Case No: CO/6791/2010

Neutral Citation Number: [2011] EWHC 1559 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Sitting at:
Birmingham Civil Justice Centre
Priory Courts
33 Bull Street
Birmingham
B4 6DS

Date: Monday, 21st March 2011

Before:

HIS HONOUR JUDGE ROBERT OWEN QC

- -

Between:

The QUEEN on the Application of K

Claimant

- and -

BIRMINGHAM CITY COUNCIL

Defendant

- -

(DAR Transcript of
WordWave International Limited
A Merrill Communications Company
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400 Fax No: 020 7831 8838
Official Shorthand Writers to the Court)

- -

Mr De Mello and **Mr Mahmood** (instructed by the Immigration Advisory Service) appeared on behalf of the **Claimant**

Miss Etiebet and **Mr Hayre** (instructed by Birmingham City Council Legal Services) appeared on behalf of the **Defendant**.

- -

Judgment

JUDGE ROBERT OWEN QC:

1. This matter concerns the question whether the finding by the Immigration Judge in earlier proceedings on 4 March 2010 as to the claimant's age is binding on a subsequent decision maker concerned with the assessment of the claimant's age, such as the local authority, the defendant in these proceedings.

2. By order dated 30 July 2010 Foskett J directed that there should be a 'rolled-up' hearing of the claimant's application for judicial review of the decision of the defendant, Birmingham City Council relating to their assessment of the claimant's age, dated 29 April 2010.

3. Counsel for the claimant, Mr De Mello with Mr Mahmood, and counsel for the defendant, Miss Etiebet, informed me at the opening of this hearing that it was understood and agreed by all concerned at the hearing before Foskett J that this hearing would be used to determine solely the preliminary issue identified by them before the learned judge, namely the legal effect of the finding of fact as to the claimant's age made by the immigration judge in the First-tier Tribunal on the decision-making process of the defendant under section 20 of the Children Act 1989, and whether the defendant was legally bound to accept the immigration judge's finding that the claimant's date of birth was 15 May 1994 and not 25 January 1990.

4. Counsel were also agreed that in the event that I should determine that the defendant was not legally bound but that permission should be granted to challenge the decision complained of, which is said to be 29 April 2010, the decision to grant or refuse substantive relief could not proceed on this occasion and should be determined at a subsequent hearing as neither party is able today to deal with that second stage.

5. These proceedings were commenced by claim form issued on 9 July 2010 against the Secretary of State for the Home Department, who had on 27 April 2010 given notice of her refusal to accept the immigration judge's finding as to the claimant's age.

6. A hearing was set for directions on 14 July 2010, on which date the court gave permission to the claimant to join Birmingham City Council in relation to its decision to maintain reliance on its own age assessment rather than to accept or adopt the finding of the immigration judge.

7. On the evening prior to that hearing, and by a letter dated 13 July 2010, the Secretary of State gave notice that she did accept the immigration judge's finding as to the claimant's age and thus conceded the claim against her department.

8. Discretionary leave to remain was subsequently granted to the claimant by the Secretary of State which is due to expire on 15 November 2011. The outcome of these proceedings will have a material influence on the fate of the claimant and his fight to

remain in the United Kingdom at least until, on his case, he attains the age of 18 on 15 May 2012.

9. On 4 March 2010 the immigration judge, Mr A W Khan, dismissed the claimant's appeal against the decision to refuse to grant him asylum and the decision to remove him from the United Kingdom as an illegal entrant.

10. Each of the grounds then relied upon by the claimant, that is, asylum, humanitarian protection and human rights grounds, was rejected and dismissed by the immigration judge for the reasons given by him in writing. The immigration judge found that the claimant had been interviewed by United Kingdom immigration officers in France on 3 June 2008. On that occasion he was fingerprinted. The person then fingerprinted gave his name as Ali Ahmed and he gave his date of birth as 25 January 1990.

11. Following his illegal entry into the United Kingdom on 15 June 2008, the claimant was fingerprinted and interviewed on 22 January 2009. The two sets of fingerprints incontrovertibly matched. The claimant asserted that he was not Ali Ahmed, nor was he born on 25 January 1990. He claimed he was born on 15 May 1994. He denied that he had previously been fingerprinted in France or at all.

12. The immigration judge found that the claimant was an unreliable witness. He referred to him as a liar and that he had lied to him, the immigration judge, in the proceedings before him and had lied in relation to his asylum interview in January 2009. Indeed, the immigration judge rejected the entirety of the claimant's testimony save for one matter, that is, his asserted date of birth.

13. On that question the immigration judge preferred the evidence in the form of a report from Dr Birch dated 19 November 2008, which provided an age assessment of 14 to 16 years of age. The immigration judge preferred that report to the other report before him, namely from Oxfordshire County Council of 19 June 2008 and 8 August 2008 (the former assessed the claimant's age at 14 and a half years, and yet the latter at over 18).

14. The immigration judge also had before him a report from Birmingham City Council prepared by Mr Singh, dated 13 August 2009, which assessed the claimant's date of birth as that originally asserted, namely 25 January 1990.

15. The immigration judge was concerned that the Birmingham City Council report contained a reference to an unidentified dentist's report which the immigration judge considered had concluded that the dental evidence showed the claimant to have been over 18. It was of concern to the immigration judge that the author of the Birmingham City Council report had, he thought, relied on that unidentified report.

16. It was in those circumstances that the immigration judge held that he preferred the report of Dr Birch and thus concluded, as he would have to, that the claimant's asserted date of birth, whilst in France, of 25 January 1990, was not true.

17. On that analysis two matters stand out. First, the claimant was found to be wholly unreliable and generally lacking in credibility but the issue as to his claimed age was evidently treated as severable and apart from the rest of his evidence and the factors which gave rise to the finding that the claimant was not a reliable witness. Secondly, the evidential basis for the finding as to age was limited to Dr Birch's report, albeit set out against the two unsatisfactory reports from Oxford and Birmingham, as explained by the immigration judge.

18. Dr Birch's assessment proceeded without regard to the claimant's credibility or history. She proceeded on the basis of her findings on examination as appears from her report. The fact of the claimant's lack of credibility appears to have been ignored or overlooked by the immigration judge when considering age. Indeed, the learned immigration judge wholly relied, as he has said, on the report only of Dr Birch. Yet Dr Birch's report did not take into account the material factor of the claimant's reliability or credibility. The claimant's assertion as to age was assumed to be true and Dr Birch concluded in light of her own methodology that her conclusion was consistent with the claimant's assertion. It seems to me that in these circumstances a subsequent fact finder such as the local authority might at least arguably regard the earlier finding with doubt.

19. The defendant's original assessment is dated 13 August 2009 in which the available evidence on dental development was reported as having two sources:

20. First, Dr Birch's findings and comments at page 17, section D (paragraphs 12 to 15 of her report). This identified an average age assessment on that basis alone of 17.7 years allowing for a slight reduction to allow for Iranian youth data which would reduce it to 17.5 years. There is no explanation within the body of the report as to why that evidence was rejected and ultimately the much lower assessment was preferred.

21. Secondly, there is reference in the body of the report at that paragraph to the unidentified dentist from Luton, as appears in the report, in which it is recorded by Mr Singh that at paragraph 10.13:

> "...and four months before he was seen by Dr Birch, an unnamed dentist in Luton has apparently concluded that [K] was over 18. It is recognised that in the absence of a written explanation for this conclusion, it cannot be interrogated. Taking all of the above into account, I conclude that:
>
> (a) [K] has not given a fully credible account. Elements of his story may be accurate but given the clear inconsistencies in his given name, age, nationality and whereabouts on 3 June 2008, his account cannot be trusted and no part of it can be relied upon;

> (b) He has often presented as vulnerable, low in mood and lacking in confidence. However, this is not in itself a determiner of age, and could easily reflect a young adult;
>
> (c) He does not appear to have grown in the course of a year;
>
> (d) Information about his dental development is indicative of a young adult, rather than a youth in his mid-teens."

22. It was in those circumstances that the social workers, and in particular Mr Singh, concluded that the assessment of the claimant's age was in excess of 18 years of age.

23. Following the immigration judge's decision, the defendant contends that it undertook a further reassessment. This is apparently evidenced by an extract from the client case record for the period 26 April to 29 April 2010.

24. As the document itself suggests, this purported reassessment appears to be no more than a short account of a brief discussion undertaken between the claimant and Mr Singh in which, it is true, the findings of the immigration judge were discussed. In this note, under the heading "Office Visit", it is stated that:

> "In relation to the immigration judge's criticism of the use in the original report of the unidentified dentist's conclusion, we accept that there was no written proof of this and in our age assessment we made reference to it and did not treat this as the main basis of our conclusion. I ended the meeting by my saying that I had considered the AID determination but based on various factors, would continue to treat [K] as an adult. If [K] wishes to pursue the issue, he will need to follow this up with his legal representative."

Under the heading "Information Only, 26 April 2010, in relation to a consideration of the AIT determination, it is recorded:

> "It appears the judge has been critical of my age assessment on the basis that I have used the scenario of the dentist in Oxford, but my report only makes reference to the issue of the dentist in Oxford and my conclusion of [K]'s age is based on the analysis of information from other varied sources; for instance [K]'s emphatic denial that he had been fingerprinted in spite of the expert evidence provided by the UKB. In Calais, [K] stated he was born on 25 January 1990 and that he was an Iraqi citizen. [K] states that he was in

> Istanbul on 3 June 2008, when he was in Calais ... fingerprint evidence. Height has remained static over a year."

In my judgment that document does not appear to be an assessment which could fairly be described as a proper reassessment made pursuant to the statutory duty in question.

25. It was perhaps in those circumstances that the defendant determined to undertake a further, and proper, reassessment, as appears from the report dated 23 November 2010. In this report, it is stated that no account was taken of the unidentified dentist's conclusion to which I have referred.

26. According to the claimant's witness statement of 12 January 2011, he was unprepared for that reassessment and was unaccompanied. He wanted his representative in these proceedings, Miss Shah, to be present at any other assessment.

27. In light of Mr Singh's reassessment, the claimant's advisors have obtained two further age assessments to support his claim. First, by an independent social worker, Paul Levy, of 17 November 2010; secondly an addendum or updated report from Dr Birch dated 16 December 2010, each of which provide a contrary opinion to the assessment undertaken by Mr Singh.

28. It was in these circumstances that the claimant's case was presented on the basis that the defendants were bound to adopt or accept the immigration judge's finding as to age.

29. The claimant's case was presented by Mr De Mello in accordance with the amended grounds and the full skeleton argument prepared by him and Mr Mahmood which may be summarised as follows:

30. First, the defendant was bound to accept the immigration judge's finding which was tantamount to rendering the issue as to the claimant's age *res judicata*. Alternatively, relying on R (Bradley) v Secretary of State for Work and Pensions [2009] QB 114, that the defendant was bound in effect to accept that finding by the immigration judge in the absence of cogent reasons to the contrary, with the burden being upon the defendant to make good the reason for departing from the immigration judge's finding.

31. In the amended grounds the claimant's position is explained on the basis that in the absence of fraud or other sound or additional material evidence to the contrary, the defendant was bound to accept the immigration judge's finding as to age.

32. It was submitted that, in any event, the immigration judge's finding was 'sound and flawless' and the defendant could not complain since its own assessment of 13 August 2009 was in fact before the immigration judge. That is, the defendants' position, Mr De Mello submitted, was before the immigration judge.

33. Finally, the claimant contends that the findings of the defendant relied upon through Mr Singh's assessment are unfair and deficient in any event. It is submitted that since the claimant seeks a declaration that he is a minor this court should in such circumstances direct that there shall be a fact-finding hearing hereafter.

34. Underpinning the principal submissions of Mr De Mello was reliance upon the decision in Bradley. This was a substantial and complicated matter concerning the Parliamentary Commissioner for Administration, that is, the Ombudsman. The Secretary of State appealed against the quashing of his decision by the judge to reject the first finding of the Ombudsman, and the claimants appealed against the upholding of the Secretary of State's decision to reject the other two findings.

35. On those appeals it was held that there was no general rule that findings of fact made in the course of a statutory investigation could only be impugned on the grounds that they were irrational, that findings of maladministration were not binding on the relevant minister, and that where the minister had been the subject of a finding of maladministration, he was entitled to reject it in favour of his own view provided that his decision to do so was not irrational, having regard to the legislative intention underlying the relevant Act, and that those bodies for whose actions there was a minister capable of being called to account by Parliament were to be subject to investigation by the Commissioner.

36. As for the Secretary of State's appeal, that was dismissed and the claimant's appeal allowed in part, in that the Secretary of State's decision to reject the Commissioner's finding that the government information had been potentially misleading and amounted to maladministration had been irrational on the facts, and the judge had therefore been correct to quash it.

37. In the course of developing his submissions on the basis of Bradley, Mr De Mello referred to R v Warwickshire County Council ex parte Powergen [1997] 96 LGR 617 and in R v Secretary of State for the Home Department, ex parte Danaei [1998] INLR 124, which decisions were discussed and analysed in detail by the Court of Appeal in Bradley.

38. Suffice it to say that (at paragraph 65) of the Court of Appeal's judgment the court explained what the principal issue was in the Powergen case, that is, whether it was reasonable for a housing authority whose road safety objections had been fully heard and rejected on appeal, then quite inconsistently with the inspectors' independent factual judgment on the issue, nevertheless maintained his own original view and whether that approach could be said to be lawful. It was the unanimous view of the Court of Appeal that in those circumstances, there could only be one answer on the facts and that was in the negative:

> "The judge found support for his conclusion in the judgments of this Court in *R v Warwickshire County Council, ex parte Powergen Plc* [1997] EWCA Civ 2280;

(1997) 96 LGR 617 and in *R v Secretary of State for the Home Department, ex parte Danaei* [1997] EWCA Civ 2704. The issue in the *Powergen* case was whether it would be a proper exercise of discretion for the County Council, as local highway authority, to refuse to enter into an agreement with the applicant, Powergen Plc, under section 278 of the Highways Act 1980 on the ground that the proposed arrangements for access to the applicant's development would be detrimental to road safety; in circumstances where an appeal from the refusal of Warwick District Council, as local planning authority, to grant planning permission for the development had been allowed by an inspector following a local inquiry, at which the highway authority had given detailed expert evidence, on the ground that the proposed access works did not present a sufficient threat to safety to justify refusal of permission. This Court, upholding the decision of Mr Justice Forbes, decided that issue in favour of Powergen. Lord Justice Simon Brown (with whose judgment the other members of the Court, Lord Justice Otton and Lord Justice Mummery, agreed) said this (96 LGR 617, 624b-d):

> '. . . Although both the judgment below and the arguments before us focused principally upon the scheme of the legislation and whether the highway authority's approach to its s.278 discretion thwarted the policy and objects of the two Acts here in question - see, for example, *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 - I for my part prefer the broader *Wednesbury* analysis of the case. Indeed, so far from this appeal raising . . . 'a short point of statutory construction', I see it rather as raising this simple question: is it reasonable for a highway authority, whose road safety objections have been fully heard and rejected on appeal, then, quite inconsistently with the Inspector's independent factual judgment on the issue, nevertheless to maintain its own original view? To my mind there can be but one answer to that question: a categoric 'No'.'

Lord Justice Simon Brown emphasised (ibid, 624d-625b) that he had reached that conclusion not by reference to any general question regarding the proper legal relationship between planning authorities and highway authorities upon road safety issues but in the light of three basic considerations: (i) that the site access and associated

> highway works, together with the road safety problems which they raised, had been (a) central to the particular planning application, and (b) considered in full detail rather than left to be dealt with as reserved matters; (ii) that the planning permission had been granted following appeal to the Secretary of State and not merely by the local planning authority itself; and (iii) that there were no new facts or changed circumstances following the inspector's determination of the appeal – 'the highway authority's continued refusal was based upon the identical considerations that their witness had relied upon in seeking to sustain the planning objection before the Inspector…
>
> > '…the Inspector's conclusion on that issue, because of its independence and because of the process by which it is arrived at, necessarily becomes the only properly tenable view on the issue of road safety and thus is determinative of the public benefit.'"

39. The role of the inspector within the statutory framework, according to which the county council as the local highway authority was bound to act was such that it was plain that the local authority could not rationally, and without stated cogent reasons, ignore the specific finding of the inspector on the issue of road safety and in the teeth of that adhere to its own contrary view.

40. The statutory framework was such that each of the parties or protagonists however, had the right or the ability to present its case to such detail as it wished before the inspector and that when the housing authority came to carry out its statutory duty in light of those known facts, each party could properly be said to have been heard. In the present case it does not appear that the defendant could be said to have had the opportunity to be heard in the earlier proceedings.

41. At paragraph 67 of the Court of Appeal's judgment in Bradley, the court identified in summary form the issue in ex parte Danaei, which was whether in exercising the discretionary power to grant exceptional leave to enter or remain outside the immigration rules, the Secretary of State was bound to accept findings of fact made in the immigrant's favour by a special adjudicator on a related but unsuccessful asylum application.

42. At paragraph 68 in the Bradley judgment Simon Brown LJ (as he then was) observed that:

> "… it was common ground that 'the Secretary of State's decision was a separate and discrete decision to be taken by him alone'; that the Secretary of State's decision could only

be challenged on *Wednesbury* grounds; and that the Secretary of State was required to have regard to the adjudicator's findings of fact as a material consideration. He went on: 'Was he, however, in the circumstances of this case, then entitled to disagree with them? That is the critical question'. He answered that question in the negative:

> 'In the present case . . . the primary fact in question is whether or not the respondent was an adulterer. On an issue such as this it does not seem to me reasonable for the Secretary of State to disagree with the independent adjudicator who has heard all the evidence unless only:
>
> 1. the adjudicator's factual conclusion was itself demonstrably flawed, as irrational or for failing to have regard to material considerations or for having regard to immaterial ones - none of which is suggested here;
>
> 2. fresh material has since become available to the Secretary of State such as could have realistically have affected the adjudicator's finding - this too was a matter we considered in *Powergen*;
>
> 3. arguably, if the adjudicator has decided the appeal purely on the documents, or if, despite having heard oral evidence, his findings of fact owe nothing whatever to any assessment of the witnesses.'"

43. At paragraph 69 it was also observed that in that case Judge LJ (as he then was) added a short judgment as follows:

> "His judgment demonstrates the essential independence of the special adjudicator within the statutory scheme governing applications for asylum without undermining the ultimate responsibility of the Secretary of State for deciding whether to grant an asylum seeker exceptional leave to remain….If therefore the Secretary of State is to set aside or ignore a finding on a factual issue which has been considered and evaluated at an oral hearing by the special adjudicator he should explain why he has done so, and he should not do so unless the relevant factual conclusion could itself be impugned on *Wednesbury* principles, or has been reconsidered in the light of further evidence, or is of

> limited or negligible significance to the ultimate decision for which he is responsible."

44. Sir John Chadwick added:

> "It is pertinent, in the present context, to note the importance which Lord Justice Judge attached, in those observations, to the role of the special adjudicator within the statutory scheme governing applications for asylum."

45. At paragraph 70:

> "For my part, I think that the following principles can be derived from the judgments in *Powergen* and *Danaei*: (i) the decision maker whose decision is under challenge (in the former case, the local highway authority; in the latter, the Secretary of State) is entitled to exercise his own discretion as to whether he should regard himself as bound by a finding of fact made by an adjudicative tribunal (in the former case, the planning inspector; in the latter, the special adjudicator) in a related context; (ii) a decision to reject a finding of fact made by an adjudicative tribunal in a related context can be challenged on *Wednesbury* grounds; (iii) in particular, the challenge can be advanced on the basis that the decision to reject the finding of fact was irrational; (iv) in determining whether the decision to reject the finding of fact was irrational the court will have regard to the circumstances in which, and the statutory scheme within which, the finding of fact was made by the adjudicative tribunal; (v) in particular, the court will have regard to the nature of the fact found (e.g. that the immigrant was an adulterer), the basis on which the finding was made (e.g. on oral testimony tested by cross-examination, or purely on the documents), the form of the proceedings before the tribunal (e.g. adversarial and in public, or investigative with no opportunity for cross-examination), and the role of the tribunal within the statutory scheme."

Paragraph 71:

> "Properly understood, as it seems to me, the two cases provide no support for the proposition that, as a matter of law, it is not open to a body which has been the subject of a finding of maladministration by the Parliamentary Ombudsman to reject that finding; rather, the cases are

> authority for the proposition that it is open to such a body, acting rationally, to reject a finding of maladministration."

And a little later:

> "The true rule, as it seems to me, is that the party seeking to reject the findings must himself avoid irrationality: the focus of the court must be on his decision to reject, rather than on the decision of the fact finder."

46. I have recited those paragraphs at length since they formed the foundation or the main plank of Mr De Mello's submissions. For the reasons given below it is my judgment that neither the decisions nor the passages relied on by Mr De Mello support his principal submission that the defendant was bound to accept the immigration judge's finding as to age.

47. The defendant's position, set out in their skeleton argument and developed in submissions by Miss Etiebet is that at its highest, the finding of the immigration judge is merely one potentially relevant factor to be taken into account by the defendant whose duty was to undertake its own independent assessment. The defendant was not bound to follow the earlier finding by someone else, on different evidence or facts and determined in proceedings to which they were not a party. That said, it was conceded on behalf of the defendant by Miss Etiebet that the immigration judge's finding made subsequent to their original assessment constituted fresh evidence or a new factor which should at least be considered or into account by way of a reassessment.

48. However, Miss Etiebet submitted that there is no question but that the immigration judge's finding could not be treated as *res judicata* as Mr De Mello had submitted. In developing that submission Miss Etiebet relied on Ocampo v Secretary of State [2006] EWCA Civ 1276, Powell v Wiltshire [2005] QB 117 and Secretary of State v AF (No 2) [2008] 1 WLR 2528.

49. In the case of Ocampo, as paragraph 2 of the report shows, the issue in the appeal was whether the AIT erred in law in its consideration of the appellant and his daughter's credibility in their evidence before them in support of his unsuccessful appeal against refusal of asylum, having regard to the acceptance by a special adjudicator of the daughter's credibility in her similar evidence to him in her earlier successful appeal against refusal of asylum. There was substantial discussion as to the effect of the earlier finding in relation to a subsequent hearing in matters which appeared to be similar with related parties, and the question arose as to whether or not *res judicata* applied.

50. At paragraph 24 Auld LJ who gave the leading judgment stated:

> "In my view, it is at the very least doubtful whether the principles of *res judicata* or *issue estoppel* have any application, certainly in their full rigour, to appeals before immigration tribunals, any more than they do to successive claims for judicial review…The *Devaseelan guidelines*, in their application to fact finding by successive immigration tribunals, represent much the same approach, as Judge LJ, as he then was, giving the judgment of the Court in *Djebbar*, indicated in approving the *Devaseelan guidelines*:"

51. At paragraph 25, Auld LJ continued:

> "25. In my view, the *Devaseelan guidelines* are as relevant to cases like the present where the parties involved are not the same but there is a material overlap of evidence, as the Immigration Appeal Tribunal observed in *TK Georgia*, at paragraph 21 of their determination. Clearly, the guidance may need adaptation according to the nature of the new evidence, the circumstances in which it was given or not given in the earlier proceeding and its materiality to securing a just outcome in the second appeal along with consistency in the maintenance of firm immigration control. It should also be borne in mind, as Hooper LJ pointed out in the course of counsel's submissions, that admission of new evidence may, as a matter of fairness, operate for, as well as against, a claimant for asylum. In immigration matters, as in other areas of public law affecting individuals, public policy interests of firmness, consistency and due process may have to be tempered with considerations of fairness in particular circumstances.
>
> 26. Accordingly, in my view, the AIT rightly rejected any application in the circumstances of this case of the strict principles of *res judicata* or *issue estoppel* and, with them, the contention that they could only take account of, and rely upon, the new evidence if the dishonesty of the appellant had not been previously establishable […]
>
> 27. So, what is left, save to judge the matter as one of fairness and maintenance of proper immigration control, along the lines of *Devaseelan*? Mr O'Callaghan did not pray in aid fairness or justice as a reason for disregarding the new evidence. He cannot and does not challenge the AIT's finding that the appellant lied in his account of what caused

> him to seek asylum here. His acceptance that, if the appellant cannot succeed on his *res judicata/status* arguments, he cannot overcome the materiality of the inconsistencies thrown up by the new evidence, is an inescapable acknowledgement that justice or fairness would not be served by allowing this appeal."

52. In Powell v Wiltshire & Others the court was concerned with the question as to whether a judgment *in personam* raised an estoppel only against the parties to proceedings in which it was given and their privies. It was held that it did.

53. Holman J dealt with the matter at paragraph 49 in these terms:

> "Where, however, the actual party sought to be bound was not himself a party to the previous litigation, the principle of finality may conflict with another important principle that 'Any contention which leads to the conclusion that a person is liable to be condemned unheard is plainly open to the gravest suspicions. A defendant ought to be able to put his own defence in his own way and to call his own evidence.' (Megarry V-C at page 516 B). Accordingly 'He ought not to be concluded [sic., but perhaps should read 'precluded'] by the failure of the defence and evidence adduced by another defendant in other proceedings unless his standing in those other proceedings justifies the conclusion that a decision against the defendant in them ought fairly and truly to be said to be in substance a decision against him.'"

54. In this respect Miss Etiebet submitted that in the present case, of course, the parties were different to those that were before the immigration judge and that one could not in the interests of fairness properly conclude that the defendant had had the opportunity fairly to put its position before the immigration judge and that such opportunity could not fairly be said to be exercised in circumstances where merely a report without qualification or representations was placed before the earlier fact-finder.

55. Mr De Mello submitted that this was a case where the defendant had had that opportunity and that, in his submission, the interests of justice and fairness fell in favour of the claimant consistent with the need to ensure finality in litigation and harmonisation as between various public bodies, and that in those circumstances the defendant should, in this case, be found to be bound by that finding.

56. Miss Etiebet sought to make good her submission, by analogy, in relation to circumstances involving a wholly different statutory framework, that is, under s3 of the Prevention of Terrorism Act 2005. Ms Etiebet cited the decision of Secretary of State v AF (No 2) [2008] EWCA Civ 117. That was a case which concerned subsequent control orders made in relation to the same controlee under s.3(2) and s.3(10) of the

Act. On a directions hearing prior to a hearing under s.3(10) to determine whether the third control order in that case was flawed, a different judge declared that findings made by a court on issues arising on a s.3(10) hearing were in principle binding between the parties, in relation to matters at that date of that hearing, on a subsequent hearing under the same subsection, subject to any relevant differences in the evidence at each hearing.

57. On appeal by AF it was held, allowing the appeal in part, that in conducting a hearing under s.3(10) a judge had to consider whether he was satisfied at the date of the hearing that the facts relied on by the Secretary of State amounted to reasonable grounds for suspecting that the controlee was or had been involved in terrorism-related activity and to give scrutiny to the necessity for each of the obligations imposed in the order; that findings made about those matters at an earlier hearing under s.3(10) in relation to a previous control order did not bind the judge conducting a subsequent hearing under s.3(10), nor were they the starting point for his consideration, to be departed from only if the circumstances were shown to be significantly different, but that the judge was to have such regard to those findings as a factor to be taken into account as was appropriate in all the circumstances of the case.

58. Sir Anthony Clarke MR said:

> "37. I would not cast doubt on the general proposition that in public law cases, where there has been a previous decision in proceedings between the same parties, and the same question arises in subsequent proceedings the starting point is likely to be the decision in the first proceedings. However, all will depend upon the circumstances. The present case does seem to me to be a very different kind of case from that discussed in the cases upon which the SSHD relied before the judge. Indeed a reading of what are known as the *Devaseelan* guidelines shows that they are not directly applicable, unsurprisingly since they are dealing with very different problems.
>
> 38. The guidelines are not unnaturally tailored to the particular problems involved in the case with which *Devaseelan* was concerned, namely where (under the legislation then in force) adjudicators of human rights challenges were inevitably reconsidering decisions of previous adjudicators on asylum claims arising out of the same facts.
>
> 39. In *Devaseelan* the IAT gave guidance as to the weight to be attached to the findings of the adjudicator who had rejected the asylum appeal. The IAT said, amongst other things, that the first adjudicator's determination 'should always be the starting point'. […]"

42. The distinction between the *Devaseelan* kind of case and this includes the fact that in asylum cases the appellant knows the case against him and very frequently gives evidence. His credibility is at the centre of the case both in respect of asylum and human rights. That is to be contrasted with the position of the controlee. Although his credibility may in one sense be in issue, he often knows little and sometimes (at any rate thus far) nothing about the case against him and (as in AF's case before Ouseley J) does not give evidence. Neither he nor his counsel is present during the critical part of the hearing, which is closed, and, once the closed material has been disclosed to the special advocate, neither he nor his counsel can discuss the case with the special advocate. Although I recognise that at a second hearing in respect of a new control order the judge and the special advocate will have a transcript of the evidence and submissions at the first hearing, neither the controlee nor his counsel will be able to see it. In these circumstances, a judge should in my opinion be very reluctant to treat the finding of the judge conducting the hearing under an earlier order as in practice determinative, save perhaps in the kind of case to which I referred earlier where the two hearings are for some reason very close together.

43. In any event the authorities to which I have referred show that the *Devaseelan* guidelines are themselves very flexible. This can be seen, not only from the guidelines themselves, but also from the later cases…

45. It is important to note that, as in the case of the *Devaseelan* guidelines, the principle relied upon in this case is not a principle of *res judicata* or issue estoppel. That being so, I do not think that it is appropriate to speak of findings of a judge at a hearing under an earlier order as being "binding". That seems to me to be the language of issue estoppel. It also raises the question what is to be binding. Is it every conclusion of fact and, if not, what is it? It was no doubt in these circumstances that the SSHD conceded that it was wrong to treat the earlier findings as "binding". If they are not "binding" then how should they be taken into account?

46. Carnwath LJ considered this problem in [54] of *AA (Somalia) v SSHD*, in which he and Ward LJ comprised the majority with Hooper LJ dissenting. At [54] Carnwath LJ considered the status of the first decision in circumstances where there was no issue estoppel or *res judicata*. He said:

> 'As Hooper LJ has noted, this passage is prefaced by a statement that the first determination is not "binding" on the second Adjudicator. However, I understand this to be saying no more than that it is not binding in the technical sense of issue estoppel or *res judicata*. The whole purpose of the guidelines is to indicate the circumstances in which it is appropriate to follow the first decision rather than allow the issue to be relitigated.'"

48. Finally, in paragraph 57 [that is in AA (Somalia)] Carnwath LJ stressed, in the light of *LD (Algeria)* that the guidelines were a proper exercise of the IAT's role as a specialist body, in order to secure consistency, while respecting the "fundamental obligation" of each adjudicator to decide each case on its own merits. Carnwath LJ also stressed the view stated in [40] of *LD (Algeria)* that the guidelines must be applied flexibly.

49. I have already expressed my reasons for concluding that the *Devaseelan* guidelines cannot simply be transferred wholesale to the different context of a hearing under section 3(10) of the PTA. I have also expressed my view that the findings in an earlier decision of a judge under section 3(10) should be taken into account and that there may be circumstances in which a judge might conclude that justice did not require the reopening of conclusions reached earlier. However, the judge conducting a hearing under section 3(10) does not make findings of fact in the way that an adjudicator does (or did) on an asylum claim or a human rights claim. I do not think that one can simply say that there has been no change of circumstances and that a judge conducting a section 3(10) in respect of a second control order can properly be regarded as bound by such conclusions as were reached at an earlier hearing. The principle is simply that he must have such regard to those conclusions as is appropriate in the circumstances…

> 51. It is the duty of the judge conducting the second section 3(10) hearing to consider the questions identified above as at the date of the hearing. In these circumstances I do not think that it is appropriate to treat an earlier decision on a different control order as a starting point. For the reasons I have given the judge should take it into account in the way suggested in [30-33] above."

59. Finally, Miss Etiebet submitted that the issue before this court had recently been considered by Hickinbottom J in R (PM) v Hertfordshire County Council [2010] EWHC 2056 (Admin) on 4 August 2010.

60. Miss Etiebet submits that this decision is directly in point. Mr De Mello submitted that the decision is distinguishable on its facts and that in those circumstances it does not assist the defendant.

61. The points of difference are fully set out in his skeleton argument and it is unnecessary for me for the purposes of this judgment to recite in full those grounds of distinction which Mr De Mello relied upon in his oral submissions.

62. Moreover, it is unnecessary for me to cite extensively from this decision; suffice to say that at paragraph 1 Hickinbottom J introduced the case as follows:

> "1. On 14 April 2010, following a finding of the First-tier Tribunal (Immigration & Asylum Chamber) ("the FTT") in the course of an asylum appeal that the Defendant was over 18 years old, the Defendant local authority ("the Council") withdrew the accommodation and other support it had made available to the Claimant, PM, as a child, since November 2008. In this claim, with the permission of Michael Supperstone QC, sitting then as a Deputy High Court Judge, the Claimant challenges that decision.
>
> 2. The claim raises the important issue of how local authorities should properly address an age finding of the FTT (or its predecessor, the Asylum & Immigration Tribunal, "the AIT"), and in particular whether authorities are bound by such findings."

In this case, the First-tier Tribunal found that the claimant was over 18 years of age. The local authority simply adopted that finding and contended in seeking to justify its decision, which was subject to challenge in judicial review proceedings, that the immigration judge's decision was indeed binding in law on them.

63. The claimant's claim for judicial review was based on the fact that in (simply) adopting that finding the local authority failed to undertake a proper and reasoned reassessment, which they were bound to do pursuant to the discharge of their duty under s.20 of the Act. To that extent, the issues which arise are broadly similar.

64. The local authority argued that the immigration judge's finding was a judgment *in rem*. They argued that the immigration judge's finding on the dental evidence was on the facts of that case significant, and justified the date of birth contended for.

65. It is unnecessary for me to deal with the issues of fact which arose in light of the information presented to the learned judge or indeed the lengthy discussion which was necessitated by reason of the parties' submissions concerning the three principal grounds of challenge which are identified at paragraphs 31 and 32 (and in particular on the first ground, whether the determination of the First-tier Tribunal is a judgment *in rem*, and as such binding on the world at large, which the local authority contended).

66. At paragraph 83 Hickingbottom J continued as follows:

> "83. However, with respect to him, I think that Mr Buttler's submission was incorrectly focused. The *finding* of the FTT is not, in itself, of any evidential weight or value to the Council, who must exercise their own judgment in assessing the Claimant's age for the purposes of their section 20 duty. Nevertheless, in any reassessment of age they now make, the previous proceedings before the tribunal will be materially relevant in two ways.
>
> (i) First, evidence as to age may have been put before the tribunal that has not previously been before the Council. The Council are, of course, able to take any such new evidence into account in considering their own assessment.
>
> (ii) Second, the Council will have, not just the finding of the tribunal, but the judge's reasoning and the process by which he came to the conclusion that the Claimant was over 18 years old, which might assist their own assessment of the Claimant's age (although, of course, in considering even that, the Council will have to bear in mind the differences between the evidence available to the judge and that available to them to which I have referred). In my view, that is what, in a planning context, Mann LJ was getting at in North Wiltshire. For that reason, I do not find any inconsistency between the evidential principle of Hollington, and the public law principle illustrated by North Wiltshire: the subsequent public decision-maker must

> respect, not the *finding* made by an earlier decision-maker *per se*, but the earlier decision-making *process*…
>
> …88. For the reasons I have given in the course of this judgment, I do not consider that a local authority charged with obligations to children under sections 17 and 20 of the 1989 Act is bound by a simple finding of fact by the FTT as to the age of an applicant for support, that finding not being a judgment *in rem* or otherwise binding in law on the local authority, or on other strangers to the asylum and immigration appeal. After such a finding has been made, in an appropriate case, it is for the authority to reassess the age of the section 20 applicant. In doing so, they must take into account any new evidence (including evidence before the tribunal that was not previously been before them), and give due respect to the basis and reasoning of tribunal's finding, whilst taking account of the fact that they may have different evidence available to them.
>
> 89. In this case, the Council failed properly or lawfully to make that reassessment after the 1 April 2010 determination of the FTT, before revoking their own age assessment and replacing it with another. In that failure, in my judgment, they acted unlawfully."

67. Miss Etiebet submitted that the approach of Hickingbottom J is the correct approach which should be applied in the present case. She further submitted that "the defendant was ahead of the game" in that before publication of the judgment in PM the defendant had already determined to undertake a reassessment and that they had done so as appears from the case extract document to which I have referred and which bears the dates 26 April and 29 April 2010.

68. I enquired whether that document was presented to the court as the reassessment in light of the immigration judge's finding and I was informed that it was. Moreover, the defendant accepted before this court that it was duty bound in the proper discharge of its duty to undertake such a reassessment.

69. I am not so sure, or satisfied, that the mere record of a brief discussion between the claimant and Mr Singh, albeit in the context of the immigration judge's decision, could correctly be described as a reassessment under the Act. It certainly did not follow the form evidently taken subsequently by Mr Singh and his colleague on 23 November 2010, which has been now described, and is relied upon as the defendant's formal reassessment.

70. I have set out I fear perhaps too extensively the judicial guidance available in the decisions referred to above. In light of that guidance and my understanding of the facts under scrutiny I reach the following conclusion on the issue before me.

71. I am satisfied that the defendant is not, as a matter of law, or on the facts of this case, bound to accept the immigration judge's finding on age. Different statutory frameworks are and were in play; different duties applied (albeit the definition of a minor is not materially different); in particular, and different parties were involved before the immigration judge and at this hearing. It cannot be right that the defendant, who is bound by statute to undertake their own assessment conscientiously and in accordance with well-understood guidelines, could be expected to abdicate, as it were, that responsibility by simply adopting or "rubber-stamping" the decision of the immigration judge. That was the approach in fact evidently undertaken by the defendant in PM and was clearly an inappropriate or unlawful approach.

72. Furthermore, there are in this case different parties to those before the immigration judge. The defendant, Birmingham City Council, were unable to make appropriate representations to the immigration judge which would clearly have been made had they been afforded the opportunity to do so. The points of concern or criticism of their report could and probably would have been addressed as might well have been the deficiencies in the approach or report of Dr Birch. It is clear that at the very least the defendant could and would have drawn to the immigration judge's attention the factors relied upon in these proceedings which would justify or at least support and deal with criticisms of its first report, which had been identified by the immigration judge.

73. That is a material point of distinction between the cases from which Mr De Mello sought assistance and the present case. In all of those cases, the material witnesses and parties were either before the court or had the ability to be before the court, and the factual matrix was very much the same and largely overlapped. Whilst it is true in this case the question "What is the claimant's age?" overlaps with the question posed before the immigration judge there is lacking, in my judgment, the necessary sufficiency of overlap in the factual matrix and evidence which could in all fairness justify the imposition of the immigration judge's finding as a matter of law on the defendant. Conversely, there is no unfairness or prejudice to the claimant in him being subjected, in the proper manner, to an age assessment independently carried out by the defendant.

74. I am equally satisfied in these circumstances that it could not properly be argued that the starting point for the defendant under the Act must be the end point reached by the immigration judge.

75. Moreover, the immigration judge's approach and conclusion is open to reasonable criticism in light of the apparent exclusion from the age issue the whole question concerning the claimant's lack of credibility to which I have already referred.

76. The factor which evidently persuaded the immigration judge to come to his conclusion as to age was the report of Dr Birch. Dr Birch's report expressly proceeds on the basis

of ignoring (or not taking into account) the claimant's assertions as to age and indeed his reasons which could then professionally and objectively be assessed. On the contrary, it is at least arguable that the report shows that Dr Birch set those matters to one side and conducted her own assessment by reference to the matters identified within her report.

77. It is well recognised, and certainly by both sides in this case before me, as I understood Mr De Mello's submissions, that the claimant's credibility is highly material, if not fundamental, to the fair and proper assessment of his age. Yet that clear question mark does not appear, arguably at the very least, to have been given any appropriate weight by the immigration judge who appears to have approached the issue of age as being a separate and unrelated (to questions concerning credibility or reliability) issue.

78. It is in those circumstances that it could not be said, in my judgment, that the immigration judge's finding in any event is plainly 'sound and flawless' as submitted by Mr De Mello. At the very least it does require the defendant, albeit properly, to reassess the matter for their own statutory purposes. In particular the defendant, as it accepts, was bound to have regard not simply to the finding of the immigration judge but also to his reasoning. That inevitably required the defendant to consider not simply what the claimant had to say about the immigration judge's findings as to his credibility and, for example, if not in particular, the positive identification of him in France by way of fingerprinting, but also to review the analysis and conclusion of Dr Birch which was shown to be the principal basis for the immigration judge's finding.

79. The true question which arises in these proceedings in my judgment is whether, in light of the further reassessment relied upon by the defendant, it is arguable that the court could come to a different conclusion. In this respect, the correct approach is identified by the Court of Appeal in R (FZ) v London Borough of Croydon [2011] EWCA Civ 59.

80. This decision specifically concerns the difficulties involved in age assessments. At paragraph 3, a summary of the importance of the decision of Stanley Burnton J (as he then was) in R (B) v Merton LBC [2003] EWHC 1689 (Admin) is given, which shows that the assessment by a local authority does not require anything approaching a mini-trial or judicialisation of that process and that it can, and as is well known, very often is, determined informally by experienced social workers provided that recognised minimum standards of enquiry and fairness are maintained.

81. It is recognised, as Mr De Mello accepted, that not only can age not be determined solely from appearance but that the decision maker may well have to assess the applicant's credibility and it is the decision maker's assessment which counts. It is necessary therefore carefully to scrutinise the manner in which that decision maker -- in this case the defendant through Mr Singh -- came to his conclusion in the reassessment of April 2010 which Ms Etiebet submitted showed that the defendant was 'ahead of the game'.

82. In that respect it is necessary to go to the basis upon which this claim is brought against this defendant, which concerns the adequacy or lawfulness of the decision to maintain the assessment of April 2010. As I understood Mr De Mello he conceded that subsequent information acquired by the local authority such as the further assessment of November 2010 could now be properly taken into account in determining that question.

83. The question that arises therefore is whether or not there is a realistic prospect, or whether it is arguable, that the court on review could reach the conclusion that the claimant was of an age younger than that asserted by the defendant (ie under 18).

84. In the case of FZ v London Borough of Croydon May LJ, President of the Queen's Bench Division, said at paragraph 5 as follows:

> "A judicial review claim challenging a local authority's assessment of age may thus be on various grounds. Some of them may be orthodox judicial review grounds. But the core challenge is likely in most cases to be a challenge to the age which the local authority assessed the claimant to be. Thus most of these cases are now likely to require the court to receive evidence to make its factual determination. It is therefore understandable that Mr Hadden, for the respondent local authority in the present appeal, submitted that orthodox judicial review challenges are likely to be subsumed in the court's factual determination of the claimant's age. If the claimant succeeds on his factual case, the orthodox judicial review challenges fall away as unnecessary.
>
> 6. Claims for judicial review require the court's permission to bring the claim. If the claim challenges the local authority's assessment of age as a fact, the court has to apply an appropriate test in deciding whether to give permission. The parties presently before the court agree that the claimant is not entitled to permission simply because he asserts that the local authority's assessment was wrong. It is evident that the Supreme Court did not contemplate that permission would be given in every case irrespective of any consideration of the merits. In one sense, the parties to the present appeal agree what that test should be. They agree that it is that formulated by Holman J in *R (F) v Lewisham London Borough Council* [2010] 2 FCR 292; [2009] EWHC 3542 (Admin) to the effect that the test is whether there is a realistic prospect or arguable case that the court would reach

> a conclusion that the claimant was of a younger age than that assessed by the local authority."

And at paragraph 9:

> "There is an analogy between the court withdrawing a factual case or matter from the jury in defamation proceedings and the court refusing permission to bring judicial review proceedings upon a factual issue as to the claimant's age. We consider that at the permission stage in an age assessment case the court should ask whether the material before the court raises a factual case which, taken at its highest, could not properly succeed in a contested factual hearing. If so, permission should be refused. If not, permission should normally be granted, subject to other discretionary factors, such as delay. We decline to attach a quantitative adjective to the threshold which needs to be achieved here for permission to be given."

85. The court then went on to consider the particular facts of that case and allowed the claimant's appeal. It was noted that as part of the Merton-compliant age assessment process an applicant must be given the opportunity to address matters that have led to a view contrary to his assertion (that is, so that he can explain himself in his own way if he can). Alternatively, if that was not done, the local authority must still show that the deficiency complained of made no difference. Thus (at paragraph 21):

> "In our judgment, it is axiomatic that an applicant should be given a fair and proper opportunity, at a stage when a possible adverse decision is no more than provisional, to deal with important points adverse to his age case which may weigh against him."

86. The court emphasised the need that, in such cases, the applicant should have the opportunity to have an appropriate adult present for that assessment and reasons were given why, as a matter of good practice and fairness, that should take place.

87. That was one matter which caused the Court of Appeal in that case to overturn the decision at first instance that fairness had been achieved by the local authority's age assessment. Thus at paragraph 29 the court concluded in these terms:

> "In our judgment, this is a case where permission to proceed to a factual hearing on evidence should be granted. One factor contributing to that conclusion is that there were two procedural lapses. However, our main reason is that we do not consider that the appellant's factual case taken at its

> highest could not properly succeed in a contested factual hearing. The appellant is recorded as giving a reasonably consistent factual account, and the initial apparent inconsistency between his claimed age and his claimed date of birth was capable of being explained. There were no glaring inconsistencies in his account, nor clear analytical reasons why his account was unbelievable."

88. So far as the disposal of that appeal was concerned, the court determined, for reasons which it gave at paragraphs 31 and 32, that to avoid a draw on limited resources of the Administrative Court, in appropriate cases such a fact-sensitive issue, which might ultimately determine the proceedings in any event, might properly be transferred to the Upper Tribunal.

89. It was noted that any such transfer could not be made if the claim in question called into question any decision made under the Immigration Acts or the British Nationality Act 1981, and it was noted, as appears to be the same in this case, that that was not such a case and, without more, could be suitable for transfer.

90. The question that arises is whether, in all the circumstances, having regard to the material before this court, and taken at its highest, the court would conclude that the claimant's case could not properly succeed at a contested factual hearing.

91. The Court of Appeal have added some additional guidance to the test formulated by Holman J (see above), namely, is there a realistic prospect or is it (reasonably) arguable that the court would reach a conclusion that the claimant was of a younger age than that assessed by the local authority? The question posed was whether or not the claimant's case appeared to have an air of unreality about it and, if so, should not be granted any further opportunity to be tested before a court. That is, only in those cases where there appeared to be a lack of a realistic prospect of success should the court deprive a claimant of the opportunity to present his case before a fact finding tribunal or court.

92. I am satisfied that permission should be granted to the claimant to proceed and to challenge the lawfulness of the defendant's decision as to age, following its alleged reassessment after the immigration judge's decision. My reason is that looking at the record or the extract of record which is now relied upon as the first reassessment of April 2010 such record (arguably if not plainly) fails to demonstrate the necessary and minimum degree of soundness in its approach, methodology or conclusion. It certainly does not appear to compare with the subsequent reassessment of November 2010 upon which the defendant now relies. That apparent difference is a matter which, doubtless, would be subject to exploration and argument on behalf of the claimant at the substantive hearing.

93. That is not to suggest that at the substantive hearing sight will be lost of issues affecting the claimant's credibility. His credibility is not a neutral factor.

94. It could not be said in my judgment looking at Mr Singh's report, that the approach of the defendant to the significance of the claimant's credibility was overstated but the question will remain as to whether or not the decision to maintain the original assessment, assuming that it is shown to be free of material defect was open to the properly informed and reasonable assessor.

95. Given the circumstances which have arisen, it is surprising to say the least that the claimant has claimed or has been permitted to claim EMA. Mr De Mello submitted that in truth it is merely another example of the claimant's unreliability and untrustworthiness and that it would have no material effect on the final determination. It is not a matter for this court to determine and I make no comment on it, save to reiterate that in my judgment the claimant's credibility is not a neutral factor and it is plain that the relevant application form and all related documents must be produced by the claimant or the relevant body without further delay to these proceedings.

96. As for the evidence which would be necessary to determine the short though critical issue of fact, it is apparent in my judgment that the principal source of evidence will be the claimant and, in particular, Mr Singh. It would not appear to be necessary for the reasonable resolution of the real issues (within the meaning of CPR 35.1 or otherwise) for either Mr Levy to attend to give evidence or, indeed, Dr Birch. The assessment which will count and which will be the subject of focus by those acting on behalf of the claimant will of course be Mr Singh's assessment(s). The information contained within those other reports, assuming they are given weight by either side at the final hearing might of course provide the basis for testing Mr Singh's approach and evidence generally. It is difficult to see how the attendance of other experts could be justified.

97. It is in those circumstances that, subject to hearing further from counsel, I would estimate the time required for the final determination of this issue of fact and the decision as to relief or not to be granted in these proceedings should not exceed one day.

98. I have given consideration to whether or not the matter should be transferred to the Upper Tribunal and I am alive to the need to spare the resources of the Administrative Court wherever possible. I should be inclined to the view that in light of the history the matter should continue before this court though I should wish to hear counsel before considering an order to that effect.

MR MAHMOOD: My Lord, thank you very much for that judgment. My Lord, just dealing please with some consequential directions. First of all, I don't think there will be any disagreement about this, that the interim orders which apply, ie that the claimant continues to be recognised as a child and thereby entitled to s.17 and s.20 Children Act entitlements, should continue. I don't imagine that there will be any.

JUDGE: On balance, I think that is right, Mr Mahmood. The previous order will continue therefore.

MR MAHMOOD: Thank you, I am grateful.

JUDGE: Which still allows 48 hours' notice if there is a material change in circumstances.

MR MAHMOOD: Certainly. My Lord, secondly, insofar as the principal issue is concerned, that is one of law – and I mean this with the greatest respect – it is one of wider public importance and we invite my Lord to consider whether that should be something that should be considered further by the Court of Appeal, ie I invite my Lord to grant permission to appeal in respect of it.

I would only this, in addition to the submissions which were made: the consequence of my Lord's decision is that the discretionary leave which has been granted thereby can be taken away by the Secretary of State, should the Secretary of State so be minded. It has relevance to other cases -- I understand there are other cases which, as it were, are in the pipeline as well. It is of some importance. My Lord has referred to the PM case, which was different in the sense that that was an argument from a local authority rather than from a claimant, but I suspect that the issue will not be one that goes away, and I invite my Lord to consider that permission to appeal to the Court of Appeal should be granted.

JUDGE: Thank you, Mr Mahmood. I refuse permission. I acknowledge the arguments you raise but I am unable to state, in all conscience, that the question, as a matter of law, "Is a local authority exercising its duties under s.17 to 20 bound to adopt or follow a finding of fact made by an immigration judge?", in the circumstances of this case, has any realistic prospect of success, for the reasons I have given. I have had to give this judgment because of that issue raised. Had the issue not been formulated or presented to me as a preliminary issue, as it were, I could have simply gone on to state shortly "Permission granted".

MR MAHMOOD: Yes, my Lord.

JUDGE: But I am not able to do so nor can I see any compelling reason to grant permission. If there is one, those best placed to identify it I am quite sure would be the Court of Appeal rather than me.

MR MAHMOOD: So be it, my Lord.

(discussion as to consequential directions)