

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 8 May 2009

Before :

Mr Justice Collins

Between :

(1)	A	Claimant
	- and -	
	London Borough of Croydon	Defendant
	- and -	
	Secretary of State for the Home Department	Interested Party
(2)	WK	Claimant
	- and -	
	Secretary of State for the Home Department	First Defendant
	- and -	
	Kent County Council	Second Defendant

(1) **Mr Ian Wise & Mr Azeem Suterwalla** (instructed by **Harter & Loveless**) for the First Claimant
Mr Bryan McGuire & Ms Peggy Etiebet (instructed by **the Solicitor to the Council**) for the Defendant
Mr James Strachan & Ms Deok Joo Rhee (instructed by the **Treasury Solicitor**) for the Interested Party

(2) **Mr Gavin Millar Q.C. & Mr Graham Denholm** (instructed by **Bennett Wilkins**) for the Second Claimant
For the First Defendant; as in (1) for the Interested Party
Mr Charles Béar Q.C. & Mr Jon Holbrook (instructed by **Kent County Council**) for the Second Defendant

Hearing dates: 10 – 13 March 2009

Judgment

Mr Justice COLLINS :

1. A number of individuals arrive in this country seeking asylum and claiming to be under 18. Most are males and have entered or have sought to enter by clandestine means. They are referred to as Unaccompanied Asylum Seeking Children (UASC). That description includes those who assert that they are under 18. Many who travel from countries where they allege they are being persecuted such as Afghanistan or Iraq will have been assisted by agents and in any event the advantages of persuading the authorities that they are under 18 are well-known. Those advantages include the automatic grant of leave to remain until aged 18 coupled with the inability to return to Member States of the European Union if the individual would otherwise be returnable in accordance with the Dublin Regulations. In

addition, as children they will usually be entitled to the care and accommodation which a local authority is obliged to provide to children in need. Thus the assessment of their age is most important.

2. These two claims come before me in order to enable guidance to be given on the proper approach to be applied by the Secretary of State or local authorities who, having made their assessment of age, are presented with a report from a paediatrician whose opinion is that their assessment was wrong. For obvious reasons, this arises when the assessment made was that the individual was over 18. The opinion obtained from the paediatrician asserts that in the doctor's view he (or in rare instances she) is under 18. I was told that there were more than 70 claims for judicial review challenging the refusal of the relevant authority to follow the paediatrician's opinion or at least to accept that it raises a doubt and the benefit of that doubt should be given to the claimant in question. I have had full argument based on what counsel and I are satisfied is all relevant material. Thus this judgment should be treated as determining the correct approach for the court to adopt in age assessment cases. Naturally, the individual circumstances of a particular case may show, at least arguably, that the assessment was in all the circumstances flawed as a matter of law. But, for reasons which will become apparent, that is likely to turn on the reasons given or the procedures adopted by the decision maker rather than on the subsequent opinion of a paediatrician.
3. A and a number of other claimants asserted that the absence of any right to make representations on the facts or any appeal breached Article 6 of the ECHR. It was said, as part of the grounds, that the court could not comply with Article 6 unless it treated the assessment of age as a precedent fact which it had to determine. On 14 April 2008 Holman J directed that A and a case entitled *M v Lambeth* (CO/2130/2007) should be heard as lead cases to determine the Article 6 ground as a preliminary issue. On 20 June 2008, Bennett J decided the issue against the claimants: see [2008] 2 FLR 1026. There was no breach of Article 6 and the court was not required to treat the issue as precedent fact. Bennett J was asked to consider the evidential value of the experts' reports but declined to do so. Holman J had said that the trial judge could, if he considered it proper to do so, decide an issue raised by *Lambeth*, formulated thus:-

"For the purpose of assessing whether a child is a child, is paediatric evidence of the sort produced by Dr Michie and/or Dr Birch in these cases scientifically ill-founded and of no evidential value?"

For what seems to me to have been entirely correct reasons Bennett J decided that the issue was not appropriate for a preliminary hearing which focused on procedure rather than substance and that in any event it could not properly be determined without considering the full factual matrix of each case.
4. Bennett J gave leave to appeal. On 18 December 2008 the Court of Appeal dismissed the claimants' appeals (2008 EWCA Civ 1445). I gather that the House of Lords has accepted the petition for leave to appeal and the matter has been listed for 20 – 23 July 2009. However, that is no reason not to decide the claims before me, since the law to be applied is that set down by the decision of the Court of Appeal.
5. On 27 January 2009 Holman J decided that A and WK should be heard together as lead cases to determine all the issues and that other age assessment claims should await that hearing. WK took over from M because Lambeth decided that it did not wish that case to be pursued as a lead case. Mr Béar Q.C. appeared for Lambeth in M and so his approach was the same in WK as it had been in M. Indeed, important evidence from a Dr Stern, an eminent paediatrician, which was obtained by Lambeth and relied on in M, has been put before me and further evidence from Dr Stern commenting on that of Dr Birch, the paediatrician whose report has been put before the defendants in both A and WK and whose further evidence justifying her methodology and conclusions has been placed before me.
6. Unfortunately, although it had been regarded as desirable that age assessment claims should not be determined until the Court of Appeal's decision was known, in error one such claim came before Mr Stephen Morris Q.C., sitting as a Deputy Judge of this court, in November 2008. His decision was given on 28 November 2008: see *R(A) v London*

Borough of Croydon [2008] EWHC 2921 (Admin). There were in that case two reports presented on behalf of the claimant, one from Dr Michie and a later one from Dr Birch. But Mr Morris did not have the advantage of the full material which has been put before me, and in particular the cogent criticism of the methodology and the value of the reports of both Dr Michie and Dr Birch. As will become apparent, I do not accept that the approach adopted by Mr Morris was correct. This is no criticism of him since he had to decide the case on the material put before him and he was inevitably and understandably influenced by the knowledge that in earlier cases judges of this court had been persuaded to overturn decisions made by the Secretary of State or local authorities in reliance on reports from Dr Michie or Dr Birch.

7. Before coming to the details of these cases, it is, I think, desirable to identify some general considerations. While I recognise that age determination impacts on all aspects of the asylum process and has serious consequences for the individual in question, the reality is that there are no reliable means whereby an exact conclusion can be reached. Furthermore, the decision which has to be made by whichever person, be he an immigration officer or a local government officer, has to deal with a particular UASC. The Secretary of State has very sensibly recognised that immigration officers are unable to rely on more than visual impression and whatever emerges from an interview and it would be entirely impractical to expect them to go into further detail. That would take time and a preliminary decision will be needed speedily. I shall refer to the guidance given in these cases in some detail, but essentially in cases where there is a belief that the UASC is over 18 but the immigration officer cannot feel sure about it he is to be referred to the relevant local authority which will then make the assessment. Unless satisfied that the local authority's assessment has failed to take account of some material evidence (for example, a birth certificate which is accepted to be authentic and reliable) or some new material which identifies a flaw in the determination reached has come to light, the Secretary of State will rely on that assessment. Since local authorities have to consider whether a person seeking to obtain assistance under the Children Act is indeed a child, they have or should have developed an expertise in this area. The problem arises regularly in the case of UASCs and a relatively small number of authorities are most frequently involved. Asylum seekers will apply to the Home Office in Croydon. Kent is involved because many unlawful entrants come through Dover or one of the Channel Ports in Kent. Hillingdon covers Heathrow Airport and Cambridgeshire has the centre at Oakington within the County. Other authorities may be involved because UASCs may apply after entry having found somewhere to stay with relatives or friends or they may have been dispersed to various parts of the country before the question of age has been considered. Thus Kent and Croydon in particular have developed an expertise, and the use by the Secretary of State of that expertise makes much sense.
8. Parliament has made clear that the decision is that of the relevant authority. Judges have frequently warned against the judicialisation of matters which have been left to be decided by an authority. It is for them to decide the facts which lead to a decision. It is only if they reach a conclusion of fact which is unreasonable (as Lord Brightman put it in *Puhlhofer v Hillingdon LBC* (1986) 84 LGR 385 at 413 – 414 in a different context "verging on absurdity") or they fail to have regard to a material consideration that their decision can be impugned. The decision is not for the court but is for the Secretary of State or the local authority. Thus in *A and M Ward* LJ cited in paragraphs 32 and 33 observations of Wilson LJ, Sir Mark Potter P, and Lady Hale which made clear that the court should be careful not to adopt a role which went beyond that which was appropriate. He said this:-

"32. If, however, I need to draw further support for that conclusion, I can find it in *Lambeth LBC v TK and KK*. Wilson LJ cited with respectful agreement the President's observations in *E v London Borough of X* [2005] EWHC 2811 (Fam), [2006] Fam 187, where Sir Mark Potter said:

"[33] ... While the 1989 Act does not expressly so provide, it is inherent in its structure and content that a local authority, in any case where doubts are raised in respect of the age of a putative child in need of care and protection, should make an age assessment and, according to its results, decide whether to take measures in respect of the "child" under the provisions of the 1989 Act. It is thus an area in which ... the court must be careful to avoid

assuming a supervisory role or reviewing power over the merits of the local authority's decision".

33. If more is needed, note Baroness Hale of Richmond in *In Re B (Children)*(FC) [2008] UKHL 35 saying:

"57. It is also important to keep separate the roles of the courts and the local authorities in the protection of children from harm. Where a local authority have reasonable cause to suspect that a child in their area is suffering or likely to suffer significant harm, they must make the inquiries necessary to enable them to decide whether they should take any action to protect the child and if so what (1989 Act, s47(1))."

The remark was obviously obiter but it confirms that Part 3 is for the local authority and Part 4 for the court. Since Baroness Hale had, as I have already described, a modest part to play in the passage of the Children Act 1989, what she says about the way the Children Act operates can hardly be taken with a pinch of salt."

9. To quote again Ward LJ in *A and M*, age determination is often a very difficult question of fact which requires a measure of professional knowledge or experience in the decision maker (see paragraph 81). Thus training is important, as of course is experience in dealing with the issue. The social workers involved in the decision making process who are employed by the local authorities in these cases have had training and do have substantial experience in assessing the age of UASCs. That is the evidence before me and I have no reason to doubt it. That does not of course mean that their decisions are not challengeable, but it does mean that the court should not readily take the view that they are flawed. Since there is no scientific proof available and the final decision involves the exercise of a judgment, it is never possible to be sure that the decision in a given case, particularly where an individual is close to 18, is factually correct. But perfection is unattainable and the approach adopted by the Secretary of State that, if the decision maker is left in doubt, the claimant should receive the benefit of that doubt is undoubtedly proper. But the decision is to be made by the authority not by anyone else and I would adopt the pertinent observations of Ward LJ in paragraphs 82 to 84 of his judgment in *A and M* where he says:-

"82. To accede to the appellants' submission that the local authority have to contract out to independent experts all age determinations or to have the court decide the issue would be a recipe for administrative chaos. "Efficient administration" is, per Lord Hoffmann, a relevant consideration. How to accommodate these asylum seekers calls for an urgent, often very urgent decision about where a person is to lay his head that night. It cannot be delayed while the case is assembled before some other body – not that there is such a body in place at the moment – still less before the court. The cost in so doing would prove prohibitive. And, as I have asked already, if the local authority have to pay the independent body, will the pedantic still complain that it is not truly independent?

83. Moreover, further confusion would be caused if the age determination had to be hived off for some special treatment whereas the "need questions", admitted to be questions fit for administrative decision, were to be left for traditional judicial review. Such a division of decision-making would not work.

84. My conclusion is that age determination, being part of broader questions relating to the provision of accommodation, and being but one of the many responsibilities for local authorities to provide support for children and families under Part III, are decisions which fall squarely within the social field of child care and are, therefore, customarily and properly entrusted to the social workers to decide. It follows that judicial review does comply with the standard set by Article 6."

10. It follows that the decision under attack can only be challenged successfully if the defendant, whether Secretary of State or local authority, erred in law in not changing it following the submission of a report from the paediatrician or any other material which is said to cast doubt on its correctness. Kent through Mr Béar contends that it was entitled to disregard Dr Birch's report and indeed any such report from paediatricians. This is based partly on the contention that their judgment can be no better than that of the experienced social worker and, since it is common ground that age determination is an inexact science and it is not possible to give an accurate assessment based on medical observations, a paediatrician's opinion cannot carry any weight. It is also based on an ad hominem attack on Dr Birch. It is said that her opinions in a number of cases show a consistent disagreement with the social workers' factual observations always in favour of the individual in question. Croydon does not go so far. It accepts that a paediatric report such as is provided by Dr Birch can amount to a material consideration and so ought to be and is taken into account. But the authority is entitled to attach to it such weight as it considers appropriate and that may be no weight at all.
11. The Home Office policy for dealing with UASC is set out in a document which came into existence in March 2007 entitled 'Disputed Age Cases'. The general policy is as follows:-

"The Border and Immigration Agency (BIA) will dispute the age of an applicant who claims to be a child but whose physical appearance and/or general demeanour very strongly suggests that they are aged 18 or over, unless there is credible documentary or other persuasive evidence to demonstrate the age claimed. In borderline cases it is BIA's policy to give the applicant the benefit of the doubt and treat them as a child.

If the applicant's physical appearance/demeanour very strongly suggest that they are SIGNIFICANTLY over 18 years of age the applicant should be treated as an adult and be considered under the process instructions for adults. These cases DO NOT fall within the age dispute process.

The BIA does not treat disputed age cases as children unless and until their age is established as being under 18. Even though the age dispute process follows the same principles as the child process, this is in place as a safeguard."
12. There is thus a distinction drawn between those whose appearance and demeanour very strongly suggests they are over 18 and those whose appearance or demeanour very strongly suggest they are significantly over 18. The former are regarded as age disputed cases, the latter not. The decisions in both must be based on firm grounds and reasons for them must be fully set out and explained to the applicant. Those in the former category are informed that they may apply to the relevant local authority (LA) which will carry out its own assessment. That is described in the document as a 'Merton Compliant assessment'. If that is contrary to the view formed by UKBA (United Kingdom Border Agency), the decision will be reconsidered and the assessment accepted unless there is good reason (for example, credible material not taken into account by the LA or doubt whether the assessment was indeed Merton compliant) to reject it. If the LA's assessment coincides with that by the BIA that the applicant is over 18 but he produces evidence which conflicts, it is UKBA's policy to give prominence to a Merton compliant age assessment but, if the subsequent evidence is persuasive that the applicant is under 18, it must prevail, although it will be put to the LA with a request to reconsider. It is recognised that there may be cases where there are differing assessments (indeed, M was such a case). If the BIA believes the applicant to be under 18, he will be treated for immigration purposes as a child. If the LA take a different view, his remedy is to seek (if he has grounds) a review of its decision.
13. Reference has been made to a Merton compliant assessment. This stems from the judgment of Stanley Burnton, J in *R(B) v London Borough of Merton* [2003] EWHC 1689 (Admin). He refers with approval to guidance issued by the London Boroughs of Hillingdon and Croydon. This emphasised the importance of using two professionals who will give their judgment over a period of time which need not be particularly lengthy to enable investigation to be carried out with the assurance that the applicant fully understood the role of the assessors and was not affected to his detriment by tiredness, anxiety, trauma

or bewilderment. It was important to try 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. It was equally important for the assessors to be aware of the customs and practices and any particular difficulties faced by the applicant in his home society and which had led to his leaving and seeking a new life in the U.K. It is said that 'a medical opinion and view on age will always be helpful'.

14. Stanley Burnton J said and I agree that reasons for the decision reached must be given, but they need not be long or elaborate. In paragraph 50, he said this:-

"In my judgment, the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. Judicialisation of what are relatively straightforward decisions is to be avoided. As I have stated, in such cases the subject matter of decision is not complex, although in marginal cases the decision may be a difficult one. Cases will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The Court should not be predisposed to assume that the decision maker has acted unreasonably or carelessly or unfairly: to the contrary, it is for a claimant to establish that the decision maker has so acted."

Those observations form an important background to these cases.

15. In November 1999 the Royal College of Paediatrics and Child Health (RCPCH) approved guidance for paediatricians in dealing with the health of refugee children. Those included guidance on age assessment. In paragraph 5.6 under the heading 'Puberty and the assessment of age', it was said that an age assessment should only be done in the context of a holistic examination of the child. It concluded:-

"In practice, age assessment is extremely difficult to do with certainty, and no single approach to this 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 5 years either side. Assessments of age measure maturity not chronological age. However in making an assessment of age, the following issues should be taken into account."

There then followed an indication of what should be taken into account and what would not be regarded as helpful considerations. Anthropometric measures cannot be used to predict the age of an individual. At most they may play a part in conjunction with relevant factors from the individual's medical, family and social history. The situation is complicated because nutritional problems and illnesses can delay puberty so that an individual may be older than his physical developments appear to suggest. Ethnic differences also play their part. In summary, this is said:-

- "The determination of age is a complex and often inexact set of skills, where various types of physical, social and cultural factors all play their part, although none provide a wholly exact or reliable indication of age, especially for older children.
- Assessments of age should only be made in the context of a holistic examination of the child.
- As there can be a wide margin of error in assessing age, it may be best to word a clinical judgment in terms of whether a child is probably, likely, possibly or unlikely to be under the age of 18."

16. In Chapter 55 of its instructions to immigration officers, UKBA has included what is set out in the 2007 Guidance. This notes that medical age assessment reports may be submitted by claimants. If they are, they must be considered and due weight attached to them, but it should be noted 'that the margin for error in these cases can be as large as 5 years either way'. That reflects what is said in the RCPCH document.
17. ILPA published a research report in May 2007. In it, the author, Dr Heaven Crawley, herself a senior lecturer at Swansea University and Director of the Centre for Migration Policy Research, states (paragraph 2.3):-

"The assessment of chronological age is notoriously difficult. Even among children who grow up in the same social and economic environment and come from similar ethnic backgrounds, there are significant physical and emotional differences, as well as differences in needs and vulnerability, between children of the same age. Separated asylum seeking children come from cultures and contexts in which childhood is defined in different ways and where the social, economic and political circumstances in which they live make it impossible for them to do the things that we expect children living in the U.K. to be able to do ...

The difficulty in assessing chronological age is further exacerbated by the fact that there is no scientific or medical assessment process which can solve the problem accurately."

She goes on to say that the medical assessment methods she describes are associated with a margin of error of at least two years in either direction and that assessment is particularly difficult for those aged between 15 and 20. She also makes the point that circumstances may have required a child to take on responsibilities which are beyond those expected of children in our society and so a child may display a maturity which is ahead of his chronological age.

18. Dr Crawley deals extensively with dental age as a guide to age assessment. X-rays of bones and of teeth are used in some countries, but the view has been taken in the U.K. that X-rays should only be administered for therapeutic purposes. She draws attention to the fact that a number of studies have found multi-year differences between chronological and dental age and she observes:-

"Because of the problems of sample size and ethnic and other differences, dental-age assessments are widely regarded as being highly unreliable for assessing age."

19. Dr Crawley identifies other anthropometric measurements such as puberty, height, weight and skin which are from time to time used. They have been the subject of extensive criticism and she concludes:-

"There are increasing concerns among academics and practitioners alike that despite the problems with medical assessments of age outlined above, unreliable medical tests and examinations are being given unwarranted scientific legitimacy in the search for a technically simple solution to a difficult and seemingly intractable problem."

She refers to a conference in Austria in 2000 at which experts came to the conclusion that 'age determination is not possible using existing medical methods'. None have come into existence since then which can challenge the validity of that conclusion. This has meant that most paediatricians in the U.K. have taken a decision against involvement in the process of age assessment because, she assumes, they believe they have little to add to the process.

20. That said, there are real concerns that errors are made and that those who are in reality under 18 have been assessed as over 18. But there is also evidence that errors are made in the other direction and evidence from Kent shows that subsequent observations of those

assessed as under 18 by doctors and others and their relationship with children with whom they associate, for example at school, show that they are over 18.

21. There is before me a statement from Professor Sir Albert Aynsley-Green, the Children's Commissioner for England. He has 30 years experience of working as a consultant paediatric endocrinologist. In paragraphs 9 and 10 of his statement he expresses his concerns thus:-

"9. My concern has been that practices including those relating to age assessments are not appropriately and sufficiently adapted for children and as a consequence do not provide the best or even an appropriate procedure in which to ascertain the relevant personal, family and background information required for age assessment. I am particularly concerned that the procedures do not in my view enable children effectively to participate in the process. My work with children has indicated that children do not always fully and properly understand the purpose of questions asked in the age assessment interview, the nature of the procedure or the consequences of the age assessment. In the context of unaccompanied asylum seeking children such procedural omissions can be significant. The disadvantages unaccompanied asylum seeking children and young people face are likely to be multiple given that they are alone, separated from their family, face language, social and cultural barriers, may have experienced physical harm and/or hardship and/or mental trauma and may find the entire experience of seeking and claiming asylum, dealing with officials and, professionals from a foreign country bewildering and even frightening. The comments on the age assessment process made to my staff by children and young people confirm these experiences.

10. Given the difficulties inherent in making factual assessments as part of the age determination process and in making decisions with (as shown below) such critical consequences for the future of the child, in my view the highest standards of procedural fairness and appropriate safeguarding of the interests of children is necessary. Age assessments are of course made pursuant to powers and responsibilities under the Children Act 1989 and carry the higher standard for consideration of child welfare than the UNCRC, namely the requirement to consider the particularised welfare matters in Section 1(3) of the Act and the paramount consideration given to children's welfare. My recommendation for such fair and protective procedures is not to diminish the need for a rigorous process, far from it; there is no conflict between the need for the system to screen out adult claimants and to ensure that those who are children are properly identified and protected. A careful and fair process producing the most reliable age assessments possible given the inherent difficulties of proof of age of asylum seekers, should serve both the protective and screening functions. "

While recognising and indeed supporting the use of social workers and other professionals he records concerns that financial pressures can influence the assessment of age since the particular age of an individual will require a greater or lesser expenditure on him. In raising this, he says he is not casting doubt on the integrity of social workers. The evidence before me from Kent and Croydon categorically denies that any such pressures have been applied or that any of those who have the responsibility of assessing the age of a UASC have been influenced by any financial considerations. I have no reason to doubt that evidence. Sir Albert expresses concern about Croydon's practice of locating age assessment at asylum screening units. He is concerned that there is a real risk that there will be a perceived link which may not be understood by the UASC and may impose pressures upon him which can lead to errors. Those concerns were more material to the point being made under the Article 6 argument that there was no independence and that that lack of independence was not cured by judicial review. The evidence from Croydon and Kent and an additional statement from an officer concerned in Cambridgeshire show that, whatever may be the concerns about risk or appearances, those responsible can be

trusted to carry out their tasks properly so that the authorities and the Home Office can rely on their conclusions.

22. Sir Albert believes that specialist centres should be set up at which age assessments can be carried out by social workers and other professionals with relevant expertise. He says that these should include paediatricians 'who can in appropriate cases, make a relevant and in my view a valuable contribution to the age assessment process especially when it comes to the assessment of physical and developmental characteristics'. Having regard to the RCPCH guidance, he says this in paragraphs 60 and 61 of his statement:-

"60 [...] Just because there is no single reliable method to calibrate and verify chronological age this does not mean that paediatricians have no role in the process. I have also had the opportunity to speak with professional colleagues from the RCPCH. Paediatricians have valuable expertise in taking histories and are experts at assessing the role of external factors such as environment and disease on the pace of physical and psychological development. They can use and rely upon methods and measurements that have scientific and in particular objective validity. They are also able to assess psychological functioning by way of recognised tests which again provide some degree of objective data over and above subjective assessments of demeanour and conduct which in a young person can prove very misleading. These medical assessments do not in my view depend upon a wholly subjective view of the personal credibility of the individual under examination which in my view is likely to be one of the least reliable indicators of age.

61. In the context of a genuinely holistic and multi-agency age assessment it is my strong view that paediatric assessments are capable of providing some level of objectivity to what otherwise becomes an entirely subjective process. This case appears to involve at least in part a personal challenge to particular paediatricians about which I do not consider it appropriate to comment. It is, however, in my view very important that the role of a paediatrician generally should not be discounted and undervalued as a general category of evidence and as a proper and indeed a valuable part of the evaluation of age that can assist both social workers and the young person in coming to reliable and fair determination of the issue."

23. I do not doubt that a paediatrician who has experience in the field of age assessment can assist in a particular case. But the real question in these cases is whether a report from a paediatrician which reaches a conclusion contrary to that found by experienced social workers means that the assessment must be varied in the UASC's favour. The claimants submit that this must follow since it cannot be shown that the individual claimant is not a child and, consistent with doubt being exercised in his favour, he should be regarded as a child. It all depends on how much if any weight can be attached to the paediatrician's opinion.
24. Before coming to the facts of these claims and the reports relied on from Dr Birch which dispute the defendants' assessment that each is over 18, it would, I think, be helpful to discuss the attacks made on her methodology. Lambeth obtained a report from Dr Stern in April 2008. This was in the case of *M* whose age had been assessed by Dr Michie. The claims before me concern reports from Dr Birch. It is, however, clear that Dr Birch's reports, as Dr Stern records, contrast well with Dr Michie's in quality. Dr Michie did not set out clearly or at all the statistical methods he used to reach his conclusions and his reports are flawed by his failure to retain any notes of his interviews and observations. It seems that those representing claimants have realised that Dr Michie's reports are likely now to be regarded as unimpressive so that Dr Birch has taken over as the paediatrician most frequently used in these cases. Suffice it to say that my conclusions in relation to Dr Birch, if adverse, would apply a fortiori to Dr Michie. Thus I do not find it necessary to analyse or to go through his methods. I am of course aware that claims have in the past succeeded on the basis of a report from Dr Michie. Thus in *R(I and O) v Secretary of State for the Home Department* [2005] EWHC 1025 (Admin), Owen J decided that, in the light of Dr Michie's experience (he said he had over some 5 years carried out 1500 or so

age assessments) and particularly relying on his being qualified to undertake dental examinations, he could find no rational basis for preferring the Social Workers' assessments to those of Dr Michie. Owen J was dealing with the cases before him on the evidence presented to him. I am bound to say that I have grave doubts whether in truth Dr Michie was qualified to give an opinion based on dental examination: he was not a dental expert and in any event it is common ground before me, the independent expert evidence being all one way, that it is not possible and so it is not appropriate to assess age from dental examination (which usually relates to whether or the extent to which wisdom teeth have erupted). That decision was based on its own facts and cannot be used to give weight to Dr Michie's reports. I have had placed before me much more material and more cogent arguments based upon it. As will become clear, I take the view that Dr Michie's reports are generally unsatisfactory, albeit I recognise that there may be cases where, for example, there are flaws in the social workers' assessment in which a report from Dr Michie can be regarded as reliable and one which should be regarded as entitled to carry weight.

25. Dr Stern is a most distinguished paediatrician. He is consultant paediatrician emeritus to the Guy's and St Thomas' Hospitals Trust. Measurements of height and weight are in his view not completely reliable unless carried out by a properly trained paediatric auxologist. In any event, assessments of growth and maturity are in his view unacceptably unreliable. Height is particularly difficult to use as a reliable indication since much will depend on the height of each parent. There is in his view no reliable scientific basis for the estimation of age. That is a view which is entirely in accordance with the guidance given by the RCPCH. A contrary view has no scientific support. Further, as Dr Stern says, and again this accords with the general medical opinion, all the factors relied on to assess age in reality can only assess maturity and maturity and chronological age are two different things. He makes what seems to me to be a cogent point when he says this in paragraph 10.4 of his report:-

"The large majority ... are asylum seekers from developing countries. Many of them have been subjected to deprivation and some to severe psychological stresses. I would expect these adverse events to have significant effects upon development, tending to delay it. Such effects would be particularly marked with respect to psychological maturity. The consequence of this would be that those clients would have both younger psychological profiles and/or earlier measures of physical maturity than their true chronological age."

It is Dr Stern's view that a paediatrician is unlikely to be able to reach a conclusion which is superior to that reached by an experienced social worker, provided, of course, that the social worker is properly trained and experienced and conducted the necessary interview in an appropriate fashion.

26. Dr Birch's reports follow, as one would expect, a common pattern. She says that she takes into account the individual's demeanour and account of his history, his growth and physical development, his sexual development, his mental and cognitive development and his emotional and abstract thought development. She has adhered to the RCPCH guidelines and *R(B) v Merton* and has not been influenced by the individual's stated age. She sets out the examinations and tests she has applied. She first considers psychometric testing and relates her conclusions as to the various mental development values to an age range. She also assesses psychological development in the same fashion. She takes what she states to be the 50th centile to reach the age assessment based on these various factors.
27. She then turns to physical examination. She measures height and applies the height found to the 50th centile for a particular age. She carries out the same exercise for weight and body mass index. Foot size is also measured and an average for a particular age is based on it. She then considers general physical development which includes facial and axillary hair and voice (whether it is in her view broken), and the size of the Adam's apple. She then goes on to sexual development, giving measurement of the size of the penis and testicles if they have descended. She applies what she regards as the norm having considered what bracket of age is in her view appropriate having regard to these observations. Finally, she considers the state of wisdom teeth.

28. Having considered all the data obtained and applied the average levels, she reaches a conclusion within a standard deviation of 2.1 years. She asserts that the standard deviation is 'taken from published sources which are generally accepted as the professional standards within each area considered. Standard deviations and centiles for weight, height and physical parameters from the CDC are used when race specific ones are not present as recommended by the WHO.' Her centile values are based on the principle of 50% of the population having values equal to or less than the 50th centile and hence 50% of the population having values between the 25th and 75th centile.
29. Having given the overall age calculation with the standard deviation of 2.1 years either way, she concludes her reports:-

"For Standard Deviation of 2.1 there is a 72% chance that the age lies between +/- 2.1 years of that estimated; there is a 50% chance that the age lies between +/-1.47 years of that estimated and there is a 30% chance that the age lies between +/- 1.05 years of that estimated."

She recognises that an individual can fall outside the probabilities if at the extreme ends of the scale based on a scatter of individual values.

30. Dr Birch has produced a lengthy and detailed justification of her methodology and of the validity of her age assessments. She asserts that by taking a number of different parameters it is possible to reach a satisfactory conclusion since the margins of error inherent in each individual parameter will be reduced so that there is, as she puts it, a regression towards the mean. If one takes height, she says that 50% of boys of a height of 170 cms will be between 14 and 17 and the average would be 15. That may be so but it is surely meaningless in assessing an individual's age. His height will depend to a considerable extent on his parents' heights and sometimes on ethnic characteristics. Thus for an individual a height of 170 cms can produce no result which has statistical validity. It may with other observations lead to a judgment, but that judgment is not one which can be regarded as scientifically and statistically valid. Indeed, Dr Birch's approach suggests that she is able to reach a scientifically accurate estimation of age based on a combination of medical observations and the demeanour and history of the individual.
31. Dr Stern says that without a blind testing of those from a similar ethnic background it is impossible to devise any exact conclusions on age. That seems to me to be an inevitably correct conclusion. Indeed, it fits in with the general view of the medical profession that age cannot be reliably assessed by medical or indeed any presently available means. This means that an accuracy within at best less than 4 years cannot be achieved. Variations between populations, the effects of poor nutrition and environmental stress increase the probability of variations from any norm, even assuming it is possible to identify a norm.
32. Dr Birch has appended support for her methodology given by two American paediatricians and one Swiss paediatrician. She asserts that hers represents the best method currently possible and so her conclusions should be regarded as reliable. I have carefully considered her views and the matters she relies on, but I am not persuaded that she is correct. The criticisms made by Dr Stern seem to me to be cogent and, as I have said, entirely in accordance with the views of paediatricians in general. I do not doubt that her opinion is reached following careful observations and that she is not in any way consciously seeking to favour the individual upon whom she has been asked to report. She is able to observe some physical developments which social workers, because they are not doctors, cannot. Sexual maturity, body hair insofar as not visible when the individual is dressed and the state of his teeth are not observable by social workers. Equally, they will not normally be aware of precise height and weight. But none of these can be a reliable basis for assessing age.
33. Thus I do not think that the existence of a report from Dr Birch can generally attract any greater weight than the observations of an experienced social worker. In order to comply with the Hillingdon and Croydon guidelines, the assessments of social workers will be made by two working together and based upon interviews and observations over a far greater time period than that available to Dr Birch or indeed any paediatrician instructed by a UASC representative. There can also be an input from those who are able to observe how the individual behaves when not being interviewed and when it can be assumed he is

demonstrating his normal behaviour. All this is capable of providing a more reliable assessment. Overall, I prefer the views of Dr Stern to those of Dr Birch. It would lengthen this judgment to no good purpose if I sought to reproduce the views of each side to any further extent.

34. I do not however think that LAs or the Secretary of State can in general disregard reports from Dr Birch or any other paediatrician. I shall deal with the ad hominem criticisms made by Kent, but I am now considering the question in general terms. It may be that a particular matter identified by the doctor has not been taken into account. In A's case, for example, it is said that Dr Birch identified his limited intellectual abilities and this had not been taken into account by the social workers. Whether that should have made a difference will have to be considered, but I have no doubt that in general Croydon's and the Secretary of State's approach is correct. However, it is for them to decide how much weight to attach to such a report and it is in a given case open to the decision maker to attach no weight. For the reasons I have given, I would expect that only in rare cases would such a report persuade the decision maker to reach a different view.
35. For the claimants it was submitted that if an authority or the Secretary of State decided to maintain the decision that an individual was not a child clear and cogent reasons had to be given for rejecting Dr Birch's or indeed any similar paediatrician's report. In *R(C) v Merton* [2005] EWHC 1753 (Admin), Davis J was concerned with what was clearly an unsatisfactory report from Dr Michie. While he recognised that it was wrong to impose too legalistic a role on local authorities, he said that in his view it was incumbent on them to 'express, in what no doubt can ordinarily be shortly-put wording, but in a clear and concise way, why it is that a claimant's case is being rejected' (Paragraph 30). As he said:-

"The point remains that this was a report of a highly experienced doctor who claims expertise in this area and the local authority does not explain why it disagrees with it."
36. Davis J went on to indicate that all that might have been needed on the facts of that case was to say that the authority disagreed with Dr Michie's view that the claimant was credible.
37. I accept that an authority cannot simply ignore a report. But in many, probably most cases all that will be needed is to say that the report has been considered but that the authority is not persuaded that there is anything in it which shows that its experienced social workers' conclusion is or may be wrong. If there is some specific matter, such as a credibility finding which for good reason is regarded as erroneous or an observation which cannot be accepted, that can and should be identified.
38. All this presupposes that the authority's decision is made by properly trained and experienced social workers in accordance with the guidelines approved by Stanley Burnton J in *B v Merton*. Problems have arisen because of the belief that without obtaining the claimant's written permission details of the age assessment cannot be disclosed to the Home Office. Since the system involves the decision being made by the LA and the Home Office accepting its decision provided that it is Merton compliant, it seems to me that it is essential that the Home Office receives a full report. Only with such a report can it judge whether the assessment is reliable, particularly if there is a paediatrician's report served which contradicts it or some other evidence which points in the other direction is provided.
39. I do not think that there is the need for the assessed person's written permission. He should be told that the assessment will be used not only by the authority but also by the Home Office to whom it will be disclosed. Since it is being obtained for the benefit of the Home Office as well as the authority, it is in my judgment entirely reasonable that it should be disclosed to the Home Office. Only if the full report is available can it be seen whether there are any apparent flaws in it and whether it is truly Merton compliant. And sight of the full report will be essential if there is any challenge raised to the decision by the Home Office.
40. Each authority has put before the court evidence of the training given to and the experience of the social workers who have to deal with age assessment. In Kent's case, there is a statement from the Head of Services for UASC, Karen Goodman. She also

identifies the number of UASCs involved and the problem created for the authority as a result. Ms Goodman has been in post in Kent since November 2006 but for the previous 4 years she had held a similar position in Hillingdon and was another of the guidelines approved by Stanley Burnton, J. She says that, as she puts it, the more robust young people, usually male, who have undertaken an arduous journey from the country of their nationality through Europe, come through a channel port, often hidden in the back of a lorry. Some 80% are from Afghanistan. In 2007 there were 402 and in 2008 572 age assessments of UASC. In each year, approximately 50% were assessed to be over and 50% under 18. Input from staff at whatever residential centre or council run hostel is taken into account and those who are involved with the UASC in different ways, for example teachers, care workers and foster parents, may give their views because the issue is kept under continual observation. Benefit of any doubt is always given to the UASC since it is recognised that age assessment is not a scientific process. Indeed, one of the problems arises from the reluctance of doctors to involve themselves in the process since they recognise that there are no medical means of reaching any wholly reliable assessment. While she recognises that the decision reached in any individual case cannot be regarded as certainly correct, she emphasises the care with which decisions are reached. Continual threats of litigation based on reports by two paediatricians are time consuming and put unwarranted pressure on the social workers and the system. She is satisfied from her experience that the reports of Drs Michie and Birch do not raise matters which cast doubt on the reliability of the decision reached by the two social workers. I am satisfied that she is correct in this.

41. In Croydon's case, the evidence comes from Janet Patrick, senior manager of the Council's Unaccompanied Minors' Team. Because of the UKBA's screening unit in Croydon (the other is in Liverpool), about 69% of all UASC applications are received at Croydon. On a daily basis, a team of social workers attends at the Asylum Screening Unit and is able to assist in age assessment there. But the more formal Merton compliant assessments are carried out not only at Croydon but by other London Boroughs who work a voluntary rota in order to share the burden of considering UASC. The relevant unit in Croydon contains 34 social workers with 2 managers supervising 7 Team Administrators. All are well qualified and attend regular training sessions in relation to age assessment. Ms Patrick was herself involved in the production of the Hillingdon/Croydon Guidelines which were approved by Stanley Burnton J. Ms Patrick draws attention to the favourable report from the Audit Commission on the exercise by the Team of its functions.
42. Ms Patrick deals with the practice of the Team in interviewing and carrying out the assessment. She says that the applicant is advised that he may have a person present to support him by observing the interview which is conducted by two social workers and will normally last between 1 and 1 ½ hours (essentially, the training should mean that the interview is conducted in a way which is fair and regard is had to all relevant matters such as ethnicity, culture and customs, the possibility of stress from anxiety or of bewilderment at the whole process, the need to establish a rapport, the need to ask clear questions). Reference is made to the possibility of coaching. That will not necessarily apply only to those who are pretending to be under 18. Those who really are children may have received coaching in the belief that it may help to persuade those responsible that they are indeed children.
43. In A's case, a statement has been produced from the Operations manager of the Refugee Council's Children's Panel, Helen Johnson. The RC is largely funded by the Home Office in recognition of its important role in providing support for UASC. She expresses the concerns of the RC about the current processes for assessing the age of UASC and the frustration resulting from the disparity in the quality of such assessments in different authorities. Pressures resulting from lack of funding and concern that resources will have to be used for those assessed to be children may operate to produce a wrong result. If the RC knows of a case in which it believes a wrong decision has been reached, it will press for a reconsideration. She also questions the assertion by Ms Patrick that applicants are routinely advised that they can have an adult present to give support and she gives an example of a case where a proper interpreter was not available.
44. I recognise that the effect on a child of being assessed to be an adult will be serious. It is essential that assessments are made by experienced trained social workers and that all the safeguards to ensure fairness are in place. The system at present is undoubtedly far from

perfect. The need for specialist units is I think apparent – furthermore, since paediatricians recognise that they can play a part, it would be desirable for such units to have the services of properly trained paediatricians even though medical science cannot produce a correct answer. In paragraph 91 of *A & M*, Ward LJ said this:-

“For the reasons set out above, these appeals are dismissed. Nevertheless, I add this footnote for I am not without sympathy for the plight of young asylum seekers whether they be under 18 or just over 18 years of age. To arrive in this country often in a state of confusion, often traumatised by the events that have caused them to flee their own land, bewildered by what is happening to them, unable to speak the language and often without help must be a daunting ordeal, one which the Children’s Commissioner has highlighted and one which in the paper *Better Outcomes: the Way Forward*, the Border and Immigration Agency acknowledge as I describe in [6] above. It does seem to me that although I have been satisfied that the present procedures comply with Article 6, nonetheless a better system could and in my judgment urgently should be provided and I hope this judgment will add impetus to the need for reform.”

I would endorse what he says.

45. It is because of the imperfections and concerns that in some cases the process of assessment or the conclusions drawn may be sufficiently flawed to justify a finding that they are not in accordance with the law that it will be necessary to focus on the full report and on the reasons given for the findings. In rare cases a medical report may help to identify flaws. Thus it will always if there is a challenge be necessary to look with care at what is said to be the basis for the decision. Authorities will be aware that those UASCs who are assessed to be over 18 may well seek to challenge that decision and so they must take care to ensure that they have done all that is appropriate in carrying out the process of assessment and that the reasons they give for the conclusion reached are satisfactory. But for the reasons I have given I am satisfied that the production of a report from such as Dr Michie or Dr Birch is not of itself likely to justify a different conclusion.
46. Before turning to the facts of the individual claims, I should deal with the matters set out in paragraph 31 of Mr Morris’ judgment in *A v Croydon*. This reads as follows:-

“As regards the particular issue of medical opinion in age assessment, the current position is as follows:

(a) Whilst it is not necessary for the local authority to obtain a medical report, a medical opinion will always be helpful:

(b) reliable medical opinion on the issue can only be got from one of the few paediatricians with experience in the area, but they may be of limited help (as in that case Michie was):

(c) When conducting or reviewing an age assessment, the local authority is under a duty to consider any medical report submitted:

(d) Where a local authority decides not to follow the views in a medical report, it is under a duty to give reasons for not following those views:

(e) A local authority should not ‘rubber stamp’ medical opinion, whether obtained by it or by an applicant: *R v Wandsworth Borough Council ex parte Banbury* (1987) 19 HLR 76 at 84-85. *Osmani v Camden LBC* [2004] EWCA Civ 1706 at para. 38(8). On the other hand, local authorities cannot be expected to make their own critical evaluation of applicants’ medical evidence and should have access to independent specialist advice, if they wish to disagree *on medical grounds*: *Shala v Birmingham City Council* [2007] EWCA Civ 624 per Sedley LJ at para. 19. In my judgment, this passage supports the proposition that, in such circumstances, the local

authority is not only entitled, but is required to, obtain its own specialist advice.”

47. I appreciate that Stanley Burnton J stated in *B* that a medical opinion would always be helpful. But in reality no paediatricians other than the very few prepared to produce reports for claimants will agree to become involved and, as I have said in reliance on Dr Stern and in my judgment, a medical view is not likely to be any more reliable or helpful than that formed by a properly trained and experienced social worker. Nor is it the case that opinions obtained from Drs Michie and Birch can be regarded as reliable. Thus I do not accept what Mr Morris says in 31(a) and (b). I agree that consideration should be given to any report received, and I have already dealt with the extent of reasons for not following its views. I am afraid I reject what Mr Morris says in 31(e). The authority will not in those cases be disagreeing on medical grounds since it is accepted that medical grounds cannot provide an answer to the question at issue. *Shala* was an entirely different situation since it concerned a truly medical question as to an individual's disability. Thus there is no obligation on the authority to obtain medical advice. That is a recipe for unnecessary expense and delay and is not conducive to good administration. In any event, for reasons which I have already given, such advice (if available) would not generally assist. Fortunately for the authorities, Dr Stern has given comprehensive evidence which can now be relied on for all cases subject, of course, to circumstances which may be particular to any such case.
48. A is from Afghanistan. He arrived in this country on 13 November 2007. He made his claim to asylum to the Home Office on 14 November. It is recorded that he claimed that his date of birth was 8 April 1992 (so that he was 15 years old) but he had 'failed to produce any satisfactory evidence to substantiate this claim'. It was said that his physical appearance/demeanour strongly suggested that he was 18 or over and so he would be treated as an adult. In accordance with the policy of the Home Office he was referred to Croydon who would make their own assessment of his age. In the course of his screening interview at the applicable centre, he gave details of his family. He said his father had died two years before while fighting for Hizb-a-Islami. He had an older brother called Ahsanullah whose whereabouts were unknown to him and a younger brother and sister who were living with his uncle in Kumar. He said that he had left Afghanistan one month before at the start of Ramadan (which would have been on 21 September). He had stayed with friends of his uncle for 5 days in Pakistan. He had then been taken to the airport and flown somewhere whereupon he had been put on a lorry and so conveyed into the UK.
49. Croydon carried out the age assessment on 22 November, having in the meantime accommodated the claimant. He was assessed to be over 18. As a result, the Home Office notified him that he was being treated as an adult but that if at any time he was able to provide further documentation or other evidence in support of his claim to be a minor, that should be sent to NASS (who were providing for him as an adult) and would be considered by the Secretary of State. On 13 December 2007 a pre-action protocol letter was sent to Croydon by the claimant's solicitors. It included an indication that his elder brother Ahsanullah was in the UK and was being supported by Westminster who had assessed him to be under 18.
50. On 16 January 2008 a report was obtained from Dr Birch. Under 'background' she records that when his father was killed, he and his younger brother and sister fled and lived with his maternal uncle in hiding for 2 years and that after 2 years his uncle said he could no longer keep him and arranged for an agent to transport him to England. He had left on the 15th day of Ramadan and it had taken him about a month to travel to the UK. He produced a birth certificate which purported to show that he was born at the Nahgarhar Public Hospital on 8 April 1992. He has also produced a birth certificate which purports to show that his brother was born at a different hospital on 1 May 1991.
51. Dr Birch's report follows her usual pattern. She notes that he 'has limited intellectual abilities and is unable to relate to symbols and pictorial test materials'. He had not progressed intellectually beyond the 14 to 17 years range. He was, it seems, living with his elder brother and appeared to be very dependent upon him. She concluded that it was likely that he was between 15 and 17 with a probable age of 15 years 10 months, almost exactly as he claimed.

52. The record of Croydon's age assessment discloses what was said in interview and the conclusions reached by the social workers concerned. Under 'Physical appearance, Demeanour' the following appears:-

"[A] is of short and sturdy stature with a thick neck and wide shoulders. ... Stubble was noticeable along [his] jaw line and above his lip. Dark shadow noticeable along his jaw was considered to be an indication that he has been shaving for some time. [He] also appeared to have some acne scarring on his face.

Throughout the assessment [he] made good eye contact but came across to the social workers as nervous and jittery. The social workers had to reassure him several times by stating he would be receiving a service regardless of the outcome of the assessment."

Dr Birch recorded that the spots were not acne but sycosis barbae and that he shaved every three days which was in her view consistent with a 15 to 17 year old.

53. The record of the interview contains the following material questions and answers:-

"Q. Who told you your dates of birth?

A. My father.

Q. When did he share this information with you?

A. When I left Afghanistan.

Q. When did you leave Afghanistan?

A. 2 years ago.

Q. Your father told you your dates of birth 2 years ago?

A. Yes.

Q. How old are you now?

A. 15 years 4 months and 8 days".

He said he did not know when he would be 16 and the precise age given by him did not accord with his stated date of birth. He was asked where he went after leaving Samas, where he had been last living with his father before his father's death. He said his maternal uncle said he could not look after him and took him to Pakistan. He went to Pakistan directly after his father died. He later said that he left Afghanistan on the 15th day of Ramadan and travelled to Pakistan. There followed these questions and answers:-

"Q. Based on the information you provided you are saying that your father told you your date of birth 2 years ago. If your father told you 2 years ago that you were 15 years old, you cannot be 15 years old now but 17 years.

A. My father told me.

Q. Your father told you two years ago that you are 15 years, 4 months and 8 days?

A. Yes, he told me in Samas.

Q. Do you understand that if your father told you that age 2 years ago that means that you are now older?

A. it was not years ago but it was in Kumar.”

At the conclusion of the interview, the following questions and answers are recorded:-

Q. We established that 2 years ago your father died and he was the one that gave you your date of birth.

A. on 15th day of Ramadan.

Q. Are you changing your account of the events?

A. My maternal uncle sent me this way after my father was killed in Kumar.”

54. The discrepancies in the account are all too obvious and they are material to the question of age. But his intellectual capacity is relevant since it is suggested that he was confused. He had left Afghanistan on the 15th day of Ramadan immediately before coming to this country but his father had told him his date of birth 2 years ago before his death. Quite why he should have done that then is not clear. It is further suggested that the reference to 4 months and 8 days was in truth a reference to his date of birth, i.e. 8 April, and the 15 years his age accordingly. It is said that there was no attempt to bond with the claimant and this questioning was not open ended but descended into cross examination. It was apparent that the claimant became upset during the interview, however he was offered but declined a break.

55. The analysis and reasons for concluding that he was over 18 stated that:-

“Nazjibullah Ahsan presented on the day of the assessment as a nervous young man. He appeared to have gone through the physical characteristic of a developing adolescent. Najibullah’s physical appearance – he appears to have been shaving for some time. He has broad shoulders (-Najibullah gave no information that he has been involved in sporting activity that could possibly have explained a premature broadening of the shoulder) and mannerism during the assessment can be described as the characteristics of a young man in late adolescence or early adulthood. Najibullah appeared to be comfortable in his body: the nervous behaviour that Najibullah displayed during the assessment was deemed to be related to the assessment and his asylum claim and not a discomfort with a changing body.

Throughout the assessment Najibullah consistently said that he was told his age 2 years ago however he denied this at the end of the assessment. This brought into question the credibility of the information he supplied during the assessment. Additionally, the information that Najibullah gave regarding his age – him being 15 years, 4 months, 8 days does not add up with his claimed date of birth of 01.04.1992.

- Najibullah claims that he is 15 years, 4 months and 8 days old. He claims that his father told him this exact age two years ago.
- Najibullah maintained throughout the assessment that he was given this age 2 years ago on the 15th day of Ramadan which would make him approximately 17 years and 8 months. When the assessing social workers highlighted the above to Najibullah he failed to give explanation or any response at all. It was only when the assessing social workers probed further that he claimed that he was not told 2 years ago but failed to elaborate further.
- Najibullah is also unable to say when he would be 16 years old.

- Furthermore if the date of birth that Najibullah gave was correct he would have been 15 years 5 months and 19 days when his father told him his age.
- Based on the above information the assessing social workers are of the view that Najibullah is older than his claimed age. Najibullah's account on how he came to know his age is not deemed to be credible and does not correspond with the dates given. Furthermore Najibullah's physical appearance and demeanour during the assessment suggest that he is a mature male. It is the view of the assessing social workers that Najibullah is an adult."

56. Criticism is particularly made of the last sentence of the first paragraph. What is meant by the observation that he appeared to be comfortable in his body? It is difficult to follow what this does mean and how a discomfort with a changing body can manifest itself. Nonetheless, the assessment of his physical appearance and demeanour coupled with the discrepancies and inconsistencies in his account of how he knew his age could justify the conclusion reached.
57. In a letter of 12 March 2008, Ms Patrick answered the criticisms levelled at the assessment. She said that birth certificates in Afghanistan are written in Arabic and not English and that in any event the names Ahsan and Najibullah are common. It is not clear where she obtained the information about the use of Arabic rather than English. She sets out cogent reasons for not accepting Dr Birch's assessments. It is however possible that the discrepancies in the account given relating to his age are due to low intellectual ability, albeit there are criticisms of Dr Birch's psychometric testing on the ground that she has failed to take proper account of background, education (or lack of it), social economic and cultural factors.
58. Following the submission of an addendum report from Dr Birch and the evidence filed in the judicial review claim, Croydon carried out a review of the assessment. This led to a lengthy response from Ms Patrick in a letter of 13 May 2008. She makes the general criticisms of Dr Birch's approach to which I have already referred and relies on the discrepancies in the interview. She states (Paragraph 10):-

"We note Dr Birch's view that [A] was a poor historian but consider in particular that the issues as to when his father died, where he was when he was told his age, when he left Afghanistan and how long he spent in Pakistan are simple and important aspects that a person with a claimed age of 15 would know. The assessing social workers were aware that where there is a doubt [A] should be given the benefit of it and confirm that this was done."

Criticisms of the interview are rejected. Reasons are given for placing little weight on the birth certificate.

59. Paragraphs 18 to 20 deal with documentation and lack of it thus:-

"We are not satisfied that the birth certificate is reliable evidence of Najibullah's age. We do not consider that the document itself is likely to be genuine. We accept the conclusions of the Immigration Board of Canada's research into identity documents from Afghanistan, which says that birth certificates are rare and have historically not been issued in Afghanistan. It does state that they may in certain very unusual circumstances be obtained from the hospital and approved by the Interior Ministry but also that the availability and veracity of birth certificates varies widely although birth records are provided by some hospitals and local authorities. It also records that if birth certificates are not obtained after a child's birth they are difficult to acquire later.

Najibullah's purported birth certificate is a photocopy, and we consider that it is difficult to be satisfied that the document is genuine from a photocopy. It is written in English and therefore is likely to be only a translation, was

acquired subsequently (after his birth) and it does not appear to be approved by the Interior ministry.

Najibullah has no documents to verify his identity. Therefore, there is nothing to link this document to Najibullah.”

It seems that there was no age assessment of the claimant’s brother by Westminster. In any event, the presence of a brother, who may have been younger than the claimant, cannot be more than a matter to be taken into account.

60. I confess that the claimant’s low intellectual capacity (albeit there is not an acceptance of Dr Birch’s conclusions on this) coupled with the possibility that the reference to 8 months and 4 days could be the 4th April and the clearly confused nature of the claimant’s answers led me to be concerned that the assessment might be erroneous. However, I have to deal with this on a judicial review basis. The decision is that of Croydon and this court should be slow to intervene unless there is established an error of law. In this context, the test is irrationality, albeit as defined by Lord Diplock in the *CCSU* case to include a failure to have regard to a material consideration. I am for the reasons given entirely satisfied that it is proper for the authority to attach little if any weight to Dr Birch’s conclusions if their own assessment is in their view sound. Croydon has reconsidered and the reasons given for upholding the original decision in the letter of 13 May 2008 are in my judgment satisfactory and disclose no error of law. I take account of the criticisms raised in addition by Dr Heaven Crawley and I recognise that the conclusion that he was comfortable in his body is difficult to follow and to regard as sensible. Nonetheless the experienced social workers judged from his demeanour and such physical features as they could observe and from the lack of credibility because of the discrepancies in his answers that he was over 18. That was a conclusion that Croydon was entitled to rely on and nothing in the criticisms raised shows that there was any error of law in so doing. Thus A’s claim fails.
61. WK was arrested having alighted from a lorry at Dover on 21 July 2008. When interviewed, he said he had left Afghanistan about 3 months earlier. It was ascertained that he had been fingerprinted in Calais on 12 June 2008. He had then given his name as Akbar Rahim with a date of birth of 1 January 1992. He had been in France for about 3 weeks. He was an orphan, his father having died about 5 years and his mother about 2 years earlier. He said his reason for coming to the UK was to study and to work. He claimed asylum at Croydon on 23 July 2008. He gave his name as Wahid Kohi. He did not know his date of birth but said he knew he was 15 because his cousin, who had come to the U.K., was 17 and he was 2 years younger than his cousin. The view was formed that his physical appearance/demeanour strongly suggested that he was 18 or over and so he was treated as an adult. But he was referred to Kent for an age assessment in accordance with the arrangements in place.
62. On 28 July 2008 Kent notified the BIA that following an ‘in-depth assessment conducted with intent to comply with both Merton judgments’ the claimant had been assessed to be an adult over 18. An artificial date of birth was given as 28 July 1990. WK was detained. It had by then been ascertained by means of a fingerprint check that he had been seen by the authorities in Greece and at a screening interview on 23 July 2008 he had admitted that he had stayed for some 7 to 8 days in Greece where the police had taken his fingerprints. The record showed he had given the name Wahid Kohi and a date of birth of 1 January 1993. He had then spent some 4 weeks in Rome before going to Calais and the U.K. Thus he was likely to be returnable to Greece in accordance with the Dublin Regulations and the Home Office made the necessary arrangements so that by the end of September, provided that he was over 18 on arrival in this country, removal to Greece was imminent. This was of course subject to legal action and on 8 October 2008 Ouseley J made an order preventing his removal the following day.
63. The full assessment record shows that it was explained to the claimant that he could challenge the assessment through his legal representative and that without his written consent the details would not be passed on to the Home Office. This was said to be in accordance with the Data Protection Act. I have already indicated my view that this should be changed. Some of the salient points emerging from the record are that he appeared to be confident and able to answer the questions appropriately with no problems, albeit he

changed his story a few times and gave some contradictory explanations. Under the heading 'Social Presentation' this is said:-

"Wahid presents as a young person who has a quiet disposition with a pleasant temperament. Wahid is very confident and articulate in speech. His physical appearance is that of a young person in his late teens, he has an Adam's apple, he has a deep male voice, and he has facial hair. Although he has a small body, his body appears to have stopped growing. Wahid's physical appearance seems to be a young person who looks after his person (sic) hygiene, his hair, his clothes, and his general appearance is that of a young person who takes great care and pride in his looks."

64. While no consideration has been given to his asylum claim since he was to be returned to Greece, his account as recorded shows no apparent validity in it. He left because, as he put it, his uncle had 'enslaved' him and forced him to work on his farm. He did some work to raise money and with his mother's boss's assistance an agent was found to enable him to travel to this country. Thus his only real chance of obtaining at least a foothold in this country was likely to arise if he could persuade the authorities that he was a child. That would have been known to any agent dealing in this sort of human trafficking.
65. I should set out the full summary and analysis which led to the conclusion about his age. It reads:-

"Wahid appears to be a pleasant young man who is likely to be a post pubescent male. His physical appearance denotes facial and skeletal definition that is indicative of a young person of about between the ages of 18 - 22 years old. Wahid has muscular definition, he has facial hair and there is indication that he could have been shaving for a while, which is an indication that Wahid is a mature male in his late teens. During the assessment, Wahid spoke with a resonant and consistent tone and volume, expected of an adult male. Wahid's body mass appeared in proportion to height and weight is consistent with an adult male and not a 15 year old. Reception centre staff supporting young people placed at the Granby have been assessing Wahid over a period of time and the general view was that Wahid is not younger than 18 years; Brian Hill stated in his report that having observed Wahid and spoken to him and was of the view that Wahid was between 18 and 20 years old. Ellen Luck who is also a member of staff stated that she was of the view that Wahid was 20 years old. Rodger Bushen stated that he was of a view that Wahid was over 18 years old, Boris Popur also stated that Wahid was 18 years and over. The young person was observed and interaction between staff and Wahid and the conclusion was that Wahid was an adult. This information was based on his physical appearance and the way the young person conducted himself while he was in their care.

Although Wahid stated that he did not have much education he came across as a young person who was of average intelligence with no cognitive issues. Wahid was able to understand new concepts and rationalise, and logically disseminate information. Wahid stated that he could not read or write, he stated that he had no concept of time, dates or years because he only had three years education. Wahid stated that he did not like school. Wahid was able to explain and tell the assessors the countries he travelled through with no difficulty, although he stated that he only travelled during the night and they were in hiding during the day. Wahid was able to state that he was arrested in France but could not tell the assessors the other country he was arrested in and yet he knew every single country he travelled through before he arrived in the United Kingdom. Wahid did not give much information about his life story and most questions were often answered with 'I don't know or I don't know when because I was in school for three years' this was perceived as Wahid refusing to give information which could indicate his age.

Wahid stated his mother had another child who is Wahid's half brother. Wahid stated that his half brother had a quarrel with his mother and left home. Wahid was asked how old his half brother when he left home. Wahid stated he did not know, he replied this was before he was born. Wahid was unwilling to give information about his brother or cousin who lives in the United Kingdom; the assessors concluded that Wahid was withholding information; as a result, this became very difficult to get an in-depth assessment of the young person's needs or his family history.

In conclusion, Wahid's physical appearance, presentation, demeanour and behaviours are consistent of a young adult of about 18+ years. Wahid's version of events may have some elements of truth but the story lacks depth and credibility due to lack of dates and timescales which makes it very difficult to comprehend what Wahid's life story is about.

It should be noted that all reception centre staff supporting young people placed at the Granby were of the view that Wahid is a young man not younger than 18 years and that he may be several years older."

66. On 15 August 2008 Dr Birch's report was produced. It followed an interview of about 1 ¼ hours. She records that he believed he was born in 1993 and he would be 15. She records under 'General Demeanour':-
- "(a) Wahid presented as a very immature and confused young boy. He was trying his best to sort out a complex situation and seemed to be struggling with trying to be responsible and make out he was 'grown up' whilst at the same time being very immature and vulnerable. Seemed to have little concept of risk and danger and his general demeanour was one of a very young early adolescent.
- (b) Wahid was very restless and chewed my pencils, made a paper plane with my appointment list and played with my disinfectant, grabbing things up like a young child would do."
67. This is contrary to the observations of the Kent social workers, supported by those of staff where he was placed by Kent, and it is suggested by Kent that his behaviour in interview was designed to make him seem younger. There is much force in that suggestion. When considering weight, Dr Birch states that 61.5 kg (which was shown when she weighed him) would be the 50th centile for a boy of 16 and on the 70th centile for one with a stated age of 15. She attributed the slight overweight to a combination of farm work in Afghanistan, which could increase his muscle density, and eating more while in detention coupled with a more sedentary lifestyle. The flawed approach indicated by this is all too obvious. It assumes the correctness of the stated age and tries to marry the weight to that.
68. Dr Birch records 'very little growth of facial hair with some hair in the moustache area and a few hairs under the lower lip. Consistent with a 14 approx. year old'. She further states his Adam's apple was not enlarged and his voice had not broken. She determined his probable age to be 14.49 years.
69. On 16 September 2008 Kent reacted to this by indicating that it relied on Dr Stern's advice that there was no scientific basis for age assessments and that Dr Birch's reports were subject to significant flaws. On 17 September 2008 a letter from UKBA to the claimant's solicitors stated that a comparison of the reports persuaded it that reliance should continue to be placed on Kent's assessment. This was also in line with published policy to give prominence to Merton compliant age assessments.
70. It has been submitted that the policy of giving prominence to Merton compliant assessments constitutes an unlawful fetter on the discretion of the Secretary of State. That seems to me to be a hopeless argument. Provided that the Home Office is satisfied that there has been a proper assessment and that the reasons given and observations made are satisfactory, it is clearly entitled to give prominence to such an assessment.

Giving prominence does not mean that it will prevail in all circumstances and regard is properly had to any other report or material presented.

71. In fact, Kent made clear in a letter of 26 September that it had reconsidered its previous assessment in the light of Dr Birch's report and had decided that there was no reason to depart from the decision of 16 September, namely to continue to rely on its assessment of 28 July.
72. Dr Birch has submitted a subsequent report following a further interview with the claimant on 11 February 2009. She says that he had grown by 1 cm. However, that difference may not in fact have existed since she is not an expert in measuring height and small differences are always possible. So far as other small suggested physical developments are concerned, the same comment applies. She repeated that his behaviour was consistent with that of a boy aged 15. She said that in view of the 'significant growth and change since the last examination' she had recalculated his age and it was now to be regarded as 14.96 (or 15). This of course was precisely in accordance with her previous findings some 6 months before.
73. It is here that Kent's concerns about the quality and accuracy of Dr Birch's observations have some materiality. Ms Chinyemba, the social worker who signed the assessment of 28 July, has made a statement. This discloses that an average assessment will take some 3 to 4 hours with regular 5 or 10 minute breaks. Two social workers are and were involved. There was criticism made of her observation that he 'could have been shaving for a while', but this was based on her view of him and information from staff where he was residing who provide residents where necessary with shaving equipment. Her and her colleagues' observations about his voice and Adam's apple do not accord with those of Dr Birch.
74. Mr Béar took me through the cases in which reports from Dr Birch contradicted assessments made by Kent. All produced a result consistent with the individuals' claimed age. In many instances, Dr Birch contradicted the social workers' observations on voice or Adam's apple or facial hair and shaving. Thus it was submitted that she was biased in favour of claimants and her reports could be disregarded. She has vigorously denied this. I do not think it is necessary to lengthen this already overlong judgment by going through the details of the various cases. I note too the comment from Mr Millar that there may well be other reports from Dr Birch which supported the age assessment made by Kent and which were accordingly not produced to Kent.
75. I am satisfied that Dr Birch has not deliberately falsified her observations to assist a claimant. I do not doubt that she has been doing her best to act as an expert should. But Kent are entitled to look with considerable scepticism at her findings which contradict their own. It does suggest that her judgment may be faulty and that the accuracy of her measurements cannot be assumed. Conclusions on whether voices have broken or Adam's apples are prominent or that demeanour suggests a particular age range involve to a greater or lesser extent the exercise of judgment. Thus Kent and so the Secretary of State are entitled to attach little if any weight to reports which make assessments based to a significant degree on contradictory findings. But this does not in my view mean that such reports can be ignored. Flawed though they may be and in my judgment are, they should be considered since there is always a possibility that they may identify something which could and occasionally should lead to a different conclusion.
76. There is the further factor that the assessment made by the social workers is more extensive and based on fuller information from others who have observed the individuals' behaviour than that available to Dr Birch.
77. I have no doubt that in the circumstances of this case, the Secretary of State was entitled to rely on Kent's assessment. It follows that the detention was not unlawful since it was properly anticipated that the claimant would be removed within a short time. He was in fact released pursuant to an order of Charles J on 19 November 2008. The claim must therefore be dismissed.
78. The notional date of birth which was given led Mr Millar to submit that WK was not to be regarded as 18 when he entered this country and therefore could not be sent to Greece under the Dublin Regulations. Those require that the applicant is over 18 when he arrives

in the country which wishes to return him to the otherwise appropriate Member State. No doubt a date of birth needed to be ascribed to him for bureaucratic reasons, but, since he was assessed to be over 18 on 28 July 2008 – and it is clear well over 18 – to choose that date as his notional date of birth was irrational. If the decision had been that marginal the benefit of the doubt would necessarily have been given to the claimant. Accordingly, since it is clear that he was assessed to have been over 18 when he entered the U.K. on 21 July, he cannot properly take advantage of the ban on return to Greece applicable to those under 18. For future reference, it would be sensible to choose a notional date of birth (if appropriate) before the entry into the U.K. If the decision is that an applicant is over 18 at the time of the assessment it is not sensible to ascribe a date of birth on that day. Having regard to the need to give the benefit of any doubt to an applicant, it would normally be reasonable to choose one at least a month before (still of course artificial).

79. Mr Béar raised a further argument against use of Dr Birch's reports. He submitted that the basis upon which she had reached her conclusions was not scientifically approved and so should be regarded as novel. It had not been tested and, albeit she asserted that her methodology had been approved by peers, the general medical opinion, certainly in this country, was against it. Reliance was placed on observations of Lord Browne-Wilkinson in *Bolitho v City & Hackney HA* [1998] AC232 at 241G to 242B:-

"My Lords, I agree with those submissions to the extent that, in my view, the court is not bound to hold that a defendant doctor escapes liability for negligent treatment or diagnosis just because he leads evidence from a number of medical experts who are genuinely of opinion that the defendant's treatment or diagnosis accorded with sound medical practice. In the *Bolam* case itself, McNair J [1957] 1 W.L.R. 583, 587 stated that the defendant had to have acted in accordance with the practice accepted as proper by a 'responsible body of medical men'. Later, at p.588, he referred to 'a standard of practice recognised as proper by a competent reasonable body of opinion'. Again, in the passage which I have cited from *Maynard's* case [1984] 1 W.L.R. 634, 639, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives – responsible, reasonable and respectable – all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis. In particular in cases involving, as they so often do, the weighing of risks against benefits, the judge before accepting a body of opinion as being responsible, reasonable or respectable, will need to be satisfied that, in forming their views, the experts have directed their minds to the question of comparative risks and benefits and have reached a defensible conclusion on the matter."

Since, he submitted, there is no body of opinion which I could properly regard as being responsible, reasonable or respectable, I should on that basis not only reject Dr Birch's findings but decline to permit her to be admitted as an expert.

80. I do not need nor do I think it right to go that far. She is a paediatrician with experience in dealing with age assessment and as such can provide assistance. Thus her reports are admissible and can be taken into account. But it is then necessary to see whether they can be relied on. For the reasons I have given, I do not think that they can insofar as they contradict the views of properly trained experienced social workers carrying out Merton compliant assessments. The crucial point is not whether either assessment is or is not in fact correct; that can very rarely if ever be ascertained with complete accuracy. The point is whether the authority or the Secretary of State is entitled in law to prefer the social workers' assessment to that of Dr Birch or another paediatrician. Generally speaking, they are and no error of law is shown if they do.
81. As I have said, I recognise the concerns expressed in the ILPA report and by the Children's Commissioner that the system can lead to decisions which are wrong and potentially very damaging to the UASC concerned. As will I think be clear, I do not suggest that reports from such as Dr Birch can have no value, but only in a very few instances will it be possible to review successfully a refusal to change a conclusion reached through a Merton compliant assessment. It is always necessary to be sure that the assessment was properly conducted and has reached a sustainable conclusion and the record of and reasons for the

assessment will be crucial. This rather than any medical report will usually provide the only possible grounds for judicial review.