Case No: CO/352/05 & CO/355/05

Neutral Citation Number: [2005] EWHC 1025 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEENS BENCH DIVISION
(ADMINISTRATIVE COURT)

Royal Courts of Justice
Strand, London, WC2A 2LL

Friday, 27 May 2005

Before :

THE HONOURABLE MR JUSTICE OWEN

- -

Between :

R on the application of ("I")	**Claimant**
and	
R on the application of ("O")	
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Nicholas Blake QC and Charlotte Kilroy (instructed by Leigh Day & Co) for the **Claimant**
Miss Jennifer Richards (instructed by Treasury Solicitor) for the **Defendant**

- -

Judgment

THE HONOURABLE MR JUSTICE OWEN :

1. INTRODUCTION

The claimants, I and O are asylum seekers. The claimant I was detained by police on 14 January 2005 at Ramsgate railway station. He claimed to have been born on 3 March 1988 and therefore to be 16 years of age. O arrived in the UK on 9 January 2005. He subsequently claimed asylum asserting that his date of birth was 25 December 1988, and that he was therefore also 16 years of age. But in both cases it was not accepted by the Immigration Authorities that the claimants were 16 years of age, and both were therefore detained at Oakington Detention Centre (Oakington). Age assessments of both claimants were then carried out by a Consultant Paediatrician, Dr Michie, through the agency of their representatives, Refugee Legal Centre (RLC). Dr Michie concluded that in I's case his age was consistent with a date of birth in March 1988, and in O's case that his age was consistent with a date of birth

in December 1988. Following the receipt of Dr Michie's reports, the Secretary of State continued to treat both claimants as adults, and continued to detain them in Oakington. The age of both claimants was subsequently assessed at under 18 by Cambridgeshire Social Services Department (CSS), an assessment that was accepted by the Secretary of State resulting in their release into the care of CSS. I and O now challenge the decision of the Secretary of State to continue to detain them as adults for the period between his receipt of the reports from Dr Michie and the age assessments carried out by CSS, in the case of I a period of 7 days, and in the case of O a period of 8 days.

2. THE FACTUAL BACKGROUND

I

I is a Moldovan national who was detained by the police on 14 January 2005 at Ramsgate railway station. He sought asylum, and in the course of the screening interview by an Immigration Officer gave his date of birth as 3 March 1988. Later that day his case was considered by an Acting Chief Immigration Officer, Gary Ollerton, who concluded that:

> *"His physical appearance and general demeanour strongly suggested he was over the age of 18 years old."*

He therefore issued Home Office form 1S97M, notifying I that he would be treated as an adult.

3. On 15 January 2005 the claimant I was given notice that he would be detained, the reasons given for his detention being that he was likely to abscond if given temporary admission or release, and that his application for asylum may be decided quickly using the fast track procedure. He was then transferred to Oakington.

4. On 18 January 2005 an assessment of I's age was carried out by Dr Colin Michie. He concluded that the claimant I was 17 years of age with an error margin of plus or minus 2 years, explaining that "*In written terms it is more likely than not that the client is 17 years of age",* and that his age was consistent with the date of birth given to the Immigration Officer. The RLC handed a copy of this report to the Secretary of State on 19 January 2005 prior to his substantive asylum interview, and on 20 January 2005 the RLC forwarded a further copy of the Report to the Secretary of State requesting I's release from detention in the light of the contents of Dr Michie's report. The covering letter made reference to the Secretary of State's policy with regard to age dispute cases and to the decision of Stanley Burton J in *R (on the application of B) v Merton London Borough Council [2003] 4 ALL ER 280.*

5. Following receipt of Dr Michie's report, I's case was reviewed at Oakington by Tony Moore, a Senior Executive Officer within the Immigration and Nationality Directorate (IND). In his witness statement dated 14 March 2005, he says that in undertaking his review, he took account of the report from Dr Michie and of all relevant information contained in the Home Office/Port file. A copy of his contemporaneous note has been disclosed. It reads:

> *"A* (presumably an abbreviation for applicant) *has been previously assessed by a CIO as his appearance strongly suggests that he is over 18. Due consideration has been given to the report by Dr Michie but, looking at this case in the round, at the totality of the evidence, I am not prepared to give A the 'benefit of the doubt'. The A has failed to provide any supporting documentation regarding age (PPT, Birth Cert, I.D. card. And whilst Dr Michie gives an error of margin for his estimate as +/- minus 2 years (making the range 15 – 19) the Royal College of Paediatrics actually state the range can be as much as plus minus 5 years). We should maintain detention to await the outcome of CSSD assessment on 26/1/05. "*

On the same day the Duty Chief Immigration Officer (CIO) at Oakington wrote to the RLC, also at Oakington, in terms reflecting the decision made by Mr Moore.

6. On 25 January 2005 solicitors instructed on behalf of the claimant I wrote a letter before claim referring to the decision in the *A v SSHD* – CO/2858/2004 and to the report from Dr Michie, and continuing that:

> "*It is impossible therefore, for you to say there is no doubt that our client is over 18 in the light of this evidence. That was the basis of the Secretary of State's concession in the case of A v SSHD. He should therefore be released from Detention immediately in accordance with the Secretary of State's policy towards disputed minors.* "

7. The letter sought a response by 1.00 p.m. that day failing which an application for Judicial Review would be issued. There was a reply from the Home Office on the same day stating that the Secretary of State was not persuaded to change the decision until the claimant I could be aged assessed by CSS. The letter concluded:

> *"We will abide by whatever decision on the age assessments is reached by CSS."*

8. The claimant I was duly assessed by Social Services on 26 January 2005. He was assessed at being a child aged 16¾. The age assessment form completed by CSS, which I was informed by counsel for the defendant, is all that is received by the Secretary of State, gave the following "Conclusions and Reasons" for the assessment:

> *"Physical appearance strongly suggests he is the stated age.*
>
> *Story and emotions appeared genuine.*
>
> *Spoke in great detail."*

It is interesting to note that I's nationality was erroneously recorded on the form as Romanian.

9. I was released from detention into the care of Social Services on 27 January 2005.

10. **O**

O arrived in the UK on 9 February 2005. He was travelling on a Nigerian passport in the name of Timothy Felix Kolawale (date of birth 26 November 1978) and sought entry as a visitor. When interviewed by an Immigration Officer he maintained that he was Timothy Kolawale, that he was here on holiday visiting his uncle and that the passport was his. The photographs in the passport and on the visa appeared to be substantially different to O, and the matter was therefore referred to the forgery officer at Heathrow airport, who concluded that O was not its rightful owner. Leave to enter was therefore refused and removal directions were set for 11 January 2005.

11. O resisted removal and an asylum claim in his false name was recorded on 12 January 2005. On 13 January 2005, O claimed asylum in his true name and stated that his date of birth was 25 December 1988.

12. On 14 January 2005 O was interviewed by an Immigration Officer, Wendy Akuijo, who has made a witness statement. She says:

> *"I did not believe that the passenger was under 18 years of age and was satisfied that he was not a border line age dispute case. I believe that the passenger's physical appearance was that of an adult and not of a teenager. The passenger arrived without a document that satisfactorily established his nationality, identify or age. He had travelled on a document impersonating a 26 year old and looked older than the person he was impersonating."*

Ms Akuijo referred the case to a CIO who agreed with her assessment and issued form 1S97M notifying O that he would be treated as an adult. His detention pending a decision on his claim to asylum was then authorised, and on 15 January 2005 he was transferred to Oakington.

13. On 18 January 2005 an assessment of O's age was carried out by Dr Michie. He concluded that O was 17 year of age with a margin of error of plus or minus 2 years, explaining as in the case of I that "*in written terms it is more likely than not that the client is 17 years old*

14. Dr Michie's report was sent to the Secretary of State on 20 January 2005. As in the case of I, O's case was then reviewed at Oakington by Mr Moore. The review was carried out on 22 January 2005, and as in the case of I Mr Moore's contemporary note has been disclosed. It reads:

> *"Medical report from Dr Michie who estimates the A's age to be 17 years plus or minus 2 years.*
>
> *Looking at this case in the round I am not prepared to give the A the 'benefit of the doubt'. Previous officers are satisfied that A's appearance strongly suggests he is over 18, there is <u>no</u> other doc. Evidence (PPT, birth cert, I.D. card) and although Dr Michie gives a margin of error as plus minus 2 years, I am aware the Royal College of Paediatrics (sic) states that the perimeter can be as much as plus minus 5 years. We should*

maintain detention to await the outcome of CSSD assessment on 27/1/04."

15. The Duty CIO wrote to RLC on 22 January 2005 stating that O would continue to be treated as an adult and therefore continue to be detained until the CSS carried out an age assessment. Save for O's name and the date arranged for the CSS assessment, the letter was in identical terms to that sent to RLC in relation to I.

16. On 25 January 2005 solicitors acting for O wrote a letter before claim demanding O's immediate release from detention. The letter was in identical terms to that sent in relation to I. As in I's case the Home Office replied on the same day and in the same terms, thus again stating that the Secretary of State would abide by the decision of the CSS.

17. An assessment of O's age was duly carried out by CSS on 27 January 2005. The Social Worker who carried out the assessment concluded that he was a child aged 16, his date of birth being 25/12/88. The 'Conclusions and Reasons' were:

"Physical appearance strongly suggested under 18.

Demeanor – very respectful, spoke as a child to adults.

Some answers very childish.

Eye contact not very good – better with interpreter.

Seemed very vulnerable and would not be able to look after himself yet.

Dates of education correspond to age given."

18. On 28 January 2005 O was released into the care of Social Services.

19. <u>THE CHALLENGE</u>

The decisions under challenge are those taken on behalf of the Secretary of State by Mr Moore on 22 January 2005 to continue to treat I and O as adults notwithstanding the content of the reports from Dr Michie.

20. The grounds upon which the decisions are challenged are first that they were made in breach of the policy applied by the Secretary of State in cases in which the age of an asylum seeker is in issue, and secondly that the decisions to continue to rely on the view taken by the Immigration Officers on the basis of the appearance and demeanour of I and O in preference to the reports from Dr Michie, a Consultant Paediatrician with specialist expertise in the assessment of age, were irrational.

21. <u>THE SECRETARY OF STATE'S POLICY AND PRACTICE</u>

Evidence as to the defendant's policy is to be found in the witness statement from Ailish King-Fisher, an Assistant Director in the Immigration and Nationality Directorate (IND) of the Home Office. Ms King-Fisher leads the Children and Family Asylum Policy Team, which is responsible for policy relating to asylum-seeking

children, whether accompanied or unaccompanied. That includes policy responsibility for age assessment. She has exhibited two relevant documents to her witness statement. The first is headed "Disputed Age Cases (2nd Edition, published January 2005)". Ms King-Fisher asserts that it was the applicable policy at the material time, although the document does not indicate the date in January 2005 when it came into effect, nor was the defendant able to provide the precise date when the issue was raised in the course of the hearing. But I was assured that there were no material differences between it and the first edition. It contains a number of provisions of direct relevance to these applications:

> *"1. **INTRODUCTION***
>
> *This section sets out procedures for how to dispute a claimant's age, where they claim to be a child but are believed to be an adult, and for handling and processing asylum cases where the claimant's age has been disputed.*
>
> *2. **WHEN A CLAIMANT'S AGE IS DISPUTED***
>
> *A claimant **must** be given the benefit of the doubt with regards to their age unless their physical appearance **strongly** suggests that they are aged 18 or over. The decision to dispute a claimant's age should always be confirmed by a second officer who is at no lower than Higher Executive Officer grade or the rank of Chief Immigration Officer, and is acting in a supervisory role at the Port, Local Enforcement Office or screening unit at which screening is being carried out.*
>
> *3. **EVIDENCE OF AGE***
>
> ***3.1 Travel documents and identity documents***
>
> ***….***
>
> ***3.2 Birth Certificates***
>
> ***….***
>
> ***3.3 Paediatrician's Report***
>
> *If a claimant submits a Report written by a practising Consultant Paediatrician that concludes that the claimant is under 18 at the time of the application this **must** be considered.*
>
> *However, care should be taken with such Reports as the margin of error can be as much as 5 years either way.*
>
> *If screening officers are in any doubt, they should seek guidance from a Supervising Officer at not lower than Higher Executive Officer grade or the rank of Chief*

Immigration Officer. If case workers are in any doubt they should seek guidance from a senior case worker.

3.4 Social Services Age Assessments

IND's agreement with Social Services on age assessments provides the claimant with a readily accessible route to challenge IND's decision to dispute a claimant's claim to be a child.

An age assessment carried out by a local authority Social Services Department which concludes that a claimant is under 18 at the time of the application is acceptable evidence of age. If IND has already assessed a claimant as being aged 18 or above, but a Social Services Department later submits an age assessment which concludes that a claimant is under 18, the IND decision should be set aside and records amended to reflect the conclusion that the Social Services age assessment.

It is envisaged that in future Social Services Departments will provide IND with a standardised pro-forma to confirm that an age assessment has been conducted. The pro-forma will provide IND with an assessment of the age of the claimant.

3.5 Evidence from Social Services other than age assessments

….

3.6 Case Worker's own opinion

…."

(Emphasis as is in the original).

22. Paragraph 5 sets out the formal procedures to be followed where age is disputed.

23. The second of the policy documents produced by Ms King-Fisher is headed "Unaccompanied Asylum Seeking Children". In her witness statement Ms King-Fisher sought to suggest that it did not have the standing of the document "Disputed Age Cases". She described it in the following terms:

> *"There exists also an Information Note entitled "Unaccompanied Asylum Seeking Children", dated July 2002. The purpose of the Information Note …is to set out IND's general approach towards unaccompanied asylum seeking children. It is not a formal statement of policy but contains a mix of policy and process information which was produced for*

Local Authority Social Workers who deal with unaccompanied asylum seeking children. The document is also in the process of being updated although quite a lot of the information contained in it is still accurate."

24. Yet paragraph 6 of the document is in the following terms:

> ***"6. IND Policy when Age is in Dispute***
>
> *6.1 Where an applicant claims to be a child but his/her appearance strongly suggests that he/she is over 18, IND's policy is to treat the applicant as an adult and offer NASS support (if appropriate) until there is credible documentary or medical evidence to demonstrate the age claimed. These applications are flagged as "disputed minors" and they are treated as adult cases throughout the asylum process, or until we accept evidence to the contrary. In border line cases IND gives the applicant the benefit of the doubt and treats the applicant as a minor.*
>
> *Although it is rare, where a SSD disagrees with IND's assessment of age, it is IND's policy to accept the SSD's professional assessment.*
>
> *….*
>
> *6.3 It is open to an applicant to submit new evidence of age – including medical evidence – and IND will consider any evidence of this kind. It is recognised however that the medical determination of age is an inexact science and the margin of error can be substantial, sometimes by as much as 5 years either side.*
>
> *6.4. For more information about handling age dispute cases please refer to the attached note (Annexe B),* ***"Liaison arrangements for handling age dispute cases"****."*

25. It is not necessary to set out the contents of Annexe B. Suffice it to say that its paragraph F provides that where IND has decided to treat the applicant as an adult, but SSD assesses him or her as a minor, *"… they inform IND who amend the case record to show the applicant is to be treated as Unaccompanied Asylum Seeking Child …"*

26. Notwithstanding the qualifications that Ms King-Fisher sought to attach to this document, it was accepted by counsel for the defendant in the course of argument and upon instructions that its paragraph 6 "*… is the policy that was applied by the Secretary of State at the relevant time*."

27. The claimants also seek to place reliance upon chapter 38 of the IND Operational Enforcement Manual (OEM), which is headed "*Detention/Temporary Release"*. Chapter 38.7.3.1 provides that:

"PERSONS CLAIMING TO BE UNDER 18

Sometimes people over the age of 18 claim to be minors in order to effect their release from detention. In all such cases people claiming to be under the age of 18 must be referred to the Refugee Counsel's Children's Panel. Where reliable medical evidence suggests that the person's true age is under 18 they must be treated as minors and released once suitable alternative arrangements have been made for their care.

A person who has initially claimed to be an adult should only be accepted as a minor if:

> *Their appearance clearly supports the claim to be a minor;*
>
> *or*
>
> *they are able to produce credible and conclusive medical or other persuasive evidence.*

Where an applicant claims to be a minor but their appearance ***strongly*** *suggests that they are over 18, the applicant should be treated as an adult until such time as credible documentary or medical evidence is produced which demonstrates that they are the age claimed. In border line cases it will still be appropriate to give the applicant the benefit of the doubt and to deal with the applicant as a minor."*

It is IND policy not to detain minors other than in the most exceptional circumstances. However, where the applicant's appearance ***strongly*** *suggests that they are an adult and the decision is taken to detain it should be made clear to the applicant and their representative that:*

> *We do not accept that the applicant is a minor and the reason for this (for example, visual assessment suggests that the applicant is over 18),*

and in the absence of acceptable documentation the applicant is to be treated as an adult."

(Emphasis as in original.)

28. The claimants issued proceedings on the premise that chapter 38 of the OEM represented the defendant's policy applicable to the detention of children or age-disputed children. But in her witness statement of 15 March 2005, Ms King-Fisher asserted that chapter 38 *"… has in fact been withdrawn and is in the process of being re-drafted"*. By letter dated 23 March 2005 the solicitors acting for the claimants sought elucidation of the assertion that chapter 38 had been withdrawn. There was no response to that request until the delivery of the supplementary skeleton argument on

behalf of the Secretary of State on the day before the hearing. The supplementary skeleton asserts that the OEM is an internal guidance manual for immigration enforcement staff, and is not the means of circulating or disseminating information about the Secretary of State's policies to the public. It is said that it is nevertheless intended to publish the whole of the OEM on the IND public website. It is also said that it is in the process of being revised and up-dated. Thus far 1 – 18 have been revised, up-dated and published, but the remaining chapters are still undergoing revision. The supplementary skeleton points out that the claimants appear to have obtained the copy of chapter 38 upon which they rely from the website of an umbrella organisation (AVID), for which the IND is not responsible. The contents of the supplementary skeleton are not of course evidence. There is no evidence before me as to when chapter 38 was withdrawn. But its contents are in essence reflected in paragraph 6 of "Unaccompanied Asylum Seeking Children"; and given the unqualified concession that paragraph 6 represents Home Office policy at the material time, it is not necessary for the purposes of this application to resolve the issue of whether chapter 38 of OEM was or was not in effect. Suffice it to say that it is surprising that there should be any confusion as to the dates upon which the relevant policies or guidance to IND staff were in force.

29. In her witness statement Ms King-Fisher asserts that "IND currently bases its decisions primarily on age on physical appearance, demeanour/behaviour and available documentation." At paragraphs 8 and 9 she says:

> *"8. It is IND policy generally to accept a full Social Services age assessment that takes into account wider cultural and social factors unless there are grounds for suspecting that the person who presented for the Social Services age assessment is not the same person as the applicant. A Joint Working Protocol on Age Assessment has been agreed, subject to ministerial approval, between the IND and the Association of Directors of Social Services. A copy is attached to this statement.*
>
> *9. IND does not use medical assessments to assess age, although applicants may submit an independent medical assessment. Any such report may be considered and, depending on any other available evidence and information and the facts of the particular case may result in a decision to treat the applicant as a minor. However, such a report will not necessarily or automatically lead to the applicant being treated as a child."*

30. The context in which the protocol to which Ms King-Fisher refers at paragraph 8 of her witness statement was negotiated is of relevance. Where an asylum seeker is under the age of 18, the appropriate Social Services department will be under a statutory duty to provide support where the child is assessed as being in need under the Children's Act 1989, whereas if the asylum seeker is an adult, responsibility for providing support, where the asylum seeker qualifies for such support, is the responsibility of IND through the agency of NASS. The protocol has the sensible objective of reducing the potential for conflicting decisions as to age reached by IND and Social Services departments, and provides a mechanism for resolving such

differences should they arise. It emphasises that it is vital that both agencies communicate disputes and decisions at the earliest possible opportunity as delay in notifying changes in status *" … can be extremely predijicial to the welfare of the applicant and could lead to incorrect decisions and or loss of support."*

31. The claimants also adduced evidence as to arrangements between IND at Oakington and CSS from Rajendra Rayan, who is employed by the RLC at Oakington. His evidence has not been challenged by the defendant. Mr Rayan says that in September 2003 a report that he prepared on behalf of the RLC, Immigration Advisory Service, (IAS), and the Refugee Counsel, was submitted to IND at Oakington and to CSS. The purpose of the report was to highlight problems in relation to cases in which there was a dispute as to the age of the detainee. At a meeting that took place on 8 December 2003 CSS acknowledged that it was under a legal duty to conduct age assessments of such individuals detained at Oakington, and IND agreed that where there was a referral for age assessment to CSS, the decision on the applicant's asylum application would be delayed pending the outcome of the assessment.

32. <u>THE ISSUES</u>

The claimants do not take issue with the Secretary of State's policy, which I am now satisfied is to be found in "Disputed Age Cases" and in paragraph 6 of "Unaccompanied Asylum Seeking Children". As is readily acknowledged by Mr Nicholas Blake QC who represented both I and O, the policy necessarily reflects the balance to be drawn between the objective of not subjecting those under 18 to detention, and the fact that individuals who claim asylum in the UK may falsely claim to be under 18. There may be a variety of reasons for advancing such false claims; but in the experience of the Secretary of State the primary reason for so doing is to benefit from the more generous asylum policies and support arrangements that are applied to children, in particular:

i) Unaccompanied children will not generally be detained or subject to the fast track procedures.

ii) Unaccompanied children whose asylum claims are refused are only removed from the UK if adequate care and reception arrangements are in place in their country of return.

iii) Unaccompanied children may benefit from being looked after by local authorities under the Children Act.

As Mr Justice Stanley Burnton observed in his judgment in *R (B) v London Borough of Merton* [2003] EWHC 1689, [2003] 4 ALL ER 280 at paragraph 29:

> *"In this context, as in others, it would be naïve to assume that the applicant is unaware of the advantages of being thought to be a child."*

33. The claimants' challenge is to the application of the policy. It is submitted on their behalf first that in making the decisions the subject of challenge, Mr Moore failed to apply the policy, secondly that his decisions were irrational. Both limbs of the challenge are directed to his approach to the reports from Dr Michie.

34. It is clear from the contemporaneous notes of the decisions taken by Mr Moore that he discounted Dr Michie's opinion as to the age of the claimants by reference to the guidelines published by the Royal College of Paediatrics and Child Health. Mr Blake submits that the Secretary of State's approach to the guidelines is flawed, and that they have been misunderstood and misapplied. Secondly he submits that the rationality of the decisions can be tested by consideration of the methodology adopted by Dr Michie, and by Social Services. He submits that it is demonstrably irrational for Mr Moore to have rejected the assessments made by Dr Michie but to accept those made by Social Services.

35. It is submitted on behalf of the defendant that Mr Moore adhered to the Secretary of State's policy, and that his decisions were rational, there being valid reasons for rejecting the assessments by Dr Michie, but accepting those by CSS.

36. <u>The Royal College of Paediatrics and Child Health Guidelines.</u>

In November 1999 the King's Fund and the Royal College of Paediatrics and Child Health published "The Health of Refugee Children – Guidelines for Paediatricians" (The Guidelines). The guidance is set out in chapter 5. Paragraph 5.6 contains the following passages which are of central importance.

> *"**5.6 Puberty and the Assessment of Age***
>
> *Paediatricians may be asked to give their opinions whether the young person is a child under the age of 18. This request may be made by the child's legal representative, who may be seeking to show that the young person in question is under the age of 18, as those accepted as such should not normally be held in detention. The Paediatrician's assessment should only be done in the context of a holistic examination of the child. When making their assessments, Paediatricians may find it useful to be aware of the Asylum Casework Instructions used by the Immigration Nationality Department of the Home Office. An excerpt from these is given at the end of this section of the guidelines …*
>
> *In practice age determination is extremely difficult to do with certainty and no single approach to this can be relied upon. Moreover for young people aged 15 – 19, 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."*

37. At 5.6.1 the guidelines address puberty and anthropometric measures, concluding:

> *"It is not possible to actually predict the age of an individual from anthropometric measure, and this should not be attempted. Any assessments that are made should also take into account relevant factors from the child's medical and the family history."*

38. Paragraph 5.6.2 addresses the assessment of bone age; and 5.6.3 dental age.

> ***5.6.3*** *"The dental age of the human from birth to 18 years can be judged by consideration of the emergence and development of the primary and secondary dentitions. Thereafter estimates have to be based on wear of the dentition and are much less accurate. There is not an absolute correlation between dental and physical age of children but estimates of a child's physical age from his or her dental development are accurate to within + or -- two years for 95% of the population and form the basis of most forensic estimates of age. For older children, this margin of uncertainty makes it unwise to rely wholly on dental age."*

39. The guidelines as to age determination are then summarised in the following terms:

> *"i) 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.*
>
> *ii) Assessments of age should only be made in the context of a holistic examination of the child.*
>
> *iii) 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."*

40. Finally the excerpt from the Asylum Casework Instructions chapter 2, section 5 (Immigration and Nationality Department) February 1999, to which reference is made in paragraph 5.6, contains the following passage under the heading "*3.13 Medical Assessments of Age*":

> *"Due weight must be attached to any medical assessment of age that is received, but it should be noted that age determination is an inexact science and the margin of error can be substantial, sometimes by as much as 2 years either side. As the paediatrician can only offer an estimate of age, all estimates should also refer to the margin of error associated with that particular estimate."*

41. As can be seen at paragraphs 5 and 10 above, Mr Moore appears to have rejected, or at the least to have reduced the weight that he attached to Dr Michie's reports, on the

basis that although Dr Michie gave a margin of error of plus or minus 2 years, the Guidelines give a margin of error of plus or minus 5 years.

42. The first point to be made is that the introduction to the Guidelines states the purpose for which they had been produced, namely *"… to assist paediatricians who are caring for refugee children."* It is clear that they are directed to all paediatricians, whether working in hospitals or in community settings, and at whatever level. They are directed at a wider audience than those with specialist expertise in age assessment or those of consultant status.

43. Secondly the passage at paragraph 5.6 of the Guidelines apparently relied upon by Mr Moore in making the decisions under challenge, is in the following terms "*Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side*." The use of the word "*sometimes*" is plainly of importance. It is a clear indication that a margin of error of plus or minus 5 years will not always be appropriate. Paragraph 5.6.3 gives guidance to those competent to carry out an estimate of age from *"… a consideration of the emergence and development of the primary and secondary dentitions*". It advises that estimates of a child's physical age from his dental development are accurate to within plus or minus two years for 95% of the population. Consequently where a dental examination has been carried out, the guidance in paragraph 5.6 that the margin of error can be as much as 5 years, should be read subject to paragraph 5.6.3.

44. Furthermore the excerpt from the Asylum Casework Instructions, paragraph 3.13 of which is quoted in the Guidelines (see paragraph 42 above) states that "… *it should be noted that age determination is an inexact science and the margin of error can be substantial, sometimes by as much as 2 years either side*".

45. As is clear from his reports, Dr Michie considered the claimants' dentition in the course of his age assessments. As is also clear from the references at the end of his reports, he has prepared over 1,500 age assessments in the medico-legal context in the past 5 years, and therefore has very considerable experience in the field. In those circumstances the passage in the Guidelines apparently relied upon by Mr Moore, does not provide a sound basis for questioning the conclusion at which Dr Michie arrived. His margin of error of plus or minus 2 years is plainly supported by the Guidelines, which is perhaps not surprising given that he is acknowledged as a contributor to them. In my judgment the claimants' criticism that the defendant has either misunderstood or misapplied the Guidelines when considering the reports from Dr Michie, is well founded.

46. The question is therefore whether the misunderstanding or misapplication of the Guidelines resulted in a failure by the Secretary of State to apply his policy. It my judgement it did. Had Mr Moore understood and applied the guidelines correctly, the only rational decision open to him was that Dr Michie's reports amounted to 'credible …medical evidence to demonstrate the age claimed' (see para 6.1 of 'Unaccompanied Asylum Seeking Children'), and that consistent with policy, the claimants should have been released from detention. At the very least the reports gave rise to a doubt, the benefit of which should have been given to the claimants (see para 2 of 'Disputed Age Cases' and para 6.1 of 'Unaccompanied Asylum Seeking Children').

47. The second limb of the challenge is that the decisions to continue to detain the claimants after consideration of Dr Michie's reports was irrational. Mr Blake submitted, and I accept, that the proposition can be tested by comparing the exercise undertaken by CSS, upon which the defendant was prepared to place complete reliance, with that undertaken by Dr Michie. The validity of that approach was accepted on behalf of the defendant, who sought to argue that there were valid reasons for not acting on Dr Michie's reports, but acting on the CSS assessments. Accordingly the question is whether such a comparison reveals any rational basis for the decisions to continue to detain the claimants after consideration of Dr Michie's reports to the effect that they were minors, yet to release them following receipt of the assessments by CSS to the same effect.

48. The reports to the defendant from Social Services are in standard form, giving reasons for the assessment in the briefest terms. But the claimant O has produced the pro forma 'age assessment' completed by CSS in his case, and used by social workers undertaking such assessments. It provides guidance under the following heads, "*physical appearance, demeanour, interaction of person during assessment*, *social history and family composition, developmental consideration, education, independent/self-care skills, health and medical assessment, information from documentation and other sources"*. The instructions given under each head are comprehensive. By way of example under the head "*social history and family composition*" the instructions say:

> *"A social history*
>
> *Do indicate to the young person that you are aware that talking about their family may be very painful and difficult for them to open up at this time. This must be understood.*
>
> *It is important to clarify the nature of their parent and sibling. Additionally ask if either parent had more than one wife/husband."*

49. Ms Richards submits that adherence to the guidance contained in the pro forma will result in a comprehensive, structured and holistic assessment, and in consequence consistency of approach, thereby enabling the Secretary of State to have confidence in the integrity of the system and justifying his decision to accept the results of such assessments save where there is confusion as to the identity of the individual assessed or where documentary evidence of age subsequently comes to light. A structured approach is obviously desirable in the interests of consistency; and I accept that the use of the pro forma enables the Secretary of State to have confidence in assessments of age made by Social Services Departments. But it is obvious from the basic level of the instructions provided in the pro forma, that social workers carrying out such assessments may well be of limited expertise and experience.

50. In contrast and as was apparent from the each of his reports, Dr Michie is a consultant senior lecturer in paediatrics who holds clinical posts in three London hospitals and research/teaching positions in two London colleges. He has developed a specialist interest in age assessment having prepared 1500 age assessments for legal reports over the past 5 years. The final paragraph of the reports invited the reader to contact him should a full curriculum vitae or further information on his experience be

required. Had that invitation been taken up, the enquirer would have learnt that as he says in his witness statement, Dr Michie has seen over 2,000 clients or patients for the purpose of age assessments, and has designed and conducted two research projects into the subject. He routinely works with Social Services in his paediatric practice, and has lectured on the subject of age assessment inter-alia to groups from Social Services.

51. In her witness statement M/s King-Fisher stated that it is IND policy "*generally to accept a full Social Services age assessment that takes into account wider cultural and social factors*…" That is a recognition that Immigration officers will not be in a position to take full account of such factors. But it does not afford a reason for accepting the reports from CSS that the applicants were minors, but rejecting those from Dr Michie to the same effect. As is clear from his reports, Dr Michie took a social and narrative history from the claimants. In each case he considered whether such history provided verifiable support for the stated date of birth. In the case of I, he concluded that it did not; whereas in the case of O he found that "*the social, schooling and narrative history provided by the client provides some verifiable support for the declared date of birth*." He then went on in each case to carry out a physical examination, and in particular a dental examination.

52. As is apparent from his reports, Dr Michie approached the assessment of age on a comprehensive basis, considering his physical findings, and in particular the results of his dental examination, in the context of the full history taken from the claimants. In the course of argument Ms Richards observed that when assessing the reliability of the social and narrative history given by the claimants, Dr Michie would not have had the information recorded by IND at the screening interview. But equally there is nothing in the evidence before me to indicate that such information was available to CSS in making their age assessment.

53. Both the CSS social workers and Dr Michie took account of the physical appearance and demeanour of the claimants, and of the social and narrative histories that they gave, in making their assessments. But Dr Michie's reports derived further authority from his extensive specialist expertise, and most importantly from the fact that unlike the social workers he was qualified to undertake dental examinations, giving an estimate of age "*accurate to within +/- two years for 95% of the population (*ie those up to 18 year of age)" (see Guidelines paragraph 5.6.3 at paragraph 40 above).

54. In those circumstances I can find no rational basis for preferring the assessments made by CSS to those made by Dr Michie. The answer may lie in administrative convenience, it being the policy of the Secretary of State to accept assessments made by Social Services without question (save in the limited circumstances referred to above) in order to avoid conflicting decisions. That is not an issue upon which it is necessary for me to make a finding for the purposes of this application. But I am satisfied that in the absence of any sound basis for rejecting Dr Michie's reports yet accepting the CSS assessments, the decisions to continue to detain the claimants following consideration of his reports was irrational.

55. It follows that in my judgment the detention of I from 22 January to 27 January and of O from 22 January to 28 January was unlawful.

MR JUSTICE OWEN: There will be judgment in the terms that I have handed down save, Mr Blake, with one -- let me just sort myself out. The last paragraph of my judgment was amended in the light of observations that you have helpfully made. But on reflection I am not sure that I have that right. I would like your help. As I understand it, looking again at the earlier parts of my judgment, although not at the papers, the decision in the case of I was made on 20 January, and the decision in the case of O was made on 22 January.

MR BLAKE: I think the position is this, my Lord. The written reports in both cases were served on 20 January. The letter responding to the service of those reports was sent on 22 January, and I think in both cases Mr Moore's decision note was dated the same date, 22 January.

MR JUSTICE OWEN: Certainly my intention had been -- I will hear what you both have to say -- was that the appropriate date was the point at which the decision was made.

MR BLAKE: In which case in both cases I think that would be 22 January, and I think that is what the judgment should be.

MISS RICHARDS: My Lord, that was going to be my submission this morning.

MR JUSTICE OWEN: In that case I am going to amend paragraph 55 to say "detention of I from 22 January to 27 January, and of O from 22 January to 28 January was unlawful".

MR BLAKE: My Lord, I am obliged. My Lord, can we then have -- I hope my Lord got a fax perhaps this morning of the claimants' proposed suggestions on relief because of matters I know that my learned friend has not been able to take instructions on just now. Can we therefore have the declaration that we seek, that the detention of the claimants between those two dates, as at paragraph 55, was unlawful.

MR JUSTICE OWEN: Forgive me just one moment. I have your -- yes, I am there.

MR BLAKE: If I can go to paragraph 2 of that note. The application for judicial review be allowed; declaration of the detention of the claimants between the relevant dates that have now been clarified was unlawful; the claim be transferred to the Queen's Bench division for an assessment of quantum of damages if the parties fail to agree on quantum; and costs -- we are publicly funded.

MISS RICHARDS: My Lord, there is no difficulty with any of those orders.

MR JUSTICE OWEN: Very well. Then, first, the application for judicial review is allowed. Secondly, there is a declaration that the detention of the claimants between the dates identified in paragraph 55 of my judgment was unlawful. Thirdly, that the claim be transferred to the Queen's Bench division for assessment of quantum of damages if the parties fail to agree on quantum. Fourthly, that the defendant pay the claimants' costs, to be assessed if not agreed. Finally and fifthly that there be detailed assessment of the claimants' publicly funded costs.

MISS RICHARDS: My Lord, the only other matter is the question of permission to appeal. It is not a matter which I have been able to take further instructions, and therefore I am going to ask your Lordship to deal with it and to protect the defendant's position in the event that the decision is taken to pursue the matter further. Your Lordship heard the arguments recently and has produced a judgment recently. I do not think it would assist my Lord if I rehearsed them again. But I ask for permission to be dealt with today by your Lordship for the reasons I have given.

MR JUSTICE OWEN: Thank you. You will have to seek your leave elsewhere. Thank you both very much indeed.