing submissions advanced by Mr Lane and Mr Sutterwala, written and oral, because we have taken account of those as we have assessed the evidence set out above. But we do make clear that we take regard of the need to see that there has been a correct application of the principle of “the benefit of the doubt”. Mr Sutterwalla referred us to comments of HHJ Pearl, sitting as a Deputy Judge of the High Court in R (KN) v London Borough of Barnett [2011] EWHC 2019 (Admin) at para 20:

“… it must be remembered that the Local Authority, in reaching its assessment that a person is over 18, should already have given this person the “benefit of the doubt.””

Although that was in the context, which is no longer the correct approach, that where the evidence does not deliver a clear answer to the question of age the court was to fall back to the position that there is a burden of proof to be discharged, the point is still well taken, that if that has not been done the court will need to factor that into its own assessment. The potential significance of giving the claimant “the benefit of the doubt” is well illustrated by Mr Patel’s acceptance that once applied his overall assessment may well have been different.

Conclusions

83.
Drawing all this together and doing the best we can with the evidence the parties have chosen to put before us we make the following observations and reach the following conclusions:

a.

We are not reaching a fresh decision upon the claimant's asylum claim but the case that was put before and rejected by the immigration judge has been put before us also in the context of the search for the claimant's true age. We are not bound by the conclusions of the immigration judge but see no reason at all to depart from his conclusions on issues other than age. We are satisfied that the claimant's account of the circumstances of his father's death and the reasons for his journey to the United Kingdom are untrue.

b.
We find also that the claimant's account of the circumstances in which the tazkira was sent to him are untrue. We reject his claim to have lost contact with his family. As he told us at the hearing, his mother and sister continue to live with his maternal uncle at his home about an hour's drive from the family's own former home. It seems reasonable to conclude that after the death of the claimant's father, whatever were the circumstances of that, the family moved to the uncle's home and arrangements were made for the claimant to move to the United Kingdom.

c.
We accept that the tazkira is a genuine document, obtained because the claimant had finished his education and so would need such an identity document in ordinary everyday life in Afghanistan.

d.
It follows that we are satisfied that the claimant had finished his education, and so had certainly passed his twelfth birthday, by the time he and his father went to apply for the tazkira some time after late July 2008.

e.
Neither the claimant nor his parents were aware of the claimant's precise date of birth, which is why the Afghan official had to assess age simply upon appearance.

f.
The first age assessment was flawed for the reasons given above but, ultimately, the Social worker who gave evidence about it accepts that the claimant's probable age fell within a range that would have then made him between 14 and 16, accepting that the lower end of that range was reasonable, allowing the claimant the benefit of the doubt. We take careful note of that evidence.

g.
The second age assessment was carried out in a way that admits some criticism but we do not regard it as flawed. That is, therefore, also important evidence of which we take account.

h.
It is common ground that the claimant was a minor when he arrived in the United Kingdom on 7 th September 2009.

i.
We conclude that the claimant's mother told him that he would be 14 years old in December 2008. But this does not mean that we must accept that as conclusive evidence of his most likely date of birth. The claimant's mother would recall giving birth to her first child, the claimant, and there is no reason at all why she should not have remembered the time of year that he was born. On the other hand, she was at pains to ensure that her son was aware of the advantage of asserting a young age on arrival in the United Kingdom.

j.

If the claimant were, as the information given to him by his mother would indicate, 14 years old as he began his journey to the United Kingdom, that would mean that the claimant would have finished school up to two years before his departure which may go some way to explain why his evidence concerning his time at school was not as consistent as would be expected if he were describing on arrival what were recent experiences, even more so if he were older that that.

k.
Assembling all of this together, and doing the best we can, we conclude that the claimant was older than he claimed to be on arrival. His own evidence is unreliable; the evidence of Mr Bruni and Reni Ravi does not assist either way. Little help can be drawn form the tazkira and the evidence of Ms Newell is broadly supportive of the defendant's case while that of Ms Besong is relatively neutral. Mr Suterwalla has established that first age assessment was flawed, and considered in the context of Mr Patel's oral evidence, suggests that the claimant could have been aged anywhere in the range between 14 and 16 years at that time. The final concession by Mr Patel, reproduced above at paragraph 71, must be seen for what it is, and must be considered in the context of Mr Patel's evidence as a whole.

l.
The second age assessment, although criticisms can be raised concerning it, is the professional assessment of an experienced social worker carried out in a way that, broadly, was "Merton compliant" and suggested that the claimant is, at the date of the hearing before us, an adult.

m.
On the basis of this evidence it is said that the claimant's true age at the date of the second age assessment lies anywhere between the ages of 17 to 19 years. There is good reason to believe that his date of birth is in December, as we accept that his mother had said so and so we settle upon 15 th December, in the absence of anything to indicate any other date of the month. The further one moves towards the extremities of the age range we have identified the greater is the risk of inadequately respecting the countervailing factors and so we settle upon 15 th December 1993, a date very approximately midway between the range identified by the parties.

n.
Thus, as at the date of the second age assessment on 9 th September 2010 we find that the claimant was in fact 16 years and 8 months old and that, the date of the hearing before us, on 2 nd February 2012, he was 18 years and 1 month old.

Decision

84.
We make a declaration, therefore, that the claimant's date of birth is 15 th December 1993. The parties may make further written submissions on the terms of any further orders sought and in particular on the issue of costs. In the absence of agreement, the matter will be relisted for further oral submissions on those issues.

Signed

Upper Tribunal Judge Southern