THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondent who is the subject of these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or of any member of his family in connection with these proceedings.

Trinity Term
[2021] UKSC 38
On appeal from: [2019] EWCA Civ 872

JUDGMENT

R (on the application of BF (Eritrea)) (Respondent) *v* Secretary of State for the Home Department (Appellant)

before

Lord Reed, President
Lord Lloyd-Jones
Lord Briggs
Lord Sales
Lord Burnett

JUDGMENT GIVEN ON

30 July 2021

Heard on 16 March 2021

Appellant
James Strachan QC
Deok Joo Rhee QC

(Instructed by The Government Legal Department)

Respondent
Richard Hermer QC
Chris Buttler QC
Jason Pobjoy
(Instructed by Scott-Moncrieff & Associates Ltd (London))

Intervener
(Equality and Human Rights Commission)
Ayesha Christie
(Instructed by Equality and Human Rights Commission)

LORD SALES AND LORD BURNETT: (with whom Lord Reed, Lord Lloyd-Jones and Lord Briggs agree)

1. This appeal, like that in *R (A) v Secretary of State for the Home Department* [2021] UKSC 37 ("the *A* case"), which was heard by the same constitution of the court, is concerned with judicial review of policy guidance issued by the Secretary of State. In that judgment we have set out the principles which govern in this area. The lawfulness of the policy in this case falls to be assessed by reference to those principles.

2. BF is a national of Eritrea. He entered the UK illegally on his own and claimed asylum here as an unaccompanied child. There are significant differences in the legal regime applicable to an asylum seeker depending on whether he is a child aged less than 18 or an adult aged 18 or over. In particular, the rules applicable in respect of detention with a view to possible removal are different.

3. In the absence of supporting circumstantial or documentary evidence, it can be difficult to make an accurate assessment of the age of an adolescent to determine whether they are aged 18 or more, based only on appearance and demeanour. Despite claiming to be a child aged 16, the respondent was assessed by immigration officers at the outset to be an adult and was treated accordingly. Later, when time permitted, more detailed age assessments (so-called *Merton* assessments: see *R (B) v Merton London Borough Council* [2003] EWHC 1689 (Admin); [2003] 4 All ER 280) were carried out and it was eventually decided that he was in fact aged less than 18.

4. The Secretary of State had issued policy guidance for immigration officers as to when, in cases of doubt when an asylum seeker first presents himself and claims asylum as a child, the person claiming asylum may be assessed to be aged 18 or over. Various criteria are set out, of which the following (known as criterion C) is the relevant one:

> "Their physical appearance/demeanour very strongly suggests that they are *significantly* over 18 years of age and no other credible evidence exists to the contrary." (Emphasis in original)

Criterion C applies where there is no other evidence of age available.

5. BF issued proceedings to quash this part of the policy guidance, arguing that criterion C was unlawful on a number of grounds. The ground which is relevant on this appeal is that criterion C is said to be unlawful because when it is followed it does not remove the possibility that an asylum seeker who claims to be a child may in fact be one, even though he looks older, with the result that he may be subject to treatment which is unlawful in relation to a child.

6. BF's claim was heard in the Upper Tribunal (Judge Storey), which dismissed it. However, his appeal to the Court of Appeal was allowed. The Court of Appeal held that the Secretary of State was obliged to formulate her policy in respect of cases where no evidence of age other than appearance and demeanour is available in such a way that removed the risk that a child might be treated as an adult and detained accordingly, and indicated that the risk of mis-classification of an asylum seeker as an adult would only be removed in a satisfactory way if immigration officers were directed to assess a claimant to be aged 18 or more if they thought he looked about 23 (or possibly 25) or more. The Secretary of State amended criterion C in line with the court's judgment but has also appealed to this court to contend that the decision of the Court of Appeal was wrong.

Factual background

7. On 11 March 2014 BF presented himself to police at Tunbridge Wells. He told them he had arrived in the UK earlier that day in the back of a lorry. He said his date of birth was 15 February 1998, in which case he would have been aged 16. The respondent said that he wanted to claim asylum. He had no passport or other papers. He was arrested as an illegal immigrant and served with relevant documentation.

8. The same day, BF's age was assessed first by an assistant immigration officer and then by a chief immigration officer. Applying criterion C, both officers assessed him to be significantly over 18. The chief immigration officer's assessment was that his appearance was that of an adult in his mid-20s. BF was served with a form setting out the officers' decision that he was an adult. His fingerprints were taken and his identity was checked. The checks revealed that he had been apprehended in Italy in June 2013 and had claimed asylum there.

9. BF was held in immigration detention until 11 September 2014 and again from 7 January to 31 March 2015 while attempts were made to return him to Italy under the Dublin III Regulation (Parliament and Council Regulation (EU) No 604/2013 of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third country national or a stateless person). In April 2014 Italy confirmed its acceptance of the UK's request that the respondent be returned there and indicated that his date of birth had been

recorded as 15 February 1988, which would have made him aged 26 when he arrived in the UK. In response to inquiries, the Italian authorities stated that this date of birth was based on the respondent's own statement.

10. BF's application for asylum in the UK was certified as ill-founded on the grounds that he could be returned to Italy and removal directions were set on 24 April 2014 for 6 May 2014. His detention was maintained with a view to ensuring that the removal directions were effectively carried out.

11. On 2 May 2014 BF issued an application in the Upper Tribunal for permission to apply for judicial review of the decision to remove him to Italy. The removal directions were suspended while that application was considered, but it was refused by the Upper Tribunal on 9 June 2014.

12. On 20 June 2014 BF commenced the present proceedings by issuing an application in the Administrative Court for permission to apply for judicial review. He challenges the lawfulness of criterion C in the policy guidance issued by the Secretary of State. The claim was transferred to the Upper Tribunal and his removal was stayed pending its determination. He was released on bail on 11 September 2014; was detained again on 7 January 2015 with a view to his removal; but was released on 31 March 2015 when his removal was no longer considered to be imminent.

13. Social workers employed by Newport City Council ("Newport") conducted two *Merton* age assessments of BF in January and February 2015. In both he was assessed to be an adult. Accordingly, Newport did not accept his claim that he was a child and refused to provide him with services under the Children Act 1989. BF commenced a further claim to challenge these age assessments on the grounds that they did not properly comply with the *Merton* principles and this claim was settled on the basis that Newport would commission an independent *Merton* assessment of his age. The social workers who carried out this third assessment decided that the respondent's age and date of birth were as claimed by him on arrival in the UK, ie he was a child at that time. After that assessment BF issued a further claim against the Secretary of State for wrongful detention. In those proceedings the Secretary of State has disputed the correctness of that third assessment. For the purposes of the present appeal it is not necessary to say anything more about that claim.

The legal and policy framework

14. Pursuant to the Immigration Act 1971 ("the 1971 Act") persons entering the UK may be subject to examination by immigration officers to determine their immigration status. In certain circumstances, if it is thought they may be subject to

removal, they may be detained to ensure that directions for their removal can be effectively carried out.

15. Section 55 of the Borders, Citizenship and Immigration Act 2009 ("section 55") provides in relevant part:

> "(1) The Secretary of State must make arrangements for ensuring that -
>
> (a) the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b) …
>
> (2) The functions referred to in subsection (1) are -
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) any function conferred by or by virtue of the Immigration Acts on an immigration officer;
>
> (c)-(d) …
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1).
>
> (4)-(5) …
>
> (6) In this section -
>
> 'children' means persons who are under the age of 18;

(7)-(8) …"

16. BF was first examined by immigration officers on 11 March 2014, who had to make a decision how he should be dealt with. At that time paragraph 16 of Schedule 2 to the 1971 Act provided as follows:

> "(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> (1A) A person whose leave to enter has been suspended under paragraph 2A may be detained under the authority of an immigration officer pending -
>
> (a) completion of his examination under that paragraph; and
>
> (b) a decision on whether to cancel his leave to enter.
>
> (1B) A person who has been required to submit to further examination under paragraph 3(1A) may be detained under the authority of an immigration officer, for a period not exceeding 12 hours, pending the completion of the examination.
>
> (2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending -
>
> (a) a decision whether or not to give such directions;
>
> (b) his removal in pursuance of such directions.
>
> …"

17. With effect from 28 July 2014, pursuant to amendments of the 1971 Act introduced by the Immigration Act 2014, a new sub-paragraph (2A) was inserted into paragraph 16 and a new paragraph 18B was added to Schedule 2 to the 1971 Act. Sub-paragraph (2A) states as follows:

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

18. So far as is material, paragraph 18B of Schedule 2 provides:

> "(1) Where a person detained under paragraph 16(2) is an unaccompanied child, the only place where the child may be detained is a short-term holding facility, except where -
>
> (a) the child is being transferred to or from a short-term holding facility, or
>
> (b) sub-paragraph (3) of paragraph 18 applies.
>
> (2) An unaccompanied child may be detained under paragraph 16 (2) in a short-term holding facility for a maximum period of 24 hours, and only for so long as the following two conditions are met.
>
> (3) The first condition is that -
>
> (a) directions are in force that require the child to be removed from the short-term holding facility within the relevant 24 hour period, or
>
> (b) a decision on whether or not to give directions is likely to result in such directions.
>
> (4) The second condition is that the immigration officer under whose authority the child is being detained reasonably believes that the child will be removed from the short-term holding facility within the relevant 24 hour period in accordance with those directions.

(5)-(6) …

(7) In this paragraph -

…

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

‘unaccompanied child’ means a person -

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

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

19. In short, as so amended, Schedule 2 to the 1971 Act makes distinct provision in relation to the detention of unaccompanied children as compared with adults, as to the location where they may be held, the conditions to be satisfied if they are to be detained and the period for which they may be detained.

20. Permission to seek judicial review of the policy guidance in criterion C was granted in October 2016 and the Upper Tribunal and the Court of Appeal reviewed the lawfulness of that guidance by reference to the statutory regime as it was at that time, ie in its amended form, as well as in its previous form.

21. In *R (Ali) v Secretary of State for the Home Department* [2017] EWCA Civ 138 (reported as *R (AA (Sudan)) v Secretary of State for the Home Department (Equality and Human Rights Commission intervening)* [2017] 1 WLR 2894) (“*Ali*”) the Court of Appeal held that for the purpose of applying the new provisions in Schedule 2 the question of whether a person is a child is a matter of precedent fact, rather than a question of reasonable assessment by immigration officers as had previously been the case. Therefore, if an immigrant is detained who is reasonably believed to be an adult (and hence amenable to the wider powers of immigration detention available in respect of an adult) but is in fact a child (and hence subject to the much narrower powers of immigration detention available in respect of a child), the detention will be unlawful even though the immigration officers acted reasonably in determining age. It is common ground that we should proceed in this appeal on the footing that this is the true legal position.

22. It has for many years been contrary to Home Office policy to detain unaccompanied children seeking asylum, subject only to some very limited exceptions. The legislative changes in 2014 made this a matter of law rather than merely policy. Both prior to and following those changes the Secretary of State has given guidance to immigration officers about how, in that context, they should approach claims by asylum seekers that they are under 18. That guidance included criterion C.

23. The relevant policy guidance was and is set out in two Home Office documents: (a) the relevant section of the general operational guidance issued to immigration officers known as the Enforcement Instructions and Guidance ("the EIG") and (b) specific guidance on age assessment contained in an asylum instruction entitled *Assessing Age*.

24. Chapter 55 of the EIG is headed "Detention and Temporary Release". Within that general chapter, section 55.9.3 is headed "Unaccompanied young persons". This has been revised from time to time. In the version which was in force at the time of BF's detention in March 2014 and at the time of the decision of the Upper Tribunal ("version 1") section 55.9.3 began:

> "As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children (that is, persons under the age of 18) must not be detained other than in very exceptional circumstances. If unaccompanied children are detained, it should be for the shortest possible time, with appropriate care. This may include detention overnight but a person detained as an unaccompanied child must not be held in an immigration removal centre in any circumstances. This includes age dispute cases where the person concerned is being treated as a child.
>
> The very exceptional circumstances in which it might be appropriate to detain unaccompanied children are set out below. In all cases, the decision-making process must be informed by and take account of the duty to have regard to the need to safeguard and promote the welfare of children under section 55 of the Borders, Citizenship and Immigration Act 2009."

25. Section 55.9.3.1 was headed "Individuals claiming to be under 18". It included criterion C, as follows:

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

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

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

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

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

D. The individual:

- prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and

- only claimed to be a child **after** a decision had been taken on their asylum claim; and

- only claimed to be a child **after** they had been detained; and

- has not provided credible and clear documentary evidence proving their claimed age; and

- does not have a *Merton* compliant age assessment stating they are a child; and

- does not have an unchallenged court finding indicating that they are a child; and

- physical appearance/demeanour very strongly suggests that they are 18 years of age or over.

(all seven criteria within category D must apply)." (All emphases in the original)

In summary, if a person claimed to be a child the default position was to accept that claim. They would only be treated as an adult if one of the specified exceptions applied.

26. A little later, section 55.9.3.1 continued with bullet points specifying actions to be taken if any of criteria A to D applied. The first of these stated:

> "Only if C or D apply: Before a decision is taken, the assessing officer's countersigning officer (who is at least a CIO [Chief Immigration Officer]/HEO [Higher Executive Officer]) must be consulted to act as a 'second pair of eyes'. They must make their own assessment of the individual's age. If the countersigning officer agrees, the individual should be informed that their claimed age is not accepted."

27. Section 55.9.3.1 continued with a series of sub-headings. The first, "Individual found to be a child", spelt out the consequence of such a finding (where the limited provisions authorising detention of a child did not apply), namely that the child "must not be detained or must be released from detention into the care of a local authority and treated as a child" (and reference was made to a separate asylum instruction about that). The fourth was headed "Section 55 of the Borders, Citizenship and Immigration Act 2009 and the assessing age detention policy". This stated:

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

…

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

28. By the time of the hearing in the Court of Appeal, section 55.9.3.1 had been revised ("version 2"). The parts of the current version equivalent to those quoted above read (with the new material italicised - other emphases are in the original):

"Individuals claiming to be under 18

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

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

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

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

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

D. The individual:

(all of the following seven criteria must apply)

- prior to detention, gave a date of birth that would make them an adult and/or stated they were an adult; and

- only claimed to be a child **after** a decision had been taken on their asylum claim, entry to the UK or immigration status; and

- only claimed to be a **child** after they had been detained; and

- has not provided credible and clear documentary evidence proving their claimed age; and

- does not have a *Merton* compliant age assessment stating they are a child; and

- does not have an unchallenged court finding indicating that they are a child; and

- physical appearance/demeanour very strongly suggests that they are **significantly over 18 years** of age.

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

> *exercised in favour of avoiding the risk of detaining a person who is later determined to be a child.*"

The requirement for a second pair of eyes originally contained in a separate part of the paragraph is now incorporated in criterion C itself. The final paragraph is evidently a reference to the *Ali* case. The other parts of the EIG quoted above continued in place with no material changes.

29. In the version of *Assessing Age* in place at the time of the respondent's detention in March 2014 and at the time of the Upper Tribunal's decision ("version 1"), paragraph 2.1 was headed "Initial Age Assessment" and stated in relevant part as follows:

> "1. The applicant should be treated as an adult if their physical appearance/demeanour **very strongly suggests that they are <u>significantly</u> over 18 years of age**.
>
> Careful consideration must be given to assessing whether an applicant falls into this category as they would be considered under adult processes, and could be liable for detention.
>
> <u>Before</u> a decision is taken to assess an applicant as significantly over 18, the assessing officer's countersigning officer (who is at least a Chief Immigration Officer (CIO)/Higher Executive Officer (HEO)) must be consulted to act as a 'second pair of eyes'. They must make their own assessment of the applicant's age. If the countersigning officer also agrees to assess the applicant as significantly over 18, the applicant should be informed that their claimed age is not accepted and that their asylum claim will be processed under adult procedures. Form IS.97M should be completed, served, **and signed by the countersigning officer (CIO/HEO grade or above)**.
>
> In general, the rest of this instruction does not apply to these applicants, since they fall to be considered under adult processes. Case owners should nonetheless review decisions to treat applicants as adults, if they receive relevant new evidence.
>
> 2. **All other applicants should be afforded the benefit of the doubt and treated as children, in accordance with the '<u>*Processing an asylum application from a child*</u>' AI [Asylum**

Instruction], until a careful assessment of their age has been completed. This policy is designed to safeguard the welfare of children. It does not indicate final acceptance of the applicant's claimed age, which will be considered in the round when all relevant evidence has been considered, including the view of the local authority to whom unaccompanied children, or applicants who we are giving the benefit of the doubt and temporarily treating as unaccompanied children, should be referred.

…" (All emphases in the original)

30. The version of *Assessing Age* in place at the time of the decision of the Court of Appeal ("version 2") was produced after consultation with the National Asylum Stakeholders Forum and provided fuller guidance on the age assessment process, particularly in relation to criterion C. In material part it stated as follows:

"Initial age assessment

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

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

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

As a general principle, even where one of the statutory powers to detain is available in a particular case, unaccompanied children must not be detained other than in the very exceptional circumstances specified in paragraph 18B of Schedule 2 to the Immigration Act 1971 (see Detention - general guidance). Failure to adhere to the legal powers and policy on detaining children can have very significant consequences, for example:

- if a claimant is detained, but a court later finds, or the Home Office later accepts that the claimant who the Home Office has treated as an adult was a child, even if it reasonably believed that the individual was an adult, any period of detention whilst that person was in fact a child which was not in line with the restrictions in paragraph 18B of Schedule 2 to the Immigration Act 1971, will be unlawful and may well result in the Home Office being liable to pay damages ([reference to the *Ali* case]).

- such a period of detention can have a significant and negative impact on a child's mental or physical health and development.

- detention can be extremely frightening for a child, with their perception of what they might experience potentially informed by previous negative experiences of detention suffered by themselves or by people they know, in their country of origin or during their journey to the UK.

- if they believe themselves to be a child, the effect of not being believed by the Home Office and, consequently, being detained, can be very stressful and demoralising.

- the serious safeguarding risks of detaining unaccompanied children alongside adults.

Home Office policy therefore is to apply the age assessment process in such a way as to guard against the detention of children generally, including accidental detention of someone

> who is believed to be an adult but subsequently found to be a child.
>
> Age assessments cannot always provide the same degree of confidence about treating an individual as an adult or a child as can be provided by reliable documents. To allow for this, the principle of 'the benefit of the doubt' is applied. This means that where there is still uncertainty about whether the individual is an adult or a child, the individual should be treated as a child and referred to a local authority, with a request for a *Merton* compliant age assessment. This would include cases where their physical appearance and demeanour does not very strongly suggest that they are significantly over 18 years of age.
>
> The initial age assessment stage for cases where the claimed age is not accepted is intended to lead to a decision on how an individual should be treated and is divided into three possible outcomes with a number of reasons for arriving at them. Further guidance on how a decision should be made as to which group an individual should fall, is provided later in this section) …"

After a description of the three possible outcomes, the guidance continued:

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

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

> "You must treat the claimant as an adult if their physical appearance and demeanour **very strongly suggests that they are significantly over 18 years of age** [emphasis in original]. You must give careful consideration when assessing whether a claimant falls into this category. Where they do, they will be

considered under the adult processes and could, therefore, become liable for detention. Refer to the introduction of the Initial age assessment section for guidance on the significantly adverse consequences of unlawfully detaining children, on both the child themselves and the Home Office.

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

The second officer must be at least either a:

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

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

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

> The age a person must exceed, to be regarded as significantly over 18, is not specified within this guidance document. This is consistent with the Upper Tribunal's judgment [in the present case] which found that:
>
> > '… since the objective of the policy is to identify by way of initial "screening" assessment cases that are outside the category of "borderline cases" it is not apparent that there would be any value in greater precision than such an assessment can deliver'."

There follow passages giving guidance on "Assessing physical appearance" and "Assessing demeanour" which have no counterpart in version 1. It is not necessary to reproduce them here. The section ends with a passage headed "The decision", which states:

> "As shown in Assessing physical appearance and Assessing demeanour, although levels of maturity can be assessed, maturity is not an accurate reflection of chronological age and maturity itself can be variable. You must also keep in mind that young people may deliberately attempt to present as younger or older than their age.
>
> The policy is specifically designed to allow a large margin of error in favour of the claimant's claim to be a child. It achieves this by requiring Home Office staff to only treat them as an adult on the basis of their physical appearance and demeanour, where they conclude that these indicators very strongly suggest that they are significantly over 18 years of age. This takes account of the challenges in assessing a claimant's age in such circumstances.
>
> Although each claimant's circumstances are unique, when making decisions on age based on the claimant's physical appearance and demeanour, you should utilise your experience of working with asylum seeking children and young people, particularly those:
>
> - with the same ethnicity, nationality and gender
> - of a similar age and background

- whose ages have been accepted by the Home Office

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

32. Both versions of *Assessing Age* included a detailed discussion of the section 55 duty, co-operation with local authorities in the initial phase before they could carry out a *Merton* assessment to determine age where it was in dispute, and the weight to be given to *Merton* assessments once carried out by local authorities and other evidence of age, including paediatric reports. In that context, *Assessing Age* referred to guidance from the Royal College of Paediatricians which emphasised that age determination "is an inexact science where the margin of error can sometimes be as much as five years either side".

The decisions of the Upper Tribunal and the Court of Appeal

33. By a judgment of 31 July 2017 the Upper Tribunal dismissed BF's challenge to criterion C in the context of the Secretary of State's policy on detention of asylum seekers as set out in version 1 of the EIG and version 1 of *Assessing Age*. The challenge was on the grounds that the policy was unlawful, in so far as based on criterion C, because physical appearance and demeanour are an inherently unreliable guide to age. The challenge was based on two principal arguments.

34. First, Mr Buttler (who at that stage was representing the respondent by himself) referred to *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] AC 112 ("*Gillick*"), *R (Tabbakh) v Staffordshire and West Midlands Probation Trust* [2013] EWHC 2492 (Admin); [2014] 1 WLR 1022 ("*Tabbakh*") and *R (Letts) v Lord Chancellor (Equality and Human Rights Commission intervening)* [2015] EWHC 402 (Admin); [2015] 1 WLR 4497 ("*Letts*") in support of a submission that the policy guidance set out in criterion C was unlawful because it permitted or encouraged unlawful conduct. The Upper Tribunal rejected this submission on the basis that there was nothing in the guidance that suggests that immigration officers are permitted or encouraged to undertake unlawful acts: "[t]he policy does not assert that minors are to be detained contrary to any statutory provisions … the safeguards set out in the policy are surely designed to ensure that unlawful acts are avoided so far as is consistent with objective knowledge at the relevant time" (para 59).

35. Secondly, relying on *R (Detention Action) v First-tier Tribunal (Immigration and Asylum Chamber)* [2015] EWCA Civ 840; [2015] 1 WLR 5341 ("*Detention Action*"), Mr Buttler submitted that the policy guidance in criterion C was unlawful because, when applied, it was so "prone to error" as to amount to a systemic deficiency such that it was inherently unfair according to the test laid down in that case. His contention was that this could be established in two ways: (i) it was clear from looking at the policy itself, and (ii) it was clear from an examination of empirical data about how the policy guidance operated in practice. The Upper Tribunal held that point (i) was essentially the same as the argument based on *Gillick* and rejected it for the same reasons (para 63). As to (ii), the Upper Tribunal judge analysed witness statements adduced by each side and conducted a review of such statistics as existed in relation to detention of immigrants in cases where there was a dispute regarding their age, reaching this conclusion (para 77): "[g]iven the evidential and methodological difficulties identified in both [sides'] data sets, I do not consider I have a sufficient evidential basis on which to draw any definite conclusions as regards whether there is a significant risk of error, let alone a risk that is systematic."

36. BF appealed to the Court of Appeal (Underhill, Simon and Baker LJJ), which considered his challenge to criterion C both in the context of version 1 of the EIG and version 1 of *Assessing Age* (as they applied prior to the changes to the 1971 Act in July 2014) and in the context of version 2 of the EIG and version 2 of *Assessing Age* (as they apply after the changes to the 1971 Act). The challenge to criterion C was upheld by the court in relation to both these contexts, unanimously in relation to version 1 of the documents and by a majority (Simon LJ dissenting) in relation to version 2. The principal judgment was given by Underhill LJ.

37. Underhill LJ referred to the evidence adduced in support of the claim in the Upper Tribunal from various witnesses to the effect that assessment of age on the basis of physical appearance is unreliable. In particular, he referred to a document published by the Royal College of Paediatrics and Child Health entitled *The Health of Refugee Children - Guidelines for Paediatricians*, which had been relied on by Stanley Burnton J in the *Merton* case and was referred to in *Assessing Age* (see above), which included this statement:

> "In practice, age determination is extremely difficult to do with certainty, and no single approach to this is [sic] can be relied on. Moreover, for young people aged 15-18, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as five years either side."

The document explains in detail the difficulties associated with assessment of age, including the absence of any reliable anthropometric measure. A letter of July 2014 from the Registrar of the Royal College of Paediatricians confirmed that the views of the Royal College remained unchanged, that "assessment of age should only be made in the context of a holistic assessment of the child" and that in its view "the guidance to immigration staff that advises visual assessment of age is unsafe and unhelpful".

38. Underhill LJ observed that "[t]he law requires a wholly different treatment of young asylum seekers depending on whether they have passed their 18th birthday" and that, despite the difficulties this involves, "it has to be applied as best can be". Where there is no objective way of establishing the age of a young asylum seeker, such as by reference to documents (and they may genuinely not know their true date of birth), "even if they do they have an obvious incentive to misrepresent it" (ie to avoid detention and to secure the provision of child services from a local authority), "[t]here are no medical or scientific means for establishing the age of a young person with any precision". It followed that "[i]n such cases the necessary determination of whether he is over or under 18 will have to be made on the basis of a subjective assessment" (para 52). Although the most reliable means of assessing the age of a young person in the absence of objective evidence is by a *Merton*-compliant assessment involving experienced social workers, criterion C is concerned with the initial assessment of age by immigration officers who have to decide on first contact what to do with an asylum seeker, and it was common ground that it is not practicable for immigration officers to procure a *Merton* assessment when deciding whether to detain or not at that stage (para 53). The legal challenge was directed to the lawfulness of criterion C as applied at that initial stage (there being means for an asylum seeker to contest an assessment that he is an adult and not a child reasonably quickly thereafter, including by asking for a *Merton* assessment) (para 56). As Underhill LJ noted, "[a]ny such initial assessment will be bound in the typical case to depend primarily on what is described in criterion C as 'physical appearance/demeanour', assessed by immigration officers on the basis of contact which is far less substantial than in a *Merton*-compliant assessment. It will be correspondingly more unreliable" (para 54). On the evidence available, the margin of error is substantial and the best estimate appears to be about five years, by reference to the guidance from the Royal College of Paediatricians, though the Upper Tribunal thought it might be as much as seven years (para 54).

39. In the Court of Appeal a number of authorities were relied on by Mr Hermer QC, who appeared for BF at that stage, in support of his submission that in these circumstances criterion C was unlawful. He relied primarily on the judgment of Laws LJ in *R (S) v Director of Legal Aid Casework* [2016] EWCA Civ 464; [2016] 1 WLR 4733 ("*Legal Aid Casework*") in his written submissions and the decision of this court in *R (UNISON) v Lord Chancellor (Equality and Human Rights Commission intervening) (Nos 1 and 2)* [2017] UKSC 51; [2020] AC 869 ("*UNISON*") in his oral submissions. Mr Hermer submitted that the guidance in

UNISON was to the same effect as the test stated by Lord Mance (with the agreement of the majority of the court) in *In re Northern Ireland Human Rights Commission's Application for Judicial Review* [2018] UKSC 27; [2019] 1 All ER 173, para 82 ("*Northern Ireland Human Rights Commission*"), and argued that "the key question was whether the Secretary of State's policy created a real risk that at least some children would be unlawfully detained" (para 60). He also submitted that the approach adopted in *R (Refugee Legal Centre) v Secretary of State for the Home Department* [2004] EWCA Civ 1481; [2005] 1 WLR 2219 ("*Refugee Legal Centre*") was consistent with both those decisions in this court. Mr Strachan QC, for the Secretary of State, accepted in his oral submissions in the Court of Appeal that there was no substantive difference between the various approaches in these cases (para 62).

40. At para 63 Underhill LJ identified the test he should apply:

> "I do not think that it is necessary or useful to analyse the various cases referred to. In my view the correct approach in the circumstances of the present case is, straightforwardly, that the policy/guidance contained in paragraph 55.3.9.1 of the EIG and the relevant parts of *Assessing Age* will be unlawful, if but only if, the way that they are framed creates a real risk of a more than minimal number of children being detained. I should emphasise, however, that the policy should not be held to be unlawful only because there are liable, as in any system which necessarily depends on the exercise of subjective judgment, to be particular 'aberrant' decisions - that is, individual mistakes or misjudgments made in the pursuit of a proper policy. The issue is whether the terms of the policy themselves create a risk which could be avoided if they were better formulated."

41. Applying that test, Underhill LJ held that criterion C, as it appeared in both versions of the EIG and both versions of *Assessing Age*, was unlawful, in that the EIG and *Assessing Age* "contain no recognition of just how unreliable the exercise of assessing age on the basis of appearance and demeanour is and, in consequence, how wide a margin of error is required" (para 65, also paras 67 and 73-75). The guidance should have indicated that the margin of error for an age assessment of a young person was of the order of about five years or more. This defect in the guidance gave rise to a real risk of children being unlawfully detained (para 68). In substance, therefore, Underhill LJ was of the opinion that the guidance should direct immigration officers that, in cases where objective evidence was not available, they could only treat an asylum seeker as an adult for the purposes of deciding to detain him if they believed him to be aged 23 or more. He reached this conclusion without needing to rely on an analysis of statistics placed before the court by both sides, although he noted that there had been numerous cases where an initial assessment

that a young person was an adult had subsequently turned out to be wrong and this lent "weight to the probability that some immigration officers have failed to appreciate the width of the margin of error that needs to be applied" (para 69).

42. Baker LJ gave a judgment of his own agreeing with that of Underhill LJ and also relying on a point of EU law raised by the intervener in these proceedings, the Equality and Human Rights Commission, which has not been raised by the parties as an issue in the appeal to this court. Simon LJ agreed with Underhill LJ regarding the test to be applied and with his conclusion that criterion C was unlawful in version 1 of the EIG and version 1 of *Assessing Age*, in that it created a risk of more than a minimal number of children being detained. However, Simon LJ considered that criterion C was lawful in the context of version 2 of the EIG and version 2 of *Assessing Age.* In his view the amplified guidance in version 2 of *Assessing Age* regarding the risks associated with judging age from physical appearance and demeanour alone, the emphasis in criterion C and the guidance generally that it was intended to provide a margin against error in assessing age based on those factors and the fact that two immigration officers of suitable seniority separately had to make the assessment in accordance with those criteria, had the effect that the risk of mis-assessment was sufficiently reduced as to make the guidance in its second version lawful.

43. In May 2019 the Secretary of State introduced amendments to her policy guidance to comply with the majority decision of the Court of Appeal. Criterion C currently requires immigration officers to base their decision regarding whether an asylum seeker is aged 18 or over on an assessment of whether "their physical appearance and demeanour very strongly suggests that they are 25 years of age or over". As mentioned above, this was done without prejudice to the Secretary of State's appeal to this court against the Court of Appeal's decision.

The issues in the appeal and the submissions of the parties

44. The issues in the appeal are (1) whether the Court of Appeal erred in law in assessing the lawfulness of the policy guidance by reference to whether it (a) created a real risk of more than a minimal number of children being detained, and/or (b) created a risk which could be avoided if the terms of the policy were better formulated; and (2) whether the Court of Appeal erred in concluding that criterion C, as construed in the context of the relevant policy as a whole, is unlawful.

45. The submissions deployed by the parties have undergone significant changes from those presented in the Court of Appeal. Mr Strachan, for the Secretary of State, has withdrawn his apparent acceptance in that court that the relevant test is to be found in *Legal Aid Casework*. Instead, Mr Strachan submits that the test to be

applied is that derived from *Gillick* and that according to this criterion C is not unlawful in any version of the guidance.

46. Mr Hermer, for BF, now also places emphasis on *Gillick*, much as Mr Buttler had done in the Upper Tribunal, even though it did not feature in the submissions or analysis in the Court of Appeal. Mr Hermer submits that *Gillick* supports the test applied by the Court of Appeal. Alongside *Gillick* he also continues to rely, in particular, on *UNISON*. He stressed that his case is that the guidance is unlawful because of the risk of unlawful outcomes to which it gives rise, not because of an inherent risk of unfair outcomes. Accordingly, he disavowed reliance on authorities concerned with alleged systemic unfairness in a policy or administrative system such as *Refugee Legal Centre*, *Tabbakh*, *Detention Action* and *Legal Aid Casework.*

47. Ms Christie, who appears for the intervener in this court, made wide-ranging submissions in support of the respondent by reference to international law and the jurisprudence in relation to the European Convention on Human Rights ("ECHR"). To the extent that these departed from the submissions relied on by BF himself we did not find them helpful. However, we will address one aspect of Ms Christie's submissions in which she argued that the approach of the Court of Appeal derives support from *R (Munjaz) v Mersey Care NHS Trust* [2005] UKHL 58; [2006] 2 AC 148 ("*Munjaz*") (on article 3 of the ECHR) and *Storck v Germany* (2006) 43 EHRR 6 ("*Storck*") and other cases on article 5 of the ECHR (right to liberty and security of the person).

The test to be applied

48. In our judgment in the *A* case, to which we refer, we have sought to provide general guidance regarding the principles to be applied to test the lawfulness of policy guidance. In a case where the lawfulness of policy guidance is in issue, it has to be asked what the obligation or obligations were of the person promulgating the guidance with regard to its content.

(i) The Gillick obligation

49. The principal obligation is that explained in *Gillick*, so in our opinion the parties were right to focus on this in their submissions in this court. The *Gillick* obligation is not to give policy direction to recipients to do something which is contrary to their legal duty: see the *A* case, paras 29-47.

50. In Mr Hermer's submission, criterion C in the context of both versions of the EIG and *Assessing Age* "permits or encourages unlawful conduct" by immigration

officers (to use Lord Scarman's formulation in *Gillick* at p 181F), in the requisite sense. According to Mr Hermer, criterion C "permits" or "encourages" unlawful conduct because it does not sufficiently remove the risk that immigration officers might make a mistake when they assess the age of an asylum seeker who claims to be a child.

51. In our view, this submission involves a misinterpretation of what was said in *Gillick* and cannot be sustained. As we explain in our judgment in the *A* case, the meaning of the formula used by Lord Scarman is much narrower than suggested by Mr Hermer. It involves comparing two normative statements, one being the underlying legal position and the other being the direction in the policy guidance, to see if the latter contradicts the former. Mr Hermer's submission as to the effect of *Gillick* distorts this test by comparing a normative statement with a factual prediction, ie comparing the underlying legal position with what might happen in fact if the persons to whom the policy guidance is directed are given no further information. If correct, this would involve imposing on the person promulgating the guidance a very different, and far more extensive, obligation than that discussed in *Gillick*. It would transform the obligation from one not to give a direction which conflicts with the legal duty of the addressee into an obligation to promulgate a policy which removes the risk of possible misapplication of the law on the part of those who are subject to a legal duty. There is no general duty of that kind at common law.

52. Whenever a legal duty is imposed, there is always the possibility that it might be misunderstood or breached by the person subject to it. That is inherent in the nature of law, and the remedy is to have access to the courts to compel that person to act in accordance with their duty. An asylum seeker has the same right to apply to the courts as anyone else. Save in specific contexts of a kind discussed below and in our judgment in the *A* case, there is no obligation for a Minister or anyone else to issue policy guidance in an attempt to eliminate uncertainty in relation to the application of a stipulated legal rule. Any such obligation would be extremely far-reaching and difficult (if not impossible in many cases) to comply with. It would also conflict with fundamental features of the separation of powers. It would require Ministers to take action to amplify and to some degree restate rules laid down in legislation, whereas it is for Parliament to choose the rules which it wishes to have applied. And it would inevitably involve the courts in assessing whether Ministers had done so sufficiently, thereby requiring courts to intervene to an unprecedented degree in the area of legislative choice and to an unprecedented degree in the area of executive decision-making in terms of control of the administrative apparatus through the promulgation of policy.

53. In this case there is no doubt that, in the period up to 28 July 2014, it was legitimate and appropriate for the Secretary of State to set out in her policy a basic rule that children under 18 should not ordinarily be subject to immigration detention

whereas adults above that age could be. When the legislation was changed with effect from that date, that became the legal rule laid down in primary legislation. The fact that it may be difficult in marginal cases to tell which category a particular individual falls into does not indicate that there is a problem with the rule itself. The Secretary of State, in the first place, and then Parliament were clearly entitled to state the rule to be applied as they did. In neither case was the Secretary of State under any obligation to correct or qualify the rule by issuing policy guidance.

54. The objective of the rule is to delineate two categories of person to be subject to different treatment at the initial stage of assessment by immigration officers. As was accepted on all sides in the Upper Tribunal and the Court of Appeal and was acknowledged by Underhill LJ (para 55), there are sound policy reasons why adults should be treated as such and not as children:

> "[Counsel for the respondent and for the intervener] [b]oth accepted, as had also been accepted before the tribunal … that there would be cases where it is so obvious, even on an initial assessment of appearance and demeanour, that a person was over 18 that to treat them as a child would be unjustified. That is of course also in line with the observations of Stanley Burnton J in *Merton* [at para 27]. It must be borne in mind that to treat an adult migrant as a child is itself not a problem-free course. It is a considerable burden on local authorities to have to find appropriate accommodation for [unaccompanied asylum-seeking children], and that resource should not be wasted on those who obviously do not qualify for it. It would bring the system into disrepute with local authorities and their staff and others involved (such as those providing foster care) if people who were obviously adults were accorded treatment and benefits intended for children. It is also of course easier for migrants with no genuine claim for asylum to abscond from a foster home or supported independent accommodation than from immigration detention."

Although a local authority, when deciding whether its obligations under the Children Act 1989 to provide child services are engaged, is not obliged to accept the assessment of immigration officers that a person is a child, it may be expected that under pressure of time before it is possible to arrange a *Merton* assessment for itself it is likely to do so on an interim basis. *Assessing Age* contemplates that there will be co-operation between immigration officers and the local authority at the initial stage of dealing with an asylum seeker who may be a child.

55. In the *Merton* case Stanley Burnton J said this at para 27:

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

56. The last point adverted to by Underhill LJ in para 54 above is particularly significant in the present context. The policy guidance in criterion C falls to be applied at the initial stage when immigration officers first encounter immigrants, when the only evidence available from which to make an assessment of their age may be their appearance and demeanour. The position is that Parliament intends that they should be able to detain the immigrant with a view to possible removal if it turns out that their immigration status warrants this and they do not have a good claim to asylum. Detention may in practice be important to ensure the effective application of immigration controls if, upon investigation, it transpires the immigrant has no good claim to remain in the UK. Where the immigrant is an unaccompanied child, this policy is adjusted to take account of their greater vulnerability, and this means that it is incumbent on immigration officers to assess whether they are dealing with a child or an adult. However, this involves no derogation from the general object of the legislation that immigration controls should be effective and that to this end adults should be subject to immigration detention in appropriate cases.

57. The Secretary of State's policy (prior to 28 July 2014) and the legislative provision now in place require immigration officers to consider detention of an immigrant at that initial stage according to the different regimes applicable to adults and children, depending on whether they consider that they are dealing with an adult or a child. The officers are required to apply the statutory regime as Parliament intended it should be applied (as supplemented prior to 28 July 2014 by the approach set out in the Secretary of State's policy), and this means they must distinguish adults and children as best they can according to the evidence available to them. If immigration officers conclude that they are dealing with an adult, their duty is to apply the regime which is appropriate for an adult.

58. The policy set out in criterion C includes an allowance to give the benefit of the doubt to the immigrant who claims to be a child whose age is being assessed, in that it states that they should be assessed to be an adult only if their physical appearance and demeanour "very strongly suggests" that they are "significantly" over 18 years of age. The wider discussion in both versions of the EIG and *Assessing Age* stresses the same point, with the emphasis becoming stronger in the second

version, as pointed out by Simon LJ. There is also an important safeguard built in, that two immigration officers of specified seniority should separately reach the same conclusion.

59. It is possible that these aspects of the policy, or something similar, were required by section 55(1)(a) of the 2009 Act, but it is not necessary to form any final view about that. It is sufficient to observe that the policy in criterion C has been formulated "having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom", so that the Secretary of State has properly complied with her duty under section 55: see *R (AA (Afghanistan)) v Secretary of State for the Home Department* [2013] UKSC 49; [2013] 1 WLR 2224, paras 47-49 per Lord Toulson ("*AA (Afghanistan)*"). He held that by issuing the equivalent of version 1 of the EIG and of *Assessing Age*, including criterion C, the Secretary of State had complied with her duty under section 55 and that by acting in compliance with that policy guidance immigration officers also complied with that duty. Mr Hermer accepts that this is so and does not contend that section 55 imposes any obligation on the Secretary of State to go further than she has done in stating the policy to be applied. As Lord Toulson observed (para 49), "[t]he risk of an erroneous assessment can never be entirely eliminated but it can be minimised by a careful process and there are appropriate safeguards", as were provided for in the EIG and *Assessing Age*.

60. Therefore, in her policy the Secretary of State has set out in a lawful way, so far as section 55 is concerned, the relatively generous degree to which the benefit of the doubt should be allowed to an immigrant who claims to be a child. As Mr Strachan points out, the policy, in particular as set out in criterion C, instructs immigration officers how they should proceed if they are *not* in doubt according to that standard. Where, after making due allowance for doubt to the degree instructed by the Secretary of State, immigration officers believe they are dealing with an adult, their duty is to treat the person as an adult so as to comply with the rule set by the Secretary of State and then by Parliament and to achieve the objectives which that rule is supposed to promote.

61. The principle in *Gillick* does not require anything different from this. The policy guidance given by the Secretary of State, in particular in criterion C, plainly does not direct immigration officers to act in a way which is in conflict with their legal duty. On the contrary, the policy recognises and reinforces the legal duties to which they are subject under the statutory regime, having regard to the limited evidence available to them when they are required to act. It directs them to treat immigrants they believe are children as children and to treat immigrants they believe are adults as adults.

62. Two additional points may be made here. First, it might be thought that the outcome proposed by the majority in the Court of Appeal - according to which, in

effect, the Secretary of State was required to direct immigration officers to treat a person as a child aged less than 18 only if they believe them to be aged less than 23 (or 25, depending on how one sets the margin of error) - itself risked being unlawful according to the *Gillick* principle, in the sense that it would appear to contradict the rule laid down by Parliament for immigration officers to apply, namely that they should treat a person who according to their judgment is 18 or over under the adult immigration regime. We do not need to decide whether section 55 might provide a legal justification for the Secretary of State to go so far, since it is conceded that it certainly imposes no obligation on her to do so. We do not consider that there is any other warrant for the Secretary of State to seek to displace the rule laid down by Parliament in this manner.

63. Secondly, leaving aside the issue of whether section 55 requires the Secretary of State to say anything about the application of the statutory rule, we do not consider that there is any obligation under the common law for her to have any policy at all in place to supplement what is said in the relevant statutory provisions. Those provisions lay down a clear rule that persons aged less than 18 should be treated as children, while those aged 18 or over should be treated as adults for the purposes of the legislative regime. The provisions do not confer any discretion on immigration officers on this point, though obviously they have to make an evaluative judgment on the basis of such evidence as is available to them whether a person is aged under 18 or not.

64. Mr Hermer submitted, relying on *Lumba v Secretary of State for the Home Department* [2011] UKSC 12 (reported as *R (WL (Congo)) v Secretary of State for the Home Department (JUSTICE intervening)* [2012] 1 AC 245), paras 34-35, that the Secretary of State was obliged to promulgate a policy in relation to the application of the statutory rule. We do not agree. The relevant part of the judgment of Lord Dyson in *Lumba*, at paras 20-39, was concerned with circumstances in which there may be an obligation to promulgate a policy to explain how a general statutory discretion might be exercised and the circumstances in which a policy should be made public. The judgment does not support the submission made by Mr Hermer that the Secretary of State was under an obligation in this case to state a policy in relation to what is a clear statutory rule.

65. This point serves to show, from another perspective, that there was no breach of obligation on the part of the Secretary of State in promulgating the policy in this case, in particular in the form of criterion C. The Secretary of State would have been entitled to have no policy at all as regards the application of paragraph 16(2A) of Schedule 2 to the 1971 Act, or a policy which simply directed attention to the rule in that provision. It would be odd to conclude that, although the Secretary of State was under no obligation to say anything at all about the statutory rule, if she did promulgate a policy in relation to it she suddenly came under an obligation to specify in her policy that the rule should only be applied if any margin of error had been

eliminated, by using 23 (or 25) as the relevant cut-off age to identify a person as a child instead of 18.

66. Mr Hermer submitted that the Secretary of State was obliged to issue such a policy in place of criterion C because the new statutory provision, particularly as interpreted by the Court of Appeal in the *Ali* case, made it clear that it was unlawful to detain someone as an adult (even if reasonably believed to be an adult) when in fact they are a child. According to Mr Hermer, since it is clear that immigration officers would act unlawfully in such a case, the Secretary of State was under a duty to issue a policy which eliminated that possibility.

67. We do not accept this submission. As we have explained above, immigration officers would also act unlawfully, in the sense that they would defeat the purpose of the statutory regime, if they treated a person as a child when in fact they are an adult. Their obligation is to apply the statute in accordance with its terms according to their best judgment, formed in the light of the available evidence. The fact that they may make mistakes and that those mistakes may lead to unlawfulness of different kinds depending on whether they wrongly conclude a person is an adult or wrongly conclude they are a child does not affect the nature of their duty. Clearly, given the difficulties of assessment in marginal cases, if the Secretary of State issued a policy requiring immigration officers always to conclude that a person is a child unless they seem to be aged 23 (or 25) or over, that would produce a large number of erroneous identifications of adults as children, thereby undermining the purpose of the statute. The fact that damages for false imprisonment would be payable if immigration officers make an opposite error, concluding that a person is an adult and accordingly detaining them whereas it is ultimately established in court proceedings that they are a child does not change this. It simply means that a child who is wrongly treated as an adult may have a range of legal remedies available to them, and their interest may to that extent be better protected. The public interest to have immigration rules properly applied and illegal immigrants removed is not affected by this.

(ii) The principle in UNISON

68. In our judgment, *UNISON* does not assist the respondent in this case and the Court of Appeal erred in thinking that it supported their approach in testing the lawfulness of criterion C. *UNISON* is concerned with the lawfulness of policy or delegated legislation which creates an unreasonable or unacceptable impediment to being able to have access to a court or tribunal for the determination of legal rights and obligations: see our judgment in the *A* case, para 80. But in the present case, nothing in the policy promulgated by the Secretary of State creates any impediment for an immigrant in gaining access to the courts for the determination of their rights.

69. As we have sought to explain in the *A* case (paras 73, 75 and 80), we respectfully consider that the Court of Appeal erred in the present case by mixing together the principle with which *UNISON* is concerned and the distinct jurisprudence on inherent systemic unfairness in cases such as *Refugee Legal Centre* in order to arrive at the test which it applied in relation to criterion C. As we have mentioned, Mr Hermer did not seek to support the Court of Appeal's reasoning in so far as it rested on the latter cases.

70. Similarly, we consider that, contrary to the opinion of the Court of Appeal, the judgment of Lord Mance in the *Northern Ireland Human Rights Commission* case, at para 82, provides no support for the test applied in this case: see our judgment in the *A* case, para 78. When reviewing, on a prospective basis, the compatibility of domestic legislation with one of the Convention rights set out in the Human Rights Act 1998, Lord Mance said that "[t]he relevant question is whether the legislation itself is capable of being operated in a manner which is compatible with that right, or, putting the same point the other way around, whether it is bound in a legally significant number of cases to lead to unjustified infringement of the right". This is a test which is similar to that in *Gillick*, in that it involves comparison of two normative statements, by looking to see if action as directed by the legislation will necessarily involve a violation of the Convention right in a significant number of cases.

(iii) Obligations derived from Convention rights

71. Mr Hermer did not seek to support the Court of Appeal's approach in this case by referring to cases based on Convention rights. However, Ms Christie for the intervener referred to several. In our view, however, they do not provide support for the decision of the Court of Appeal and do not provide relevant guidance applicable in this case. We refer to our judgment in the *A* case at paras 49-53 and 76-79.

72. The *Munjaz* case is concerned with a distinct obligation which arises pursuant to article 3 of the ECHR to protect an individual from being exposed to a real risk of treatment falling within the scope of that provision. No such obligation is engaged in the context of the present case.

73. Ms Christie relied on the judgment of the European Court of Human Rights in *Storck*. This was a case involving the detention of an individual by a private person. The issue arose whether the state could incur liability under article 5 of the ECHR in respect of the detention. Ms Christie relied on a passage at paras 101-102 in which the court held that article 5 lays down a positive obligation on the state to protect the liberty of individuals, so the state's responsibility was engaged. However, the present case is concerned with detention by the state and it is not in doubt that the state has responsibility in relation to that, nor that article 5 is

applicable in such cases. Article 5(1)(f) permits "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition". Article 5 includes a requirement that detention according to national law must not be arbitrary: *Saadi v United Kingdom* (2008) 47 EHRR 17, GC, paras 61-74. It is not suggested that the detention of the respondent was arbitrary. It arose from the application of a rule which drew a clear and legitimate distinction between the treatment of adults and children and was based on a genuine and considered assessment by two immigration officers that he was an adult. More germanely, it cannot be said that article 5 imposes any obligation on the Secretary of State to put in place a policy of the kind discussed by the Court of Appeal. As this court held in *AA (Afghanistan)*, paras 44-49, section 55 is compatible with article 5 and detention in accordance with the policy guidance in the EIG and *Assessing Age* will be compliant with article 5.

Conclusion

74. For the reasons given above, we would allow the appeal by the Secretary of State. At all material times, the relevant parts of the policy she maintained in place, and criterion C in particular, were lawful.