CO/1939/2009

Neutral Citation Number: [2009] EWHC 2357 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 18 September 2009

B e f o r e:

MR JUSTICE BLAKE

- - - - - - - - - - - - - - -

Between:
THE QUEEN ON THE APPLICATION OF NA

Claimant

v

LONDON BOROUGH OF CROYDON

Defendant

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Mr C Buttler (instructed by Steel and Shamash Solicitors) appeared on behalf of the **Claimant**

Mr B McGuire (instructed by London Borough of Croydon) appeared on behalf of the **Defendant**

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J U D G M E N T

MR JUSTICE BLAKE:

Introduction

1. This is an application for judicial review of decisions of the defendant, the London Borough of Croydon, dated 12 December 2008 and 15 June 2009. Both decisions concluded that the claimant was not the age he claimed to be, which was 15 with a date of birth in November 1993, but rather he was 17 and was given an assigned date of birth of November 1991.

2. The claimant is an Afghan national who arrived in this country as an unaccompanied minor seeking asylum. He had with him an identity document that will be further considered in this judgment. It appears that the original of the document was provided to the Home Office and its whereabouts now are uncertain. The Home Office referred him to the defendant Council for assessment and support as he appeared to be older than 15, although it was accepted that he was under the age of 18.

The Ist December assessment

3. On referral the claimant presented the defendant with a good photocopy of the original document without an English translation. On 1 December 2008, he was interviewed by two social workers, Dorianne Sultana and Lurine Henry, who acted under the supervision of their manager, Albertha Golding, who may have played some superficial part in the process on that day. All are social workers and, by reason of their employment with the London Borough of Croydon, the court will assume that they are experienced in age assessment and have substantial experience. It is a matter of judicial knowledge that the borough contains the Home Office Asylum Reception Unit, and it conducts large numbers of age assessments year in year out.

4. At the conclusion of that interview the Management Decision Sheet recorded the following:

> "In view of the uncertainty decision delayed until 9/12/08 so document can be translated to assist final decision. He is accepted as a minor/under 18. Dorianne has agreed to type the age assessment."

The action agreed was:

> "age assessment decision deferred until the ID document sent to translating."

The Identity Document

5. On 9 December the identity document was translated into English. That translation reveals that it is stated to be a document of value dated 16/2/1386 that the court has been informed is the Afghan Islamic calendar date corresponding to 6 May 2007 in the Gregorian calendar used in Europe. It is apparently signed in three places by the responsible clerk, the Chairman, and the owner of the document, and bears a

fingerprint of someone. It is stated to have been issued by the Islamic Republic of Afghanistan Home Office Registration Ministry in the province of language Nangarhar and has a reference number. Under the heading "Place of birth and age" the translation of the Afghan reads as follows:

> "Our documents show that he was 9 years old in 1382 (2003)."

The translator has identified the Islamic Afghan year 13/82 as 2003 in the Gregorian calendar. Another section of the document has the entry:

> "Book (mentions an alphabet letter in Pashto) 1382
>
> Page number 11 register book 53."

6. There is a photograph of the applicant attached to the document in a relevant section provided, and the Afghan original discloses an official looking stamp across the photograph bearing words that have not been translated. I understand from counsel that the photograph shows the claimant at a younger age than the age he was when he was examined by the social workers in December 2008, but the age that he appears to be in the photograph is a matter in dispute in these proceedings, albeit that the best information that the assessors have is a photocopy of a passport sized photograph attached to the document.

7. Taken at its face value, therefore, the document states that it was issued in May 2007, which is the time when the claimant states he was 13 and a half. The document then refers back to documents held by the Issuing Authority in 2003 that apparently show that the claimant was nine years old at that time, which corresponds with the age he claims to be then. The document was thus of material assistance to the claimant indirectly supporting the age he claimed to be.

The 12th December decision

8. On 12 December 2008, having received the translation, the social workers made their assessment. They concluded that the claimant was 17-years of age. They did not re-interview him on that date, but told him of their conclusions and served on him a document in English, which essentially simply says he is assessed to be a young person aged 17. He was not served on that date with the complete age assessment form, to which further reference will be made.

9. In February 2009 the claimant instructed solicitors, who are experienced in age-dispute cases, who sought disclosure of the material documents from the London Borough of Croydon and initiated judicial proceedings. On 10 March 2009, the age assessment form of some ten pages was provided along with other information. The age assessment was a completed pro forma of a kind that is familiar to local authorities and lawyers who have been conducting in the context of age assessment ever since the judgment of Stanley Burnton J, as he then was, in the case of R (B) v the London Borough of Merton [2003] 4 All ER 280, [2003] EWHC 1689 (Admin), the Merton case.

The December age assessment form

10. It is to be noted that the form has guidance notes in boxes on the margin. The assessment takes an hour and a half, or more, to complete and is intended to be a holistic assessment of various narrative histories on different topics of the child or claimed child's life, and has a section where the various enquiries and observations are put together.

11. In terms of the information that the claimant provided as to his past social, educational and medical history, the core information may be summarised as follows: he stated his father had disappeared in about June 2008. There had been previous threats made to his family, and on one occasion the claimant himself was threatened and had his arm broken. He first said that this happened about three years ago (that would be roughly 2005) and later he said that it happened 18 months ago when he was around 13; that would have been the summer of 2007. He was then told to provide specific information, as it was to be recorded, at which he apparently raised his voice with the interpreter and was told not to do that. He then gave information about his schooling and said he had started school at seven and had studied for seven years when he left Afghanistan. I observed that that would roughly make him 14 at that moment.

12. In the medical section he stated that his arm was broken 18 months previously in Afghanistan. He went to hospital and they put a plaster on for one month. It was observed at the time that he had an abnormality of his elbow that is now receiving orthopaedic assessment in the United Kingdom.

13. The guidance notes to the penultimate section of the Merton Compliant form reads as follows:

> ""INFORMATION FROM DOCUMENTATION AND OTHER SOURCES"
>
> Documentation when available should always be carefully checked; authenticating documents however, is a specialist task. If the assessment is an ongoing process, it is important to obtain the views of the other significant figures involved with the young person."

The final section states:

> "The assessing worker should draw together the information obtained, and present his/her views and judgment on the age of the person being assessed, giving clear reasons for the conclusion. If this differs from the stated age, clear reasons for this disagreement should be given.
>
> Please remember this process is not an exact science and that conclusion should always give the benefit of the doubt."

A v London Borough of Croydon No 2

14. The real difficulties of anybody making age assessment on children between the ages

of 15 and 17, particularly where there are children who are foreign nationals with different cultural histories and who may have experienced traumatic events in their lives, are well set out in the consistent learning of this court and the Court of Appeal. For present purposes they are summarised in the judgment of Collins J in the case of A v London Borough of Croydon and Others [2009] EWHC 939. That case itself arose as the second part of a judicial review. The first part of which resulted in a case going to the Court of Appeal. The Court of Appeal dealt with certain submissions as to how age assessments should be challenged in this court and made other pertinent observations of relevance to any court deciding this issue in a judgment given on 18 December 2008 [2008] EWCA Civ 1445. Because there are now a number of different decisions with the same name I shall refer to the decision of Collins J as A v Croydon No. 2 for the purposes of this judgment.

15. Mr Justice Collins sets out at paragraphs 8 to 22 the learning derived from previous decisions of this court, including the decision of Stanley Burnton J in Merton. He cites the guidance of the Royal College of Paediatricians and the views of the expert report of Dr Heaven Crawley "Working with Children and Young People" published by ILPA. None of this needs to be repeated in this judgment and I adopt his remarks made with gratitude. Unlike A No 2 the present case is not concerned with the vexed sub-issue of how far, if at all, assessment by paediatricians can make a useful contribution to the age assessment process, and I say nothing at all on that topic.

16. At paragraphs [38] to [45] of his judgment Collins J, having reached the conclusion that paediatric assessment was unlikely in the general run of cases to be of much assistance, stressed, however, the assessment must be made by trained social workers applying the Merton guidance and providing procedural fairness. At [43] he noted that Croydon's procedures to ensure fairness included the putative child being informed that he had a right to an independent adult to be present at the interview. In the following paragraph [44] he states:

"I recognise that the effect on a child being assessed to be an adult will be serious. It is essential that assessment are made by experienced and trained social workers and that *all* the safeguards to ensure fairness are in place. The system at present is undoubtedly far from perfect"

(emphasis supplied)

17. It will be necessary to consider in this judgment how far the London Borough of Croydon complied with the practices that they told Collins J they applied in the determination of age assessment, and from which I conclude that at paragraph 44 of his judgment Collins J concluded it was important that Croydon and other social worker authorities making age assessments did apply in the particular case.

Conclusions on the December decision

18. Returning then to the December 2008 age assessment, the social workers expressed their conclusions in the following terms:

> "The social workers waited to conclude his date of birth until the birth certificate translation got through. They found the birth certificate as not authentic.
>
> [They then quote the words appearing in the translation]
>
> 'Our documents show that he was 9 years old in 1382 - (2003).'
>
> There is no proof that the birth certificate was written when it was requested by the young person. There is no evidence that the birth certificate was issued at the actual date of birth. The young person mentioned that he was 9 years when the picture was taken. In the picture he looked older than just 9 years.
>
> The young person looked young in his appearance but the social workers believe that he is older than 14-15 years of age. His demeanour was more consistent with the age of a young person who has just turned up 17 years old."

19. If matters had rested there, in my judgment such a conclusion would have been very difficult to sustain in a judicial review applying the fair standards identified by the courts in age assessment cases, as summarised by Collins J in A v Croydon No 2. I can summarise these reasons briefly. Whilst I accepty that the identity document was not conclusive in his favour, there was a material failure to understand its nature, authenticity, and the assistance it provided to the claimant in a case of admitted doubt.

20. I make the following observations. First the document was not a birth certificate but an identity document. The important difference between the two is explained by the Home Office Country Guidance relating to Afghanistan, with which Croydon are familiar as they successfully relied upon it and referred to it in their decision in A v Croydon No 2 itself, the Country of Origin Information Report (COIR) Afghanistan, dated 18 February 2009. At paragraph 33.05 under the heading "Identity Cards" the relevant provisions of the Afghan civil code are cited. Then in the following paragraph there is a quotation from the Research Directorate, the Immigration and Refugee Board of Canada, in December 2007, which says in the following terms:

> "... a representative of the Afghanistan Research and Evaluation Unit (AREU)- ... indicated that tazkiras [identity documents] are much more common than passports. The Representative stated that about 70 percent of Afghans have such documents ... Similarly, the report of a Finish fact-finding mission to Afghanistan states that the taskira (referred to in the report of Tashkera) is the most commonly used identity document in Afghanistan ... The United States (US)-issued Reciprocity Schedule states that the taskera is 'the most Universal and accurate document in Afghanistan'... According to the AREU Representative, the identity cards 'are required for transacting any business with the government, including the purchase or sale of immovable property, the preparation of official documents (including the passports), admission into school and so

on'(AREU, 16 Apr 2006.)."

21. Further information from COIR report reveals in the following paragraph that there had been a change of practice from a 20 page identity document known as the full taskera, and replacing it in about 1990 to 1992 with a shorter document which is called a taskera certificate, which is only one page and, includes some minimal essential information. By contrast paragraph 33.08 under the heading "Documents registration, births and marriages" the point is made that birth certificates are very rare in Afghanistan, certainly outside maternity hospitals in Kabul. Official statistics state that less than one per cent of the population has birth certificates.

22. It is of some relevance that in the particular case that Collins J was considering it was that the claimant relied upon a birth certificate, even though the in-country guidance suggested it was statistically highly unlikely that he had to be properly issued with one.

23. Second, in my judgment the error in failing to contra-distinguish between birth certificates and identify documents fundamentally invaded the probative worth of the document upon which the claimant was relying in this case; because it was an identity certificate it did not purport to record birth contemporaneously and can hardly be dismissed as to its authenticity for that reason. However, if the document was issued when the translation stated it was, it was issued about a year before he left Afghanistan and before any claim to asylum or protection as an unaccompanied child asylum seeker had arisen. Moreover, the document on its face was, internally referring back to documents held apparently in 2003, long before any occasion to leave Afghanistan or claim asylum was risen and indicated that the claimant was then aged nine.

24. Third, if the nature of the document had been understood, then it would indeed have suggested that the claimant was 13 when the photograph that was attached to the document, and appended to it, was taken. This may well be older than the age he claimed he was when it was taken, but it would nevertheless give consistency with the age claimed by the claimant in supporting the consistency in the identity document itself that appeared to have been issued by the competent authority in Afghanistan.

25. Fourth, although the age assessment indicates in the words quoted that the social workers did not find the document to be authentic, when solicitors became involved in this case a Part 18 request for further information was made. In the answers to that Part 18 request it is said that that was an error and that there was no intention to make any judgment or assessment on the authenticity of the document as the social workers had no training in that issue, and all that was intended to be said was that it needed translation. It is a little difficult to simply correct the report by substituting translation for authentication, as suggested in the Part 18 report, although the court takes the point that it is now said that no criticism of the document was intended in the sense that it was not intended to go behind what the document purported to be.

26. Fifth, if no doubt was intended to be thrown on the authenticity of the document, ie what it purported to be, on 12 December 2008, in my judgment it is very difficult to see how the social workers applying the cautious approach required by the assessment process, and giving the benefit of doubt to the child claimant in the case of doubt, could

have reached the conclusion that he was 17. There was doubt at the time of the initial interview causing a decision to be deferred. It was recognised that the document was an important document not merely in the form, but in the fact that the matter was put over from 1 December to 12 December for a translation to assist in the process. When the document was translated it substantially supported the claimant's claimed age and there was nothing unusual or suspicious about it on its face: the fact that it was in existence at all, its form, its content, or what it appeared to be saying. Apart from the one inconsistency in the earlier assessment as to the date of the elbow injury, upon which no emphasis appeared to have been placed in the December assessment, the social, educational and medical histories were all consistent with each other and with the identity document as to the age and the claimed age. Nothing else emerged to undermine the claimant's age as claimed.

27. It is common ground, and clear throughout all the materials and the authorities on this topic, that physical appearance alone is a notoriously unreliable basis for assessment of chronological age. The extensive literature and guidance on the subject says so. Indeed anyone with ordinary non-expert knowledge of young people whether as a parent or otherwise, knows how difficult it is to make such assessment from appearances alone. In any event, submits the claimant, it was accepted that the claimant looked young.

28. What apparently counted against him in the December assessment was his demeanour, as assessed in interview, his response to the interpreter, which he was told not to do, and that was indicating some assertive behaviour and some doubt about the narrative of his travel from Afghanistan to the United Kingdom: a journey that he undertook with the benefit of an agent. That is, on any view, somewhat fragile material to weigh conclusively in the balance against the age claimed either at all, or to the degree in which the balance did weigh against this defendant in the conclusion that he was not 15, but 17.

29. Therefore, if the December decision had stood alone it would, on the conventional judicial review principles, have been quashed (1) because it was based upon a failure to take into account material factors arising from an identity document; (2) it took into account immaterial factors arriving from errors and understanding what the document said; and (3) on the material that is contained in that assessment alone, in my judgment it was a decision that no reasonable social worker properly directing themselves as to relevant test and material could have arrived at. On the balance of factors for and against the conclusion on age, a conclusion that he was 17 was simply not one reasonably open on this material, even if the view was taken that the Afghan authorities may have erred in 2003 in identifying his age as nine then. Mr Buttler, who appears for the claimant, accepted that the position might well have been different if an assigned age of 16 had been given, a little older than the claimed age, but not two years older in all the circumstances.

The events of 2009

30. However, the December 2008 decision was not the last word on this matter. The court must now revert to the sequence of events. Having obtained the information,

including the Merton Age Assessment form in March earlier, on 23 March the claimant amended his grounds. On 28 April permission was granted to judicially review the decision of the defendants, notwithstanding that an acknowledgment of service had been put in defending that decision and submitting that there were no grounds to interfere with it.

31. On 28 May 2009, there was a skeleton argument served and on 1 June 2009 witness statements were served responding to the information revealed in the Social Services file, and the age assessment that had been disclosed earlier. So the claimant therefore had amended his case from asserting that there was a procedural failure by failing to give reasons at all, to challenging the particular reasons disclosed, to which reference had already been made.

32. At about the same time that all this was done in June, the claimant served a witness statement from an interpreter, that amongst other things, refers to the identity document and states that there were various errors in the translation obtained by the London Borough of Croydon. The only error that is material for the purpose of this judgment is that it is said that the date on which the document was issued was wrong. The claimant's version in the bundle before me has in that part of the document "error in translation 16/2/1386" crossed out and "16/2/1383" inserted. The court has been informed that by the use of an internet calculator that would give a Gregorian calendar date of 5 May 2004. That is to say that if the revised translation is right, the date that the document has been issued has been pushed back to a date when the claimant would have been about ten, again separating it from the events which may have caused his journey to the United Kingdom and making the date between the documents that showed that he was nine in 2003, and the issue of the document in 2004, a much shorter gap. That would be relevant to the age that he would have been on the photograph attached to the document.

33. There was no revised acknowledgment of service or evidence served by the defendant in response to the advised grounds. This application was due to be heard on 17 June 2007 by Mr Goudie QC, sitting as a Deputy Judge of this court. The night before the hearing, however, the claimant was served with a further age assessment, apparently completed on 15 June 2009 and based upon an interview that the claimant's solicitors knew nothing about what had been undertaken between social workers and the claimant on 9 April 2009. There was clearly some discussion before the learned Deputy Judge as to the appropriate course to be taken and the outcome was that the case was adjourned with the defendant having to pay the costs thrown away. The defendant was directed to file grounds of defence within 14 days of any amended grounds to be served by the claimant. The claim form was amended for a second time in July 2009 and the claimant served further evidence, but again no evidence was served by, or on behalf of, the defendant and no detailed grounds were filed in response to the case as now amended.

34. The case was then due to be heard in August, but the defendant applied to break the fixture because counsel of choice, who had settled the skeleton argument, was unavailable. The case then came into the list before me on 17 September in the event that that counsel was still not available, but the court has been ably assisted by Mr

McGuire, who has made pertinent submissions upon the case, which lost none of their force because of the economy and moderation with which they were presented.

The Issues in the present application

35. In the event four questions have been argued before me as issues to be resolved in this application:

(1) Should the court review the decision with anxious scrutiny as it would do in a case where life was at risk or human rights were engaged, or should it apply simply conventional judicial review principles?

(2) Does the decision of December 2008 have any continued relevance to the fresh decision apparently taken in June 2009?

(3) Was the procedure adopted by the defendant in taking the fresh decision unfair in all the particular circumstances of the case?

(4) Was the conclusion reached by the defendant in that revised decision flawed for a failure to apply the Merton approach, or any other relevant consideration that would be amenable to judicial review, if that be the test?

(1) Intensity of scrutiny

36. I reject the claimant's submission that the court should review the June 2009 decision with a particularly intense or anxious scrutiny, as such an approach appears to me to be inconsistent with the principles that emerge from the decided case law on the question, particularly A v Croydon in the Court of Appeal. Life and limb is not put in jeopardy by a flawed age assessment and the courts have not recognised that an age assessment interferes with the core of human right.

37. Further, the cases of B v Merton and A v Croydon No 1 and A v Croydon No 2 all emphasise the decision in question is that of the experienced social workers who have the knowledge to form these assessments, and the experience of interacting with young people from abroad not available to the court. Further, as a matter both of strategy construction as to who was intended by Parliament to make the decision, and the practical realities of the difficult task of how such assessments should be conducted that arise frequently day in and day out, as the numbers of unaccompanied asylum seeking children has risen over the years, all indicate that these are questions for social workers, subject, of course, to judicial review.

38. More than one reference emerges in the case law warning the court against over judicialisation of the process, and from trespassing from the proper province of supervising how the decision was reached into something closer to making a decision on the merits itself. It has been stated on a number of occasions that the principles of judicial review represent the appropriate mechanism for supervision of the decision for compliance of all the relevant requirements of the law. I accept, however, that those principles permit an appropriate degree of scrutiny according to the subject matter, the circumstances, and the consequences of the decision, even where the heightened

approach of anxious scrutiny is not required. The direct and immediate consequences of this decision are not as severe as they would have been if the claimant was being rejected altogether as a minor.

39. It is to be observed the Home Office, following the assessment by Croydon, granted him discretionary leave to remain as a minor from Afghanistan and an application for an extension of that permission that leave to remain is presently outstanding. He is being accommodated and supported by Croydon as a child under section 20 of the Children Act and other material duties that are owed to him in the light of his assessed age are being provided. He therefore does not face imminent detention, removal or homelessness as an adult.

40. Nevertheless, if the present assessment is undisturbed by this court he will be treated as an adult in two months time when all of these consequences may occur. It is submitted that if they occur to someone who has not in fact reached the age of 18, he will be caused in a general sense harm inconsistent with the principles of the Children Act, the Home Office policies applicable to unaccompanied children, and also the international obligations that this country owes pursuant to the United Nations Convention on the Rights of the Child.

41. In the case of A v Croydon No 1 in the Court of Appeal, Ward LJ, giving the principal judgment in that case, considered whether a precedent fact approach to age-assessment was required because there was a human right engaged under Article 8 of the European Convention of Human Rights. He said this:

> "I dare say a finding relating to a person's status as an adult or a child could come within the aegis of Article 8. Where, however, I depart from
>
> Mr Wise's analysis is in his assertion that the age determination by itself engages Article 8. It does not. It is not a judgment *in rem* declaring to the world at large that these appellants are adults. It was, as I have already pointed out, a staging post or a preliminary finding on the way to the consideration of the broader question of whether the applicants are entitled to be accommodated by the local authority or whether they must look to the Secretary of State to find them shelter. The assessment of age by itself does not engage Article 8(1) because it does not affect A's physical or psychological integrity or personal development or personal autonomy."

42. Although that case has recently gone to the House of Lords on appeal, I understand from counsel that that part of the judgment is not challenged and it has not been suggested by Mr Buttler, appearing for the claimant before me, that Article 8 requires a particular form of scrutiny in this case.

43. It is of course right that determination of age as a part of an assessment of whether a housing duty is owed is not, as a matter of law, an *in rem* adjudication on the status for all purposes. In the present case, in fact, the dispute is not essentially about whether duties are owed as a minor at all because he has been assessed to be under 18.

However, I do observe that in the light of the developments in the case law, and particularly the observations and conclusions reached by Collins J in A v Croydon No 2 when he explained why in his judgment paediatric evidence will not generally be likely to succeed in challenging the local authority assessments, it is unlikely that a social worker assessment, that is undisturbed by the court, will not have significant impact in other aspects of the person's social life. If the social workers, for example, have considered the one thing that an asylum seeking child may rely upon in support if he has such a thing, namely an identity document apparently issued by the government of which he was a national and consider that that does not indicate reliably the age of the child, there is very little other forms of material that the claimed child will be able to put to either the social worker, the Home Office or anybody else to challenge that age assessment.

44. Other agencies of the state are unlikely to have the same experience of age assessment as social workers who are trained in the necessary techniques and have substantial experience in applying them. As a matter of practice, therefore, although not of law, a social worker assessment of the precise age of a child may well prove to be the decisive assessment on which other agencies of the state and private persons do, and are entitled to, rely in performing their duties. I observe that the following aspects of social life at least are engaged:

(1) Home Office practice: the Home Office under a protocol will apply the age assessment of the local authority for immigration purposes, that include vulnerability to detention and removal, as well as the issue of an identity document that it is the duty of the Home Office to provide whether under the Refugee Convention or otherwise, that will be taken as evidence of identity by other people in the United Kingdom in the absence of rectification or change of circumstance.

(2) Education: It is not surprising in this particular case that this claimant was treated by the educational services provided by the same borough as of the age that he was assessed to be by Social Services. He therefore has not been provided with secondary education, but he is in a college of further education learning English.

(3) Welfare Benefits: Very different regimes apply to welfare benefits such as income support to asylum seekers, or other persons with protection, who have arrived here and have no one else to turn to in this country, depending upon their age. That will be likely to be based upon the assessment of age spelt out on the Home Office identity document, which is in turn relied upon the social work assessment. There have been cases before this court of age disputed children, or former children, facing difficulties in the transitional to adult life precisely because of the impact of a Social Services assessment on their age and the way it affects their engagement with other persons.

(4) Medical: The present case indicates that unsurprisingly the doctors who examined the claimant used the assessed date of age as his date of age and he was treated as of that age for the purposes of medical treatment.

45. I accept, moreover, that the present decision is not merely a question of

providing a roof over the claimant's head and a means of support, a child under 18 is entitled, under the statutory regime under the Children Act intended to reflect, or implement, the United Kingdom's obligation on the Convention on the Right of a Child, to be looked after generally and to look to the local authority for all the kind of support and guidance that a parent would normally give to an adolescent alone in the world. In any event, the assessment that he is over 16 in this case means that he has been accommodated in an independent living unit rather than a foster family, and so on. Of course it will affect the date when those services cease to be provided to him.

46. Although the assessment in law is not intended to be a determination of age *in rem*, that may be precisely the problem. Article 7 of the United Nations Convention on the Rights of the Child, notes "the child's right to be registered after birth" and then Article 8 provides:

"1.States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference."

> 2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to speedily re-establishing his or her identity.

47. I conclude that age is an important aspect of identity in that context. Article 22 of the Convention says that:

> "States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention ..."

48. All these considerations lead me to conclude, as others have concluded before me, that these are decisions of great moment to the claimant and that is why the courts have insisted on transparent, fair and careful assessments of extremely difficult questions with the importance of giving the benefit of the doubt to the claimant in a case of real doubt, when every other factor for and against has been appropriately weighed. Nothing more may be required, but nothing less will do.

<u>Issus (2) to (4: the Fairness of the June 2009 decision</u>

49. I then turn to the look at the decision taken in June 2009 in the light of those principles. The purpose of that decision was set out in the first page of the assessment document The claimant was advised "of the purpose of the meeting and that the assessing workers were reviewing his age assessment in light of his legal challenge to the initial age assessment." The assessing workers were Albertha Golding and Dorriane Sultana, two

of the three who had been involved with the previous assessment, although I accept that Albertha Golding only marginally so.

Procedural failures

50. It is common ground that the interview, and the subsequent writing up of this assessment based upon the interview, did not follow the best practice that Croydon recognises it hopes, or ought, to apply in such cases. The following departures from such practice emerge:-

(1) The claimant was not asked whether he wanted to have an independent adult present. That was considered to be one of the necessary aspects of fair procedure to be applied in A v London Borough of Croydon No 2, at [44]. Although nit every departure from good practice results in a conclusion of unfairness, the context of the present case reveals the importance of that requirement in the overall assessment..

(2) It is particularly surprising that the claimant was not offered an independent adult present in the light of the fact that he had been recognised as a minor, was represented by a litigation friend in the outstanding judicial review proceedings, and he also had a solicitor experienced in child protection matters acting for him. Neither the litigation friend, nor the solicitor were informed that there would be a review at all of the decision under challenge, or that a further interview of their client was contemplated in pursuance of that review.

(3) The review was not prompted by a recognition that the December decision was flawed and needed to be set aside as flawed, because the judicial review had been resisted up until that moment and there was no indication that the judicial review could be compromised by a withdrawal of the decision and a fresh assessment. Rather as the grounds show, it was a response to the legal challenge. As it was undertaken by two of the same people who had considered the claimant's credibility to be undermined in December, it is understandable that a suspicion might arise in the mind of a reasonable observer that one of the purposes of the re-interview or reassessment was to provide better material than hitherto existed to resist a challenge to the previous decision. It is always more difficult for the same person to take a fresh decision unaffected by a previous flawed one.It is not necessary, in my judgment, to explore the learning of whether reconsideration by the same person who made the decision as a single consideration alone would, for that reason alone, make the decision unfair. I have been referred by Mr McGuire to the decision of HHJ Higginbottom, as he then was, now Higginbottom J, in Abdi v London Borough of Lambeth [2007] EWHC 1565 (Admin), that concerned consideration of whether a person who had been held not to be owed housing duties ought to be nevertheless accommodated pending a first stage review by the same decision-maker. In my judgment, that is not the same point in this case. I am satisfied that the fact that the two people conducting the interview in April had been involved in the December process is a relevant one on the particular facts of this case in making the overall assessment of fairness.

(4) There was a two month gap between the interview having been conducted and the writing up of the assessment in June 15. It appears that such an extensive length of

period of time between the two events was contrary to the practice applied by Croydon, as accepted by counsel on 17 June and recorded in part of the recital of the order of Deputy High Court Judge Goudie QC on that day.

(5) The June 2009 age assessment, read as a whole, does not suggest that inconsistencies that were relied upon as the basis for the reviewed adverse decision were put to the claimant at the time for comment, or he was otherwise given the opportunity to disabuse the decision-maker of any point that they were minded to attach weight to against him. This aspect of procedural fairness, where there is no right of appeal, has long before been recognised to be of importance.

51. Stanley Burnton J in R(B) v Merton stressed the importance of that requirement of fair procedure at paragraphs 55 to 56:

> "[55] So far as the requirements of fairness are concerned, there is no real distinction between cases such as the present and those considered in *R (on the application of Q) v Secretary of State for the Home Department* [2003] 2 All ER 905, [2003] 3 WLR 365. It follows that the decision-maker must explain to an applicant the purpose of the interview. It is not suggested that that did not happen in this case. If the decision-maker forms the view, which must at that stage be a provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can. In other words, in the present case, the matters referred to at [15], above should have been put to him, to see if he had a credible response to them. The dangers of misunderstandings and mistranslations inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the claimant the opportunity to explain.
>
> [56] The claim form clearly alleged that the claimant should have been given an adequate opportunity to answer the points that the defendant was minded to hold against him. Ms Rodney does not suggest that this was done. It follows that her decision should be set aside unless the defendant has established that his responses to the matters on which she relied could not reasonably have affected her decision. The claimant addresses these matters in his second witness statement. Not surprisingly, he gives no explanation of the implausibility referred to at [15](d), above. His explanations of the matters referred to at (b) and (c) are unsatisfactory, and in essence amount to an assertion that Ms Rodney must have misunderstood him. It is the risk that there was some misunderstanding of what he said, a risk that is accentuated by the inconsistency between her notes of the two statements as to his religion to which I have referred, and the possibility that he might have been able to rectify any misunderstanding if the matters relied upon had been put to him, that leads me to conclude, albeit with considerable hesitation, that the defendant has not satisfied the onus of establishing that even if they had been put to the claimant, the same decision would inevitably have been

made."

52. It can be said that the principle of fair opportunity to disabuse a decision-maker goes right back to at least the case of re HK [1967] 2 QB 617. I accept, of course, Mr Maguire's submissions that this is not a requirement that is to be pedantically mandated in respect of every aspect of a case that can cause reasonable assessors to doubt age. In my judgment central allegations considered by the assessors to be of importance must be put. It is best done at a time when matters are fresh in minds and any errors or ambiguities of interpretation may then be identified. It was not done in this case.

The adverse conclusions reached by the flawed procedure

53. I conclude that taking these defects cumulatively as a whole seriously undermines the fairness of the assessment procedure adopted in June. The June decision played particular attention to three matters. First, it was observed that he claimed that his age was nine in the photographic document, but his own counsel in the skeleton argument lodged in May had observed that he would have been 13 at the time.

54. Second, there was an inconsistency between what the claimant had said to a GP in a health assessment conducted on behalf of the authority in February 2009 about when his arm was broken: when he said he had broken it 18 months ago, and what he said to the assessors in April that when he went to Pakistan for medical treatment he could not remember when it was.

55. Third, in connection with the medical advice he received in Pakistan in connection with his arm, it was said that he was told that he needed another operation when he was 18 and the decision-makers in the assessment say that he said that he was worried as he was near that age, to which they infer the age of 18, and now. This last point is a particularly significant one. On the occasion of the April assessment he was found to be calm and co-operative with the social workers, rather than assertive and loud voiced as he had been criticised of being previously, but it was plain that at the beginning and throughout the interview he was maintaining that his age was 15 or so, as per the identity document. It is therefore suggested that he had inadvertently let slip that he recognised that his real age was close to 18.

56. In his witness statement the claimant says that this was an error in understanding and translation, and that what he was really trying to get across was that he was worried at the time he received the advice in Pakistan about his future prognosis at 18, because of the continuing problems with his elbow. In my judgment this is precisely the sort of important dispute that the presence of a solicitor, or an adult friend, or an adviser is intended to guard against. It is certainly the kind of inconsistency that must be put at the time to ensure that the assessors have accurately captured the information through the interpreter and any explanation that they might be able to obtain from the claimant in respect of it.

57. These are interviews conducted through interpreters and Stanley Burnton J himself observed in B at paragraph [52] how that provides further opportunity for errors of mutual understanding and distorting decisions on this question.

58. The court's concerns arising from these procedural failures have not been diminished, rather increased, when the interview notes taken in April were provided to it. Of course the court does not have the benefit of a witness statement from either of the social workers who undertook the assessment, for the reasons given in the chronology of this matter, and Mr McGuire was only able to offer very limited assistance on the notes, but there appear to be two sets of notes taken on 9 April, though precisely who took which is not known. The first set of notes that I shall call document A is in one hand and document B is in another hand. Document A records something about Pakistan in the following terms:

> "Paternal uncle was in Pakistan - I've never been to P. He came back to Afghanistan when he heard he has been tortured.
>
> It was only once because of My Broken Arm - he does not Don't remember. Remember anaesthetic. He does not know whether he stayed couple 4/days.
>
> He is worried that he is getting close to that Age (18) to heal the Arm - As that's what Doctor said in Afghanistan. It will heal when he reaches the age of 18 years."

Document B, dealing with the topic of Afghanistan and picking them up after a reference to maternal uncle being Afghanistan, say:

> "No idea where in Pakistan.
>
> Jalabad no idea.
>
> only briefly.
>
> travelled to Pakistan once in relation to his arm. Can't remember how long he stayed there. Gave me anaesthetic. don't know how long, quite painful, and hard to cope with.
>
> Still painful.
>
> complaining night & day.
>
> he does not know how long he stayed.

travel time walking distance..."

The notes become a little difficult to read because the photocopier does not capture the end of the page. They appear then to go on to another topic.

59. Mr McGuire, whose assistance I sought upon this topic, accepted that there are differences between the notes first as to what the question was about Afghanistan, namely was it how long he stayed there, or when he went there, and more strikingly there is no record in the notes of B of what was relied upon in the final assessment as a

really significant answer, namely that he was worried that he was reaching that age, ie inferentially 18 now.

60. The striking inconsistency in the notes, and the fact that the writer of contemporary notes, version B, did not record what was subsequently relied upon as a really important answer, only adds to the court's concerns that this whole procedure should be quashed as procedurally unfair on conventional administrative law grounds. The question of whether a reasonable decision-maker could reach the decision he or she eventually comes to only arises at the end of the sequence of questions that the courts impose. There must be at first a fair procedure and a correct self-direction on material considerations and exclusion of immaterial ones.

The further consideration of the identity document

61. Moreover, in my judgment, the June decision continues to be flawed by a failure to analyse or engage with the identity document. The first of the points taken against was the observation made by the claimant's counsel that the photograph would have shown a 13-year old child on the identity document if it was issued in 2007. That was a perfectly appropriate point to take at the time and the only information was the Council's own translation of the document. However, for reasons already analysed that fact, whilst it may give rise to an inconsistency as to what age the claimant says he was when the photograph was taken, gives rise to supporting evidence of the value of the document and confirming going back to 2003 and back to the date of birth. However, that point in the skeleton argument was thrown into doubt once the new translation became available in June of which the decision-makers were plainly aware, since they refer to it in the assessment on 15 June, but they did nothing to further investigate the point. They said this about the identity document**:**

> "Both assessing social workers confirmed that they had seen a photocopy of the document. We are not satisfied that this provides reliable evidence of [the claimant's] age as we cannot ascertain whether it was properly issued by the supposed responsible authorities in Afghanistan. In addition to this we are not satisfied that the information in the document is completely accurate or in part true. Some of these documents are not made by whoever purports to be the author. There is evidence to suggest that forged documents are readily available and obtainable in Afghanistan and that the documents may be obtained without the person actually being present and in the absence of formal documents to corroborate date of birth or age. There is nothing that links the ID document to [the claimant]. At the previous assessment he said he was 9 years old when the picture was taken. [Then the point is made.] Subsequently his solicitor has said he was 13 when it was taken. [The claimant] has provided a different translation of the ID document however the local authority does not change its view on the document."

62. There are a number of things wrong with that assessment. First, it is wrong to take the point made by counsel about age 13 against the claimant when that was made upon the previous translation of the document, and the local authority have now not directed their

minds to the fact that that point may be wrong in the light of the information in the revised translation that they should have been aware of if they had engaged with the document properly. Either the new translation would show that the claimant was roughly the age he claimed to be when the document now appears to be issued, or the previous position would have been reverted to which authenticates the document, although does not remove the inconsistency in the claimant's assessment of his age of nine, albeit that the document indicates that something had happened at the age of nine with respect to the recording of his age.

63. Second, in my judgment this is not a case where the Social Services were entitled to ignore the document altogether on the basis that it is known that fraudulent documents have been obtained in the past to promote asylum applications, or indeed applications for age assessment.

64. In the skeleton argument lodged by the defendant in this case there is reference to the approach of the Asylum and Immigration Tribunal with respect to documents generally in the case of Tanveer Ahmed v Secretary of State for the Home Department [2002] Imm App R 318. That submission was wisely not renewed in oral submissions by Mr. McGuire, but, in any event, I conclude that that point is not well-founded in this particular case. Unlike in an asylum case a claimant is not seeking to make out a claim to protection where the burden is upon him to establish his case. Here the local authority is engaged in an age assessment where, to some extent, the obligation is upon them to provide cogent reasons after a fair procedure as to why the claimed age, particularly where it is supported by the document that would normally be indicative of age, is to be objected. I have already quoted the guidance on the form which indicates the importance of the documents as the adjournment in December indicates that Croydon were aware that it was important.

65. Third, for reasons already noted there in my judgment, nothing about this document on its face to suggest that it is unusual or peculiar. It is the kind of document that is issued in Afghanistan when one needs it to progress in the education at school, as the Home Office COIR shows. That is precisely what the claimant said in his subsequent witness statement explaining why it was obtained. He was never, of course, asked about that in interview. The point is previously made that the dates on the document appear to pre-date any journey, so it does not look as if it was manufactured for the purpose of making an age assessment, and whatever age the claimant is on the photograph he is of a younger age that he was assessed to be when he arrived.

66. I appreciate, of course, that none of the above excludes the possibility that there was a margin of error in Afghanistan as to what the claimant's age really was at the time that the information that the document records that was gathered about his age was obtained, ie 2003 when he claimed to be nine. However, any such margin of error would be wholly unrelated to a bogus asylum claim, or a bogus claim to be younger than a claimed age, and there simply would be no reason to believe on the present material that the marriage would be particularly great. This is of many aspects of the difficulties arising with regard to certainty in a society which has not placed the premium upon contemporaneous registration at births that western societies have.

The failure to assess maters in the round

67. Apart from the extent to which the defendants have engaged with the document, there were further criticisms made of the assessment process in this case. I do not consider it necessary to labour this judgment by setting them all out. However, I do accept that there is substance in the complaint that the concluding sections of the June 2009 age assessment did not do what the guidance notes says is required, namely to balance the factors for and against the claimed age and to reach an objective assessment upon the totality of the material within this case: the assessment of demeanour, and particularly now the assessment that he was older than he claimed to be because he was calm in interview being taken into account.

68. In this particular context, in my judgment, any uncertainty as to how long, or for what purpose, the claimant was in Pakistan in connection with medical treatment would have to be seen in the context of his answers as a whole. In December 2008 he twice gave a narrative that his arm was injured 18 months prior to interview. The early reference to three years was not picked up or relied upon against him. He said the same thing to a doctor in February 2009. When he is asked about it again it is for a different purpose. Whether he was asked about how long he had been in Pakistan, or when he went to Pakistan, if he was not sure about either question he would be justified in being cautious, given the criticisms to which he had been subjected before when he was accused of speculating or not giving clear answers. That narrative of history needed to be weighed in the balance when it is apparent that whenever it was he received some treatment, and he says in his witness statement it was further treatment in Pakistan, it would have been within a range of dates that he had given information about consistently and previously.

Conclusions

69. None of this, of course, diminishes the weight that the court should attach to expert assessments that are carefully reasoned in accordance with the Merton Assessment form after hearing the enquiry as set out in the procedures given by this court to be important, and recognising the advantages that the expertise of witnesses have. Although in this case I stress that the court has not had the advantage of any witness statements from those who conducted the assessment. However, for the reasons that I have given, in my judgment, the June assessment was seriously flawed and cannot stand and again must be quashed. For the avoidance of doubt I will also quash the December decision as it was never formally rescinded and, in my judgment, the defendant may have continued to be influenced by factors in the same decision in their reconsideration in practice.

70. The matter, therefore, will have to be re-determined afresh. In that re-determination I expect the following aspects of good practice to be observed as an essential requirement of fairness: (1) the translation of the addendum document will need to be checked, and a final accurate version translating all the information that the document has on its face is obtained and disclosed to lawyers before any reassessment is concluded; (2) the lawyers of the claimant are to be informed if there is to be a fresh interview of the claimant; (3) the claimant has an opportunity of an independent adult to be present at any re-interview if he so wishes; (4) any information of significance that may result in a

determination adverse to the claimant on the question of his assessment is identified and put to him in the course of that interview so that he can comment upon it; (5) the final assessment that may result from such a process is to be drawn up in a way that the guidance notes indicate, and supplied to the claimant and his legal team promptly after the conclusion of the assessment; (6) in the event that there is a narrow balance between factors for and against the age assessment of the claimant in the reassessment, then the application of the benefit of doubt principle should be identified in the reasoning process.

71. For those reasons I quash both decisions in this case.

MR MGUIRE: Before giving way to my learned friend, could I ask for clarification of point five. It is, of course, the practice that a written copy of the interview is passed over. Should we suggest seven days being the period in which it should be supplied, simply so the parties know where they are?

MR JUSTICE BLAKE: I left it promptly, but if you want to give the meaning upon seven days -- I did not want to make undue burdens upon your client' team -- so be it. Promptly, namely seven days. Thank you very much.

MR BUTTLER: My Lord, I am very grateful for such a thorough judgment. I have three points to raise. Firstly, I ask for the claimant's costs. Secondly, as your Lordship noted there are a number of A v Croydon. May I suggest this case be distinguished by being called "NA v Croydon". Thirdly, may I ask for an expedition of the transcript of your Lordship's judgment because I know that on Thursday of next week very similar issues are going to arise on the question of appropriate adults being present at interview. What your Lordship has said this morning will directly bear on that case.

MR MGUIRE: I cannot oppose costs in the circumstances. "NA" is sensible.

MR JUSTICE BLAKE: The costs order I award. Is this case known as "NA", or only known as "A" at the moment?

MR MGUIRE: I originally asked for it to be called "NA", but it has variously being referred to in court documents as "A" or "NA".

MR JUSTICE BLAKE: I will direct it be called "NA". (Discussion with shorthand writer re expediting transcript).

It seems that it is not going to get to me until Wednesday. I will direct expedition of the transcript, but it is not at all certain that you will get it if it is relevant to another case. I will do my best if it gets in on Wednesday to correct it.

MR BUTTLER: Thank you very much, indeed.

MR JUSTICE BLAKE: Thank you very much to you both for your assistance in this case.