OPINION OF SENIOR COUNSEL

For

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Re

LOCAL AUTHORITY OBLIGATIONS TO UNACCOMPANIED AGE-DISPUTED YOUNG PEOPLE

[1] JustRight Scotland seek advice in relation to the obligations of Scottish local authorities towards asylum seekers who are separated from their parents and claim to be under the age of 18. The majority of the young persons involved will have fled war, violence, trafficking and exploitation. They generally have no identification documents as these have been lost, stolen or never existed in the first place. The Home Office may accept they are children and refer them to the local authority to be accommodated, or may give them the benefit of the doubt that they are children and refer them on to the local authority, or assess them as adults because their physical appearance and demeanour "very strongly suggests they are over 18."

Duty to provide accommodation

[2] The Children (Scotland) Act 1995 sets out local authority duties towards separated children who have no accommodation:

25.— Provision of accommodation for children, etc.

(1) A local authority shall provide accommodation for any child who, residing or having been found within their area, appears to them to require such provision because—

(a) no-one has parental responsibility for him;

(b) he is lost or abandoned; or

(c) the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care.

(2) Without prejudice to subsection (1) above, a local authority may provide accommodation for any child within their area if they consider that to do so would safeguard or promote his welfare.

(3) A local authority may provide accommodation for any person within their area who is at least eighteen years of age but not yet twenty-one, if they consider that to do so would safeguard or promote his welfare.

[3] The first point to note is that provision of accommodation to a child separated from parents is a duty. It is not a discretion. If there is no-one with parental responsibility, the child is lost or abandoned, or the person caring for the child is prevented from doing so, then it falls to the local authority to provide accommodation. This applies to any child "found within their area." A "child" is a person under the age of 18 (see definition in section 93(2)(a) of the 1995 Act). There is a discretion to provide accommodation to other children, or to young people aged between 18 and 21, but this is in addition to the primary duty to children set out in section 25(1).

[4] It should be noted that the duty depends on presence. It falls on the local authority for the area where the child is residing or where the child is "found". If the child moves from one local authority area to another, then the duty shifts to the new authority. There cannot be a situation where no authority is responsible for accommodating a child who fulfils one or more of the conditions (a) to (c) set out in section 25(1). If a child does arrive in a new authority area but the original authority which has been

accommodating the child is prepared to continue to accommodate, then provision by the new authority may not be required, but if the original authority are no longer providing accommodation or the child does not propose to return there, then the new authority must assume responsibility.

[5] *R (A) v Croydon London Borough Council* [2009] 1 WLR 2557 is authority for the proposition that the definition of "child" is unqualified. It did not allow of the interpretation "a person who appears to the local authority to be under the age of 18" or "a person whom the local authority or any other person making the initial decision reasonably believes to be under the age of 18." Whether a person is a "child" has a right and a wrong answer. It might be difficult to determine the answer, but that is true of many questions of fact. Ultimately, if necessary, the court will be required to decide. However, once the qualifying criteria are established, a local authority has no discretion under section 20 of the English 1989 Act. The existence of the criteria is a matter of judgment, not discretion. It is axiomatic that same logic will apply to section 25 of the Children (Scotland) Act 1995.

[6] The Children (Scotland) Act 1995 actually leaves even less room for discretion than section 20 of the Children Act 1989. The English Act adds a provision that to qualify for accommodation the child must be "in need". The duty in section 25 to provide accommodation is not contingent on a child being "in need". That would import a number of value judgments. Instead section 25 specifies in precise terms when the duty arises, ie when there is no-one with parental responsibility for the child, when the child is lost or abandoned, or where the person who has been caring for the child is

prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care. Those conditions will generally apply to separated asylum seeking children.

[7] It should be noted that this is not a general social welfare duty. It is a duty is owed to the individual child. The phrase "for whatever reason" indicates the widest possible scope must be given to the provision in section 25(1)(c). The guiding principle is the need to safeguard and promote the child's welfare. This was explained by Lord Hope of Craighead in *R (G) v Barnet LBC* [2004] 2 AC 208, at §100, with reference to section 20 of the English Children Act 1989, which imposes a similar duty to accommodate. Given the identical terminology in this part of the legislation, it is reasonable to apply the same interpretation of the duty in section 25 of the 1995 Act. On this basis separated asylum-seeking child is likely to fall within the local authority's duty to accommodate.

[8] The legislation draws no distinction between a child born in the United Kingdom and a child born elsewhere. There is no special case for a refugee or asylum seeker. It does not matter how the child has come to the attention of the local authority. If the child is found in the local authority area and no-one has parental responsibility for him, or he is lost or abandoned, or the person who has been caring for him is prevented, whether or not permanently and for whatever reason, from providing him with suitable accommodation or care, then the local authority must accommodate that child.

[9] I am advised that on occasion asylum seeking young people have come to the attention of the police, who have refused to refer these young people to the local authority. While such a referral may be consistent with general policing duties, the police have no express duty to refer an age-disputed young person to social work. On the other hand if a young person is under 18 and therefore falls within the local authority duty to accommodate, no referral by the police is required. The local authority owes its duties direct to a qualifying child or young person, regardless of who refers. All the child requires to do is to be found in the local authority area. A local authority cannot refuse to comply with its statutory duty in the absence of a police referral. No referral of any nature is required.

Duty to children

[10] The duty to accommodate under section 25 applies in the case of a "child", that is a person under the age of 18. The local authority has a responsibility to decide for itself whether a person is a "child". *R (on the application of B) v Merton LBC* [2003] EWHC 1689 (Admin) established that the local authority cannot simply adopt a Home Office decision on age. To rely on a Home Office assessment that a person is not a child is actually unlawful (see *R (AF) v Milton Keynes Council* [2023] EWHC 163 (Admin)). A local authority must assess age for itself.

[11] A local authority may refuse to provide children's services where it determines that an applicant is not a child, but it must properly inform itself as to whether the applicant is in fact a child, in accordance with the general principles laid down in *Secretary of State*

for Education & Science v Tameside MBC [1977] AC 1014. The duty identified in *Tameside*, as summarised by Lord Diplock at §1065B is:

> "… did the [Defendant] ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?"

The Tameside duty is a requirement of general application to all relevant decision-makers and a necessary condition for a decision to be characterised as lawful (see *R (RP) v Brent LBC* [2011] EWHC 3251 (Admin)).

[12] It is not therefore necessary to challenge a Home Office age assessment in order to seek accommodation from a Scottish local authority. It is of no relevance that the Home Office assessment took place more than three months before the young person presented to the local authority in Scotland, because it is not necessary (even were it appropriate) to challenge the Home Office decision. The local authority is required assess whether a person is a child and so whether the person should be accommodated under section 25.

[13] Age Assessment Practice Guidance for Scotland issued in March 2018 makes the point that appropriate accommodation should be in place for the duration of the assessment, and that "Case law cautions against using adult services provision whilst carrying out an age assessment…" It refers to *R (S) v Croydon LBC* [2017] EWHC 265 (Admin) where Lavender J held that by agreeing to carry out an age assessment the local authority had accepted that the claimant might be a child. Given the English guidance that where the age of an individual claiming to be a child was in doubt, that person was to be treated as a child unless and until an age assessment showed them to

be an adult, Croydon was, in that case, *prima facie* required to treat, and accommodate, the claimant as a child pending the outcome of the age assessment. Croydon had proffered no cogent reason justifying its departure from the guidance and the refusal to accommodate the claimant was held to be unlawful. This decision has been followed in England on a number of occasions, including in the three cases decided by Poole J in *R (AB) v Brent* [2021] EWHC 2843 (Admin). It is likely to be followed in Scotland.

Trafficked children

[14] In December 2008 the UK Government ratified the Council of Europe Convention on Action against Trafficking in Human Beings. Scotland became bound by the terms of the Convention in April 2009. The Convention defines "trafficking" as:

> "… the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs"

[15] The Convention specifies, in article 10.3 that where the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age. A state that is party to the Convention is required, as soon as an unaccompanied child is identified as a victim, to provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of the child (article 10.4). Article 12 sets out measures of assistance that may be

necessary to assist victims of trafficking , including appropriate and secure accommodation, psychological and material assistance and, in the case of children, access to education.

[16] The Human Trafficking and Exploitation (Scotland) Act 2015 gives effect to measures required by the Convention. Consistent with the Convention, "trafficking" is given a wide definition under section 1(1)(a) and (2), including transportation and transfer for the purpose of exploitation. Exploitation includes, at a minimum the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs. It is likely that an unaccompanied child or young person will have been transported, as opposed to arriving under his or her own steam. If this was for exploitation then the child or young person falls to be treated as a victim of trafficking.

[17] Part 2 of the 2015 Act provides a statutory basis for the protection of victims of trafficking, including children under eighteen years of age. Section 11 provides for arrangements for appointment of an "independent child trafficking guardian" to assist, support and represent a child where a relevant authority (including a local authority) has reasonable grounds to believe that the child is, or may be, a victim of the offence of human trafficking or is vulnerable to becoming a victim of that offence, in cases where there is no person in the United Kingdom with parental rights or responsibilities in relation to the child.

[18] Where a relevant authority (in this case a Health Board or local authority) has reasonable grounds to believe a person many be a victim of an offence of human trafficking and a relevant authority is not certain of the person's age but has reasonable grounds to believe that the person may be a child, section 12 requires an assumption that the person is a child for the purpose of carrying out its functions, until "an assessment of the person's age is carried out by a local authority, or the person's age is otherwise determined". This applies in relation to provision of accommodation under section 25 of the Children (Scotland) Act 1995. This goes beyond the general position explained above, that is set out in guidance and confirmed in case law. It imposes a statutory requirement.

[19] To be clear, section 12 of the Human Trafficking and Exploitation (Scotland) Act 2015 does not impose a direct duty to accommodate. It imposes a duty to give the benefit of the doubt to young people where there are reasonable grounds to believe the person may be a child. It is the required assumption that the young person is a child that then gives rise to the duty to accommodate. Given the wide definition of "trafficking" it is likely that the benefit of the doubt will apply to many, if not most, unaccompanied asylum seeking young people.

Brief assessments

[20] The duty to accommodate under section 25 applies to a child. If a person is over the age of 18 then there is no such duty (although there is a discretion to under section 25(3) to provide accommodation for any person within the area who is at least eighteen years of age but not yet twenty-one, if the local authority consider that to do

so would safeguard or promote his welfare). As was explained in *R (on the application of B) v Merton LBC* [2003] EWHC 1689 (Admin) age determination is extremely difficult to carry out with certainty. The margin of error can be as much as 5 years either way. It is not generally possible to predict age from any anthropometric measure and any assessment should take into account relevant factors from the child's medical, family and social history.

[21] In *Merton* Stanley Burton J set out guidance for assessment of age. This has been built on in subsequent cases and led to the term "Merton compliant" to refer to an interview or assessment process which complies with the necessary standards of inquiry and fairness. In *Merton* it was acknowledged that there may be cases where it is very obvious that a person is under or over 18. If a person is obviously a child then no inquiry at all is called for. A decision-maker is however under a public law duty to make the necessary inquiries to arrive at an informed decision on the fact of the young person's age and to apply minimum standards of fairness.

[22] So-called "brief assessments" are therefore lawful in cases where it is very obvious that a person is over 18 or is a child. In *R (AB) v Kent CC* [2020] EWHC 109 (Admin), [2020] PTSR 746 Thornton J held that while it might be legitimate for a local authority to assess age based on an abbreviated assessment of physical appearance and demeanour, it was then incumbent on the authority to take into account the margin for error, reflecting the established understanding that physical attributes and demeanour were fragile material on which to base an assessment of age. She declined to specify a permissible margin for error, but held in that case that the assessment was flawed by a

failure to follow up on potential relevant evidence or to come to a view on credibility without acknowledging the margin for error. The assessed age in that case of 20 – 25 was too close to the cut-off age of 18 for the young person not to be given the benefit of the doubt, and for a full *Merton* compliant assessment to be made.

[23] When it came to the lawfulness of a local authority carrying out a "short-form assessment", as opposed to a full "*Merton*-compliant" age assessment, in *R (HAM) v Brent LBC* [2022] PTSR 1779 Swift J held that the distinction between the two was legally irrelevant. The legal standard of fairness required to be met in each case. When a person appeared to be close to 18, fairness might ordinarily require the decision-maker to make further inquiries, either through an interview with the person to obtain that person's history, or otherwise. When an interview or other enquiry was undertaken, it must be undertaken fairly. If a person's credibility was an issue that should be made clear and dealt with "head on" during the investigation process. If the authority was minded to conclude the person lying, that provisional view and the reasons for it should be explained and the person should have the opportunity to respond before a final decision was taken.

[24] As explained in *HAM* there may be a range of steps that could be taken to ensure that the procedure is fair, but they will not all be required in every case. These could include more than one social worker to conduct the interview, taking information from other sources (such as medical professionals, social workers or teachers), more than one interview, keeping verbatim notes and having an interpreter personally present as opposed to available by phone or video call. However, there is no checklist

as such. Fairness is a matter of substance rather than simple form. While, in *R (HAM) v Brent LBC* the procedure adopted had not been fair as the claimant had not been afforded the opportunity to respond to points leading the Council to reject his claimed age, Swift J did not quash the age assessment decision. He refused to remit the age assessment to the Council to redetermine. He transferred the question of the substantive decision to the Upper Tribunal for determination on its merits.

[25] This course follows logically from the decision of the UK Supreme Court in *R (A) v Croydon London Borough Council,* to the effect that when age is disputed, ultimately it is for the court to determine age. In the absence of any other remedy age requires to be determined by adapting the procedure of judicial review. In practice, in England, this has resulted in remit to the Upper Tribunal for a decision on age.

[26] The implications have been spelled out by the Court of Appeal in *R (SB) v Kensington and Chelsea RLBC* [2023] EWCA Civ 924. If a court can, and does, decide the merits of a dispute over age, it is irrelevant that a local authority has made a procedural error in the course of their age assessment. A failure to put adverse points to a claimant, or otherwise to conduct an interview in a fair manner will not matter once the court has decided, on the basis of all the evidence, what the age of the claimant actually is. The decision on the merits may well make any procedural challenges unnecessary and it may be artificial and unhelpful to consider procedural challenges without confronting the merits. Once permission to apply for judicial review has been granted then the norm, in England, should be a transfer to the Upper Tribunal for procedural challenges to be considered in the context of a decision on the merits.

[27] Resort to litigation should not, however, be necessary if a lawful age assessment is carried out. Thornton J's decision in *R (AB) v Kent CC* sets out a useful summary of the guidelines in age assessments derived from Merton, subsequent case law and Home Office guidance. While she is referring to "full", Merton compliant assessments, it is necessary to bear in mind that the same legal standards of fairness apply to any assessment (see §[23] above). In this respect there is no distinction between a so-called "brief assessment" and a "full" assessment:

> "*Purpose of the assessment*
> (1) The purpose of an age assessment is to establish the chronological age of a young person.
> *Burden of proof and benefit of the doubt*
> (2) There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child.
> (3) The decision needs to be based on particular facts concerning the particular person and is made on the balance of probabilities.
> (4) There is no burden of proof imposed on the applicant to prove his or her age.
> (5) The benefit of any doubt is always given to the unaccompanied asylum-seeking child since it is recognised that age assessment is not a scientific process.
> *Physical appearance and demeanour*
> (6) The decision-maker cannot determine age solely on the basis of the appearance of the applicant, except in clear cases.
> (7) Physical appearance is a notoriously unreliable basis for assessment of chronological age.
> (8) Demeanour can also be notoriously unreliable and by itself constitutes only "somewhat fragile material". Demeanour will generally need to be viewed together with other things including inconsistencies in his account of how the applicant knew his/her age.
> (9) The finding that little weight can be attached to physical appearance applies even more so to photographs which are not three-dimensional and where the appearance of the subject can be significantly affected by how photographs are lit, the type of the exposure, the quality of the camera and other factors, not least including the clothing a person wears.
> *Conduct of the assessment*
> (10) The assessment must be done by two social workers who should be properly trained and experienced.
> (11) The applicant should be told the purpose of the assessment.
> (12) An interpreter must be provided if necessary.

(13) The applicant should have an appropriate adult, and should be informed of the right to have one, with the purpose of having an appropriate adult also being explained to the applicant.
(14) The approach of the assessors must involve trying to establish a rapport with the applicant and any questioning, while recognising the possibility of coaching, should be by means of open-ended and not leading questions. Assessors should be aware of the customs and practices and any particular difficulties faced by the applicant in his home society.
(15) The interview must seek to obtain the general background of the applicant including his family circumstances and history, educational background and his activities during the previous few years.
(16) An assessment of the applicant's credibility must be made if there is reason to doubt his/her statement as to his/her age.
(17) The applicant should be given the opportunity to explain any inconsistencies in his/her account or anything which is likely to result in adverse credibility findings.

Preliminary decision

(18) An applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him. It is not sufficient that the interviewing social workers withdraw to consider their decision, and then return to present the applicant with their conclusions without first giving him the opportunity to deal with the adverse points.

The decision and reasons

(19) In coming to the conclusion the local authority must have adequate information to make a decision independent of the Home Office's decision.
(20) Adequate reasons must be given.
(21) The interview must be written up promptly."

[28] It should however be re-iterated that fairness is a matter of substance rather than simple form. While lists such as this have their uses they cannot be regarded as if they were legislative requirements, to be followed in every case. Nor does such a list necessarily represent the minimum requirements of fairness in any particular case

Nature of accommodation

[29] Section 26 provides that a local authority may provide accommodation by placing the child with a family, a relative, or any other suitable person, or by maintaining the child in a residential establishment, or by making such arrangements as appear to them to

be appropriate, including making use of such services as are referred to in section 17(1)(b). Those are services available for children cared for by their own parents as appear to the local authority reasonable in the case of this child. There is flexibility in the terminology, but the arrangements are to be "appropriate". The reference to section 17(1)(b) gives a context of services available for children, which must appear reasonable. It can be argued that placing a child to fend for themselves in accommodation designed for adults would not generally meet the requirements of section 26.

[30] If a child is accommodated under section 25, then that child is "looked after by the local authority" (section 17(6)(a)) and the authority has a duty to safeguard and promote the child's welfare and to make use of services which would be available for children cared for by their own parents as appear to the local authority reasonable (see section 17(1)). The authority should also provide advice and assistance with a view to preparing the child for when he is no longer "looked after" (section 17(2)). Regular reviews are generally required in relation to a looked after child (section 31), but these are to be at intervals prescribed by Scottish Ministers. The Looked After Children (Scotland) Regulations 2009 (SSI 2009/210) prescribes intervals for children with parents, kinship carers, in foster care or in residential establishments, but are silent in relation to children otherwise accommodated.

[31] The 2009 Regulations apply to young asylum seekers accommodated under section 25. The authority must carry out an assessment in accordance with regulation 4. There is an extensive list of matters to assess, including the child's immediate needs and long-

term needs and how these can be met, the proposals for safeguarding and promoting the child's welfare, proposals for making sustainable and long-term arrangements for the child's care and the nature of the services proposed for the child. The assessment must extend to health arrangements and educational needs and religious persuasion. The authority should seek and take into account the child's views. There is also a requirement in regulation 3(3)(b) to obtain a written assessment by a registered medical practitioner or registered nurse of the child's health and their need for health care. A "child's plan" is required in terms of regulation 5. If a local authority has not performed this duty before accommodating the child, then it should be carried out after accommodation

[32] There is some case law in the English context, where the local authority is required to provide the child with "suitable" accommodation appropriate to his needs. While the word "suitable" does not feature in section 26 of the Children (Scotland) Act 1995, similar principles are likely to be applied. In *R (on the application of KI) v Brent LBC* [2018] EWHC 1068 (Admin) the court held that whether accommodation was suitable was a matter for the Council's expert judgment, subject to normal public law principles, which set a high threshold for intervention by the court. On the other hand the courts in England have intervened when young people are "sofa surfing" without secure accommodation (see *eg R (on the application of A) v Coventry City Council* [2009] EWHC 34 (Admin)). In *R (M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 (at §20) Lady Hale explains that it would not be consistent with duties towards a "looked after" child to place the child in a bed and breakfast hotel or in hostel accommodation without enough money for food and essentials. Although a local authority do not

have "parental responsibility" for the child, they are replacing to some extent the role played by a parent and are expected to look after the child in all the ways a good parent would.

[33] It was acknowledged in *R (on the application of BC) v Surrey CC* [2023] EWHC 3209 (Admin) (at §8) that it would be right to have regard to the current difficult and financially straightened circumstances in which local authorities have to operate, but once the criteria for accommodation (in Scotland under section 25) are met, then the duty to accommodate is immediate and unqualified. A local authority cannot resist the duty because it lacks resources (*R (on the application of JL (A Child) v Islington LBC* [2009] EWHC 458 (Admin) at §§ 68 and 71), nor can it resist because it considers that provision can or should be made under some other power (*G v Southwark LBC* [2009] 1 WLR 1299, *per* Lady Hale at §28), or because some other authority or body (such as the housing authority) can provide accommodation under a different legislative scheme (*R (M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535 *per* Lady Hale at §§29 – 31). If a young person qualifies for accommodation under section 25 of the 1995 Act, a local authority cannot therefore resist carrying out the duty to accommodate because the child may be accommodated by the Home Office. This was recently confirmed in *R (on the application of BC) v Surrey CC* [2023] EWHC 3209 (Admin).

[34] Part 9 of the Children and Young People (Scotland) Act 2014 imposes corporate parenting duties on (among others) Scottish local authorities Such duties apply to every looked after child and every young person under the age of 26 who was on that person's 16th birthday or at any subsequent time, but is no longer, looked after by a

local authority. Corporate parenting duties include being alert to matters which might adversely affect the wellbeing of children and young people, assessing their needs, promoting their interests and taking such action as the particular corporate parent considers appropriate to help children and young people to access opportunities, make use of services and access support which it provides (see 2014 Act, section 58).

United Nations Convention on the Rights of the Child

[35] In Scotland there is now an additional imperative. Duties to children have been reinforced by the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024, which came into force on 16 July 2024. In terms of section 6 of that Act it unlawful for a Scottish public authority to act, or fail to act, in connection with a relevant function in a way which is incompatible with the UNCRC requirements. However the Act does not affect functions that are not conferred by the Scottish Parliament, nor functions in terms of statutory instruments made pursuant to a power not conferred by an Act of the Scottish Parliament. The Children (Scotland) Act 1995 was made in Westminster, but the Children and Young People (Scotland) Act 2014 is an Act of the Scottish Parliament. Provision under the 1995 Act, including accommodation under section 25, is not open to challenge under the Incorporation Act, but provision referable to the 2014 Act should be open to challenge and to an action for damages under section 8 of the UNCRC Incorporation Act.

[36] When the United Nations Convention on the Rights of the Child (Incorporation) (Scotland) Act 2024 does apply the child's best interests must be treated as a primary consideration in terms of article 3 of the Convention. The child should be afforded

such protection and care as is necessary for his or her well-being. The institutions, services and facilities responsible for the care or protection of children should conform with the standards established of the competent national authorities, particularly in the areas of safety, health, in the number and suitability of their staff as well as competent supervision.

[37] Article 20 provides that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the state. That means that the state is required, in accordance with national law to ensure alternative care for such a child. Article 22 is expressly directed towards children seeking refugee status or who is considered a refugee in accordance with international or domestic law. That child is to receive appropriate protection and humanitarian assistance and the enjoyment of the UNCRC rights and rights in terms of other international human rights or humanitarian instruments to which (in this case) the UK is a party. The general UNCRC rights include a right to the highest attainable standard of health (article 24), a standard of living adequate for the child's physical, mental, spiritual, moral and social development (article 27), education (articles 28 and 29) and leisure (article 31).

After-care duties

[38] Duties to children who have been looked after have been extended over the years. There are now significant responsibilities towards children who were accommodated on or after their 16th birthday. Section 26A, inserted by the Children and Young People (Scotland) Act 2014, section 67, imposes a duty of continuing care for young

people over 16, and under a specified age. This duty obliges the local authority to continue to provide the same accommodation and other assistance as was provided before the person ceased to be looked after, subject to certain exceptions. The intention is that a young person should not generally be turned out of his or her home on attaining the age of 18.

[39] There are "after-care" provisions in section 29 were extended by the 2014 Act. They apply when continuing care is not provided under section 26A:

"29.— After-care.
(1) A local authority shall, unless they are satisfied that his welfare does not require it, advise, guide and assist any person in their area who is at least sixteen but not yet nineteen years of age who either—
(a) was (on his sixteenth birthday or at any subsequent time) but is no longer looked after by a local authority; or
(b) is of such other description of person formerly but no longer looked after by a local authority as the Scottish Ministers may specify by order…
(2) If a person within the area of a local authority is at least nineteen, but is less than twenty-six, years of age and is otherwise a person such as is described in subsection (1) above, he may by application to the authority request that they provide him with advice, guidance and assistance.
…
(5) It is the duty of each local authority, in relation to any person to whom they have a duty under subsection (1) above or who makes an application under subsection (2) above, to carry out an assessment of the person's needs.
(5A) After carrying out an assessment under subsection (5) above in pursuance of an application made by a person under subsection (2) above, the local authority—
(a) must, if satisfied that the person has any eligible needs which cannot be met other than by taking action under this subsection, provide the person with such advice, guidance and assistance as it considers necessary for the purposes of meeting those needs; and
(b) may otherwise provide such advice, guidance and assistance as it considers appropriate having regard to the person's welfare.
(5B) A local authority may (but is not required to) continue to provide advice, guidance and assistance to a person in pursuance of subsection (5A) after the person reaches the age of twenty-six…
(8) For the purposes of subsection (5A)(a) above, a person has "eligible needs" if the person needs care, attention or support of such type as the Scottish Ministers may by order specify."

[40] Section 29 imposes a duty to advise guide and assist a person who was looked after on or after his 16th birthday but who is not yet 19, unless satisfied that the young person's welfare does not require such assistance. There is a power to provide advice, guidance and assistance to a young person who was looked after on or after his 16th birthday and is over the age of 19 but under the age of 26. These statutory provisions apply to a young person in the local authority area. The Support and Assistance of Young People Leaving Care (Scotland) Regulations 2003 (SSI 2003/608) confuses matters somewhat by imposing the after-care duties on the local authority which last looked after a person. Those regulations make provision for a pathway assessment to be carried out in respect of young people to be supported. This should lead to a pathway plan. A pathway co-ordinator should be appointed, together with a supporter for the young person concerned. Assistance may be provided under regulation 14 by way of accommodation.

[41] Section 29(5A) and (8) refer to meeting "eligible needs". The Aftercare (Eligible Needs) (Scotland) Order 2015 (SSI 2015/156) provided that eligible needs are:

(a) financial support to meet essential accommodation and maintenance costs;
(b) support, in the form of information or advice, to assist the person to access education, training, employment, leisure and skills-related opportunities; and
(c) insofar as not covered by sub-paragraph (b), support, in the form of information or advice, relating to the person's wellbeing.

[42] Section 30 of the Children (Scotland) Act 1995 provides for grants to young persons who were looked after on or after their 16th birthday and are under the age of 26. Such grants may be made to meet expenses connected with receiving education or training. They may be contributions to the accommodation and maintenance of any such person

in any place near where the person may be employed or seeking employment, or receiving education or training.

[43] This is all very well, but if there are difficulties assessing age then a young person may attain the age of 18 without being afforded accommodation, although they were entitled to be accommodated. Not only have they missed out on accommodation, they have also missed out on meeting the qualification for after-care services. That young person will not be entitled as of right to such services (*R (M) v Hammersmith and Fulham LBC* [2008] 1 WLR 535). It was not possible to treat what ought to have happened, in terms of provision of accommodation, as if it actually had happened.

[44] There have been attempts to argue that if a person has been wrongly assessed as an adult, when in fact a child, that person should be "deemed" to have been accommodated and so entitled to after-care. This argument failed, but in England it is now settled that the local authority has a discretion to make good any unlawfulness and to provide services which it might have been obliged to provide had the person been a former looked after child (see *R (GE (Eritrea)) v Home Secretary* [2015] 1 WLR 4123). It is pertinent to note that the purpose of the after-care provisions, as explained by Christopher Clark LJ in *GE (Eritrea)* (at paragraph 17):

> "… is to ensure that a relevant or eligible child is not simply left without support the moment he reaches his eighteenth birthday but receives the same sort of support and guidance which children can normally expect from their own families as and when they become adults."

While this is an English case, the sentiments expressed are consistent with the Children (Scotland) Act 1995 and the corporate parenting provisions of the Children

and Young People (Scotland) Act 2014.

[45] In *R (HP) v Greenwich RLBC* [2023] PTSR 1499 Fordham J gives a useful analysis of the factors a local authority should take into consideration when exercising such a discretion. Denial of looked after status as a result of a flawed age assessment would be an injustice, which may be aggravated by culpability on the part of the local authority. If there has been a prompt challenge and an application for interim relief by the claimant, that may be relevant. There may be circumstances where there were aggravating features that were so powerful that a local authority could not reasonably decline to exercise their discretionary power to make at least some services available.

[46] By way of footnote if a claimant's asylum application is refused, or the claimant is in breach of immigration laws then no support is available under sections 29 and 30 of the Children (Scotland) Act 1995. This is the effect of section 54 and schedule 3, paragraphs 1, 6 and 7 of the Nationality Immigration and Asylum Act 2002. However this exclusion from services does not apply where the performance of a duty is necessary to avoid a breach of rights under the European Convention on Human Rights (paragraph 3). In *R (CVN) v Essex* [2023] 1 WLR 3950 the local authority were assisting a claimant who had enrolled on an English language course at a local college, while he pursued his asylum application. The asylum application was refused and the local authority maintained he was no longer eligible for assistance. Dexter Dias KC held that the local authority were under a duty to provide the claimant with assistance in the form of payment for accommodation near the place he was or would be in education or training and to make a grant to meet expenses connected with his education and

training beyond his 21st birthday. This was necessary to prevent a breach of article 3 of ECHR (right not to be subjected to inhuman or degrading treatment) and article 2 of the First Protocol (right not to be denied education). Funding of accommodation and living expenses to support his education was necessary to prevent the claimant from becoming destitute. Destitution would significantly impair his ability to access and engage in education.

[47] For the avoidance of doubt, the Local Government (Scotland) Act 2003, section 20, gives Scottish local authorities wide powers to incur expenditure, give financial assistance, enter into arrangements and provide staff, good, material, facilities, services of property to any person, if this is likely to promote of improve the well-being of persons within its area.

Summary

As can be seen, this is a complex area of law. The principal legislation was not drafted with asylum seekers in mind, but the group with whom JustRight Scotland are involved are for the most part highly vulnerable and in need of local authority services. The obligation to provide services to young asylum seekers is not well understood and on occasion poorly implemented.

Janys M Scott KC

Advocates Library,
Parliament House,
Edinburgh
10 September 2024

OPINION OF SENIOR COUNSEL

For

JUSTRIGHT SCOTLAND

Re

LOCAL AUTHORITY OBLIGATIONS TO UNACCOMPANIED AGE-DISPUTED YOUNG PEOPLE

2024

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