Neutral Citation Number: [2010] EWHC 2614 (Admin)

Case No: CO/15687/2009

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/10/2010

Before:

MR JUSTICE WYN WILLIAMS

- -

Between:

R (on the application of) TS	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**
and	
NORTHAMPTONSHIRE COUNTY COUNCIL	**Interested Party**

- -
- -

Mr Christopher Buttler (instructed by **Steel & Shamash**) for the **Claimant**
Mr Tim Eicke (instructed by **Treasury Solicitors**) for the **Defendant**
The Interested Party did not appear and was not represented

Hearing dates: 17 September 2010

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Judgment

Mr Justice Wyn Williams:

The relevant facts

1. The Claimant is an Afghan National. He arrived in the United Kingdom on 8 December 2008. On the same day the Interested Party undertook an age assessment. At the assessment the Claimant asserted that his date of birth was 16 October 2004 and that he was 14 years old. The assessors concluded that he was probably 16 (although it is now accepted that this was an overestimate of his age and that the Claimant probably stated his age correctly). The Interested Party took the Claimant into care.

2. On 15 January 2009 the Claimant came to the attention of the United Kingdom Border Agency (hereinafter referred to as "UKBA"). On that date the Claimant

claimed asylum. On the same date he underwent a screening interview and his fingerprints were taken. At interview he asserted that his fingerprints had not been taken in any other country and that he had not claimed asylum in any other country.

3. On 31 January 2009 the Claimant's fingerprints were matched against the Eurodac automated fingerprint database to a person who had previously claimed asylum in Belgium on 7 November 2008 and had been classed as an illegal entrant into Greece on 6 August 2008.

4. On 7 April 2009 UKBA sent a formal request to the relevant Belgian authorities asking them to accept responsibility for the consideration of the Claimant's asylum application. UKBA sent that request in reliance upon Article 16.1 of Council Regulation (EC) Number 343/2003 (hereinafter referred to as the "Dublin II Regulation"). On the same day UKBA notified the Claimant's then legal advisors of the request to Belgium. The following day the social services department of the Interested Party were notified of that proposed course of action. On 15 April 2009 the authorities in Belgium notified UKBA that they would take back the Claimant and assess his asylum claim in Belgium.

5. Before UKBA had made its request to Belgium the Interested Party had formulated a care plan for the Claimant; that plan anticipated that the Interested Party would care for the Claimant until his eighteenth birthday. On 2 April 2009 the Interested Party carried out a detailed review. The Claimant's social worker was Mr. Paul Pateman. A student social worker Ms Folarin Johnson was also involved.

6. By email dated 27 April 2009 the UKBA notified the social services department of the Interested Party that Belgium had agreed to take back the Claimant. The email continued:-

> "In order to facilitate the child's smooth transfer of care to Belgium, I would like to offer you the opportunity to meet via a conference call with officials from the UKBA to discuss any concerns, and if it is deemed appropriate to continue with the transfer, to arrange the child's care plan which will be sent on to the receiving country.
>
> Please contact me ASAP to arrange a suitable date and time."

7. On the same date a conversation took place between Ms Johnson and Ms Karen Nelson, a senior caseworker employed by UKBA. There is no record of what was discussed but it is clear that Ms Johnson raised concerns about the possibility of the Claimant being removed to Belgium. An exchange of emails makes it clear that these concerns would be discussed at a telephone conference call. The conference was originally scheduled for 11 June 2009. It may be that it actually took place on 17 June 2009. The date matters not. Ms Johnson expressed concerns about removing the Claimant to Belgium.

8. On 24 June 2009 the Defendant took the decision to certify the Claimant's asylum application on third country grounds in reliance upon the Asylum and Immigration (Treatment of Claimants etc) Act 2004 (as to which see below). That decision was intended to set in motion the process for removing the Claimant to Belgium.

9. On 2 July 2009 the Claimant instructed Refugee and Migrant Justice (hereinafter referred to as "RMJ") to represent him. By letter dated 9 July 2009 RMJ requested sight of the evidence that the Claimant had claimed asylum in Belgium and had been fingerprinted there. There was an exchange of correspondence between UKBA and RMJ which ended with a letter from UKBA on 2 September 2009. That letter provided the evidence which had been sought relating to the fingerprinting of the Claimant and concluded by affirming that the Claimant was liable to be removed to Belgium.

10. On 8 September 2009 Mr Paul Pateman wrote a letter "To whom it may concern". In that letter he expressed strongly felt views to the effect that the Claimant should not be removed to Belgium. Whether or not that letter was provided to the Defendant immediately after it was written is unclear but I do not understand it to be disputed that it was brought to the attention of UKBA within a short time of being written.

11. On 15 September 2009 RMJ wrote to UKBA raising a fresh reason why removal would not be lawful. I need not detail the point since on 16 September UKBA responded demonstrating that the point raised had no substance.

12. On 17 September 2009 Mr Pateman wrote directly to UKBA. He did so after telephoning UKBA to inform them that he did not believe that it was in the Claimant's best interests to remove him to Belgium. In the letter Mr Pateman summarised his views thus:-

> "TS has been living in the UK for over 9 months, in this time he has made exceptional progress in his integration into British society. Since moving to Northampton his spoken English has improved enormously, he did speak some English on arrival and that has been a solid foundation for the progress made. If TS is allowed to stay in the UK it is likely that with his positive attitude to education and his proven ability that he will continue to a wider based curriculum and further education. His spoken English is his key to accessing economically useful education and assisting him to a sustainable lifestyle and making a positive contribution to the UK economy.
>
> For TS to be removed then his access to education will be severely hampered and the likelihood of financial independence also restricted severely.
>
> Were TS to be removed to Belgium in my professional view it would severely affect his likelihood of thriving. It may also be negative psychologically as he is currently still overcoming the trauma of his journey where he was witness 2 violent murders and also suffered beatings to his body and feet on an almost daily basis.
>
> His personal progression towards being a fully integrated member of British society has been exceptional; he has shown an enthusiasm and an ability which is really unusual and a pleasure to witness. I am sure that to remove him from his

> current place of residence would be against four of the five outcomes of the Government's Every Child Matters Programme to
>
> - be healthy
> - enjoy and achieve
> - make a positive contribution
> - achieve economic well-being.
>
> As such I feel his human rights under the European Convention of the Child would be compromised."

13. On the day following, 18 September 2009, UKBA referred the Claimant's case to the Children's Champion. The email by which the referral was constituted informed the Children's Champion that UKBA intended to remove the Claimant to Belgium and explained the process by which the removal would be undertaken. The email continued:-

> "Please find attached to document from TS's social worker, Paul Pateman, giving us an update on his personal circumstances. I have attached the document for two reasons. Firstly, it is a clear and concise assessment of the subject's circumstances and secondly because I wanted to read for yourselves the stance that his Social Worker has taken on the situation. Subject has at present a firm of solicitors making representations on his behalf.
>
> At the end of the day we consider subject to be a young healthy male with no compassionate circumstances to take into account before removal. He did claim asylum in another EU country before arriving in the UK, and he failed to inform the officer who screened him for his asylum claim that he had spent some time in another country.
>
> We would therefore like to request your agreement to proceed with this third country removal of a young person."

14. The Children's Champion applied on or around 18 September in an email. In short, the Children's Champion made a number of suggestions about what should occur in relation to removal but did not object to the principle of removal to Belgium.

15. It was also on 18 September 2009 that the Interested Party carried out a further review of the Claimant's care needs. In advance of that review RMJ had asked that the Claimant should undergo a psychological assessment related to "possible trauma suffered both during his journey to the United Kingdom and prior to that period". As a consequence of the request Mr Pateman referred the Claimant for assessment.

16. On 25 September 2009 Mr Geoffrey Keats, a nurse with specialist qualifications in mental health, carried out an assessment upon the Claimant. He concluded that the Claimant was likely to be experiencing a "decreased mood" but not at a level that would be classed as clinical depression. The nurse did feel, however, that symptoms described by the Claimant were consistent with post traumatic stress disorder. Mr Keats expressed those views in a letter to Mr. Pateman dated 11 October 2009.

17. On 2 October 2009 UKBA set removal directions to Belgium for 13 October. Apparently, the Claimant was not notified of the directions until 12 October 2009. Certainly Mr Pateman was not aware of the directions until that date. He notified RMJ immediately. An application for an injunction to restrain removal was made which was successful.

18. On 20 October 2009 the Claimant was examined and interviewed by Dr Sean Perrin, a consultant chartered clinical psychologist. The examination took place in the presence of Mr Pateman. Dr Perrin had access to social service records but no other documentary evidence. Dr Perrin expressed the opinion that the Claimant met diagnostic criteria for a mild to moderately severe case of post traumatic stress disorder and that the Claimant required treatment for this condition in the form of trauma-focused cognitive behavioural therapy. Dr Perrin also expressed the view that provided the Claimant received the treatment indicated and there was some resolution of his asylum claim his prognosis was good. However, attempts at deportation were likely to cause the Claimant to have a relapse of his PTSD (if successfully treated) and a depressive reaction that would significantly worsen his prognosis and increase the likelihood of him seriously self-harming.

19. By letter dated 1 December 2009 RMJ provided the Defendant with the report of Dr Perrin and other material. They made detailed representations that the Claimant should not be removed to Belgium. Those representations were made with specific reference to section 55 Borders, Citizenship and Immigration Act 2009 which had come into force on 2 November 2009 (hereinafter referred to either as "the Act" or "the 2009 Act"). Following the receipt of the letter and its enclosures the Defendant agreed to reconsider the decision to remove the Claimant to Belgium. In consequence the judicial review proceedings which were then pending were withdrawn.

20. On 15 December 2009 an officer of UKBA, on behalf of the Defendant, issued a new decision letter. It concluded by expressing an intention on the part of UKBA to remove the Claimant to Belgium. It is this decision which is the subject of these proceedings.

<u>The Claimant's Grounds of Challenge</u>

21. The Claimant advances four grounds of challenge. They are:-

    a) The decision-maker failed to take account of a material consideration and misdirected himself on how a child's welfare should be taken into account. The decision-maker failed to consider whether removal would be in accordance with the best interests of the child (as required pursuant to section 55 of the Borders, Citizenship & Immigration Act 2009.) Instead he asked whether the Claimant's medical condition "was so compelling as to warrant departure from the usual practice of returning third country cases."

b) On the available evidence the decision-maker could not rationally conclude that removal to Belgium would safeguard the Claimant's welfare or be in accordance with his best interests.

c) The decision-maker irrationally rejected the conclusion of the clinical psychologist.

d) The decision-maker failed to ensure that adequate arrangements were actually (rather than theoretically) in place, should the Claimant be removed to Belgium.

I deal with each ground in turn.

Ground a)

22. The relevant parts of section 55 of the 2009 Act are in the following terms:-

> "(1) The Secretary of State must make arrangements for ensuring that –
>
> (a). the functions mentioned in subsection (2) are discharged having regard to the need to safeguard and promote the welfare of children who are in the United Kingdom, and
>
> (b). any services provided by another person pursuant to arrangements which are made by the Secretary of State and relate to the discharge of a function mentioned in subsection (2) are provided having regard to that need.
>
> (2) The functions referred to in subsection (1) are –
>
> (a) any function of the Secretary of State in relation to immigration, asylum or nationality;
>
> (b) …….
>
> (c) …….
>
> (d) …….
>
> (3) A person exercising any of those functions must, in exercising the function, have regard to any guidance given to the person by the Secretary of State for the purpose of subsection (1)."

23. There can be no doubt that the decision to remove the Claimant to Belgium taken on 15 December 2009 was the carrying out of a function within section 52(2)(a) of the Act. Accordingly, it is common ground that it was necessary for the decision-maker to have regard to the need to safeguard and promote the welfare of the Claimant and, further, to have regard to any guidance given by the Secretary of State for the purpose of section 55(1).

24. The expression "have regard to" appears in many statutes in many different contexts. Usually, however, the courts interpret the phrase to mean that a duty is imposed upon a decision maker to have regard to that which is identified in the particular statutory provision which he must consider. The duty is mandatory and one which must be fulfilled prior to the making of the decision in question. The duty requires the decision-maker to embark upon a sufficient and proper decision making process so as to discharge the duty with an open mind. The question in every case in which it is alleged that a decision maker has failed to have regard to the factor identified in the statute is whether the decision maker has in substance had regard to the matter identified. In the written decision produced by the decision maker he does not have to refer, expressly, to the relevant statutory duty; however the terms of the written decision must be such that it is clear that the substance of the duty was discharged.

25. In the instant case there was a duty upon the decision maker to have regard to the need to safeguard and promote the welfare of the Claimant when discharging a function which was both an immigration and an asylum function. I consider that the duty arose not just in relation to the process of removal but also in relation to whether or not removal should be directed. The decision maker was also under a duty to have regard to any guidance issued by the Secretary of State "for the purpose of subsection (1)" of section 55 of the 2009 Act.

26. In order to judge whether the decision maker complied with the duty to have regard to the need to safeguard and promote the welfare of the Claimant it is necessary first to investigate the meaning to be attributed to the words "safeguard and promote the welfare of children."

27. The phrase is a familiar one in legislation relating to children. It appears in section 17 of the Children Act 1989 and section 11 of the Children Act 2004. Neither of these Acts provides a definition of the words "safeguard and promote" in the context of the welfare of children. However, following the enactment of the Children Act 2004 guidance was issued upon the meaning to be attributed to the phrase.

28. The substance of the guidance issued in 2004 as to the meaning to be given to the phrase "safeguard and promote" is referred to expressly in guidance issued in November 2009 by the Home Office and the Department of Children, Schools and Families in a document entitled "Every Child Matters: Change for Children" (hereinafter referred to as the "2009 guidance"). This guidance was issued under section 55(3) and 55(5) of the 2009 Act. It specifies that safeguarding and promoting the welfare of children shall mean:-

- protecting children from maltreatment;
- preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
- ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and

> - undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully."

29. It seems to me to be clear that the phrase "the need to safeguard and promote the welfare of children within the United Kingdom" should be interpreted to encompass the concepts encapsulated in each of the bullet points set out above. Neither Mr Buttler nor Mr Eicke contends otherwise. I should add, too, that promoting the welfares of a child is a different concept from safeguarding his welfare. The last two of the bullet points, in particular, seem to me to be addressing the concept of promoting a child's welfare.

30. What weight should the decision maker give to the need to safeguard and promote the welfare of children within the United Kingdom when discharging an immigration or asylum function? The phrase "have regard to" is normally read as providing a discretion to the decision maker as to the weight he attaches to those considerations in any given case. However, this interpretation must be considered in the light of the 2009 guidance. Paragraphs 2.6 and 2.7 of the guidance are of particular importance. They provide as follows:-

> "2.6 The UKBA acknowledges the status and importance of the following: the European Convention for the Protection of Human Rights and Fundamental Freedoms, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the EU Reception Conditions Directive, the Council of Europe Convention on Action Against Trafficking in Human Beings, and the UN Convention on the Rights of the Child. The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.
>
> 2.7 The UK Border Agency must also act according to the following principles;
>
> - Every child matters even if they are someone subject to immigration control.
> - In accordance with the UN Convention on Rights of the Child the best interests of the child will be a primary consideration (although not necessarily the only consideration) when making decisions affecting children.
> - Ethnic identity, language, religion, faith, gender and disability are taken into account when working with a child and their family.
> - Children should be consulted and the wishes of children taken into account whenever practical when decisions affecting them are made, even though it will not always

> be possible to reach decisions with which the child will agree. In instances where parents and carers are present they will have primary responsibility for the children's concerns.
>
> - Children should have their applications dealt with in a timely way and that minimises the uncertainty that they may experience"

31. The UN Convention on the Rights of the Child contains a number of Articles which relate to the welfare of children. Article 3 provides that in all actions concerning children undertaken by specified public bodies the best interests of the child shall be a primary consideration. Article 20 specifies that a child temporarily or permanently deprived of his or her family environment shall be entitled to special protection and assistance provided by the State. Under that Article, too, States shall ensure alternative care for such a child in accordance with their national laws and when considering solutions for such alternative care the body responsible for making the decision shall pay due regard to the desirability of continuity in a child's upbringing. Article 24 specifies that the States which are parties to the Convention recognise the right of a child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health.

32. It seems to me that the effect of the 2009 guidance is clear. In discharging immigration and/or asylum functions concerning children the best interests of the child will be a primary consideration; it will not be the only consideration but the use of the word primary means that it will always be at least an important consideration. Further, the specific aspects of the UN Convention set out above (Articles 20 and 24) will obviously be important components when the best interests of the child are being considered.

33. As I have said, section 55(3) places a duty upon a decision maker to have regard to the statutory guidance. Paragraph 6 of the Introduction to the guidance is in these terms:-

> "6. This guidance is issued under section 55(3) and section 55(5) which requires any person exercising immigration, asylum, nationality and customs functions to have regard to the guidance given to them for the purpose by the Secretary of State. **This means they must take this guidance into account and, if they decide to depart from it, have clear reasons for doing so.**"

34. In light of this paragraph it is clear that a decision maker does not need to adhere to the guidance, slavishly, if cogent reasons exist to depart from it. Accordingly, the decision maker may, in an appropriate case, attach less weight to the best interests of the child in question than the guidance suggests is appropriate. He is not bound to regard the best interests of the child as a primary consideration in a particular case. To repeat, however, if a decision maker concludes that the best interests of a child should not be a primary consideration he should explain why.

35. It is to be noted that the statutory guidance uses the phrase "best interests of the child" when describing what should be taken into account by UKBA. That, of course, is not the phrase used in section 55(1) of the Act. However, the guidance provided at paragraphs 2.6 and 2.7 as set out above appears under the general heading "making arrangements to safeguard and promote welfare in the UK Border Agency". It seems to me, therefore, to be clear that the statutory guidance intends that when a decision maker is having regard to the need to safeguard and promote the welfare of a child he is for all practical purposes also having regard to the best interests of the child.

36. In summary, the effect of the statutory guidance is that when a decision maker discharges an immigration and /or asylum function he should regard the need to safeguard and promote the welfare of the child in question as a primary consideration unless there are cogent reasons which justify a different approach. Since the decision-maker is duty bound to have regard to the guidance it follows that when discharging his functions under section 55(2) of the Act he should regard the need to safeguard and promote the welfare of the child as a primary consideration unless there are cogent reasons to adopt a different approach.

37. In the instant case the decision letter of 15 December 2009 deals with section 55 of the Act and the 2009 guidance in a discrete section. Paragraph 20 of the letter reads:-

> "You have asked that the statutory duty and guidance under section 55 of the Border, Citizenship and Immigration Act 2009 is taken into account when considering removing your client. You have also asserted that UKBA has not carefully planned or liaised with care professionals in the management of your client's expectations. The Secretary of State refutes this totally. He notes that your client has had the proper care and attention afforded to him with regards to this section of the Act throughout the period that his immigration matter has been processed. Your client's needs and welfare have been fully met by both UKBA and the Northamptonshire Social Services. The social services were made aware of every aspect of your client's application and kept informed fully throughout the process. Indeed when your client was due to be removed to Belgium a Care Plan was drawn up to help with his transfer to Belgium. This Care Plan was faxed to the authorities in Belgium in advance to ensure they were aware of all the issues. Taking this into account and that any removal action taken in the future would follow the same care and attention to the welfare of your client, it is considered that your assertion that this was not followed in your client's case is baseless."

This part of the decision letter is a response to the representations which were made by RMJ in the letter of 1 December 2009 referred to in paragraph 19 above. It is worth setting out the material parts of that letter. It reads:-

> "Since our letter of 15 September 2009 was written, section 55 of the 2009 Act has been brought into force, thereby placing upon the Secretary of State the statutory duty to safeguard and promote TS's welfare."

The letter then sets out the relevant parts of section 55 and continues

> "The Secretary of State has provided the guidance required by subsection 55(3) in "Every Child Matters – Change for Children" published in November 2009……
>
> ….the guidance explains that
>
> "*Safeguarding and promoting the welfare of children is defined in the guidance to section 11 of the 2004 Act….as:*
>
> (*inter alia) preventing impairment of children's health or development (where health means "physical or mental health" and development means "physical, emotional or behavioural development)"* (and)
>
> *"undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully"*
>
> In our opinion it is evident from the supporting evidence, that removal to Belgium in the face of recommendations to the contrary from Dr Perrin and Northamptonshire Social Services, could not be said to be safeguarding and promoting TS's welfare. Dr Perrin's evidence is that such removal will impair TS's mental health and his emotional development.
>
> *"It is my view that attempts at deportation are likely to cause him to have a relapse of his PTSD (if successfully treated) and a depressive reaction would significantly worsen his prognosis and increase the likelihood of him seriously self-harming".*
>
> In his letter to the United Kingdom Border Agency dated 17 September 2009, TS's social worker, Paul Pateman, could hardly have made his opinion any clearer:-
>
> *"Were TS to be removed to Belgium in my professional view it would severely affect his likelihood of thriving. It may also be negative psychologically as he is currently still overcoming the trauma of his journey where he was witness [to] 2 violent murders and also suffered beatings to his body and feet on an almost daily basis.*
>
> *His personal progression towards being a fully integrated member of British society has been exceptional; he has shown an enthusiasm and an ability that is really unusual and a pleasure to witness. I am sure that to remove him from his current place of residence would be against four of the five outcomes of the Government's Every Child Matters Programme to – be healthy - enjoy and achieve - make a positive contribution - and achieve economic well-being."*

…….

> Any steps that are taken to remove TS would therefore be clearly contrary to the statutory duty to prevent impairment of children's health or development.
>
> The guidance makes specific reference to the problem which we have raised above, that the harm that would be caused to TS's physical and psychological integrity by his removal to Belgium will be compounded by the fact that he has been allowed twelve months in which to establish a private life in this country. At paragraph 2.20, the guidance says
>
> *"There should also be recognition that children cannot put on hold their personal development until a potentially lengthy application process is resolved. Every effort must therefore be made to achieve timely decisions for them."*
>
> In the following paragraph the guidance requires that
>
> *"In co-operating with the bodies qualified to plan for the children's futures, including local authority children's including Local Authority Children's Services, schools, primary and specialist health services, arrangements must be put in place to secure the support needed by the individual child as they mature and develop into adulthood."*
>
> The paragraph continues, making specific reference to the planning that needs to be put in place if third country removal is contemplated:-
>
> *"Unless it is clear from the outset that the child's future is going to be in the UK, these arrangements will necessarily involve planning for the possibility that children and their families may have to be returned to their countries of origin (or in some cases the EU country in which they first claimed asylum). [Para 2.21]*
>
> In our submission the guidance implies that very careful planning, and liaison with care professionals in the management of a child's expectations, are essential pre-conditions to the third country removal. In TS's case this has not occurred. The Secretary of State has sought to remove TS in contradiction of the recommendations of those who have been involved in TS's care. We hope that you will agree that it is now too late for a process envisaged by the guidance to be embarked upon with a view to third country removal."

38. Stripped to its essentials the letter of 1 December 2009 is asserting first that it would be detrimental to the Claimant's welfare to remove him to Belgium and second that in

any event such a removal required very careful pre-planning if it was not to impact adversely upon him – planning which had not occurred.

39. It seems to me to be clear that the extract from the decision letter of 15 December set out above addresses the second issue raised by RMJ but does not address the first issue at all. Nowhere in the extract set out above does the decision maker grapple with the powerful submissions made by RMJ as to why removal to Belgium would be detrimental to the Claimant's welfare.

40. A possible explanation for that omission is the fact that Dr Perrin's report is considered as a discrete topic earlier within the decision letter. Eight paragraphs are devoted to an analysis of Dr Perrin's report and the issues raised as a consequence of the report. Paragraphs 5 to 8 of the decision letter read as follows:-

> "5. The UK Border Agency has considered the fact that your client suffers from PTSD and depression in regard to his removal to Belgium. However it is not considered that your client's medical condition is so compelling as to warrant departure from the usual practice of returning third country cases to the relevant Member State responsible for considering their asylum claim under the Dublin Regulation.
>
> 6. The United Kingdom Border Agency is aware that Belgium has at least the equivalent health care service to that available in the United Kingdom and your client will be able to access the appropriate treatment and support he requires upon arrival in Belgium. In order to ensure your client's safe transfer to Belgium, the United Kingdom Border Agency will inform the Belgian authorities of your client's medical condition upon arranging his removal. They will also be provided with any medical reports your client has submitted. This will enable the Belgian authorities to arrange the appropriate reception arrangements for your client's arrival. Your client will be accompanied by at least two escorts, one of which will be medically trained, throughout the whole journey to ensure your client's safety and comfort. If required, the escort will also carry with them your client's medication which will be handed to the Belgian authorities on arrival.
>
> 7. Belgium is a signatory to Council Directive 2003/9/EC of 27 January 2003 laying down the minimum standards for the reception of asylum seekers (Minimum Standards Directive), which sets out that housing, food, medical care and clothing must be provided to asylum Applicants. The Directive also sets out that Member States shall provide the information on organisations that can provide legal assistance to asylum seekers and also that any information should be passed on to asylum seekers in writing, and as far as possible, in a language that they may reasonably be supposed to understand.

> 8. In the light of the above, the United Kingdom Border Agency is satisfied that your client will be able to access the appropriate treatment he requires upon return to Belgium."

41. As will become apparent when I deal with Ground d) I am satisfied that it was permissible for the decision maker to proceed on the basis that Belgium could provide appropriate medical treatment for the Claimant. However, it seems to me that nowhere in these extracts is the decision maker addressing the point made by Dr Perrin that removal in itself would have a detrimental effect upon the Claimant's health.

42. Is that explained by the terms of paragraphs 9 and 10 of the decision letter? Paragraph 9 sets out an extract from the decision of the AIT in HE v SSHD [2004] UKIAT 00321. The extract is as follows:-

> "A particular difficulty arises in the contention that a report should be seen as corroborating the evidence of an applicant for protection. A doctor does not usually assess the credibility of an applicant; it is not usually appropriate for him to do so in respect of a patient or client. So for very good and understandable reasons the medical report will nearly always accept at face value what the patient or client says about his history.
>
> Where the report is a psychiatric report, often diagnosing PTSD or some form of depression, there are often observations of behaviour at the interview, and a recounting of the answers given to questions about relevant conditions e.g. dreams and sleep patterns. Sometimes these answers are said to be consistent with what has been set out as the relevant history of the applicant. It is more difficult for the psychiatrist to treat what he observes as objectively verified, than it is for the description of physical conditions, because they are the more readily feigned; it is rare for a psychiatrist's report to be able to indicate that any part of the observations were undertaken in a way which makes them more objectively verifiable. It is the more difficult for there to be any verification of conditions which the psychiatrist cannot observe and for which he is wholly dependant on the applicant.
>
> The further major problem with the contention that a psychiatric report can be used to support an applicant's claim to have told the truth about the history is that there are usually other obvious potential causes for the signs of anxiety, stress and depression. These include the fact that the applicant may be facing return to the country which he has left, at some expense to himself and family, and it may well not be a pleasant place to which to return. He may face the loss of friendships and lifestyle which he has enjoyed in the UK. There may be a loss of family contacts and of medical treatment. He may anyway suffer from some depression

> without having been ill-treated in a way requiring international protection. He may have experienced difficulty other than those which he relies on for his claim. But it is very rare, and it will usually be very difficult, for a psychiatrist to assess such factors without engaging in the process of testing the truth of what the applicant says. This is not his task and if there is a therapeutic side to the interview, it may run counter to those aims as seen properly by the doctor."

The decision letter then continues:-

> "10. The determination above shows that a psychiatric report does not necessarily assess the credibility. Your client only raised concerns about his mental state when he was aware that he was going to be removed to Belgium. The claim that he suffers nightmares due to what he witnessed on the journey to the UK is not credible as his symptoms did not exist before his removal direction was set. The social services conducted reviews on your client on 30 December 2008, 2 April 2009 and 18 September 2009. It was only during the last review that your client raised the issue of having nightmares about his Home Office application. This was not mentioned by your client in the previous reviews."

43. Paragraph 10 does not state, expressly, that the decision maker rejects Dr Perrin's diagnosis on the grounds that the Claimant, himself, has not given a credible account of his history to the doctor. Mr. Eicke submits that the decision maker was entitled to express his views about the credibility of the Claimant but, nonetheless proceed on the basis of Dr. Perrin's diagnosis which is what he did.

44. Not without some hesitation, I accept that the decision of 15 December is based primarily upon an acceptance that the Claimant was then suffering from PTSD but that it could be treated appropriately in Belgium. However, on the basis that the decision maker accepted the diagnosis of Dr Perrin, I am forced to conclude that he failed to have regard to the need to safeguard and promote the Claimant's welfare in one important respect. Nowhere does he deal with Dr Perrin's view that removal to Belgium would exacerbate the Claimant's PTSD. His view, rather, is that the Claimant's medical condition is not so compelling so as to warrant departure from the usual practice of removing.

45. I do not consider that answering the question "Is a child's medical condition so compelling so as to warrant departure from the usual practice of removal?" properly addresses the issue which must be considered under section 55. The statutory obligation is to have regard to the need to safeguard and promote the welfare of the child. Self-evidently, in my judgment, that is not the same as asking the question whether the child's medical condition is so compelling so as to justify a departure from the usual practice of removing.

46. There is a further reason why I conclude that the decision maker failed to have regard to the need to safeguard and promote the welfare of the Claimant. As it seems to me nowhere in the decision letter does he deal with the points made by Mr Pateman in his

letters of 8 September and 17 September 2009 about the detrimental effect which removal would have upon the Claimant's welfare. The plain fact is that in those letters Mr Pateman had asserted that the removal of the Claimant to Belgium would have a serious adverse impact upon many aspects of the Claimant's welfare. His views were summarised in the letter of 1 December 2009 as set out above. Yet his views are ignored in the decision letter of 15 December.

47. I am forced to the conclusion that the decision maker in the instant case did not have regard to the need to safeguard and promote the Claimant's welfare when he made the decision of December 2009 to remove the Claimant to Belgium so that his asylum claim could be dealt with in that country.

48. If that conclusion is wrong I am satisfied in any event that the decision maker certainly did not treat the best interests of the child as a primary consideration when deciding whether or not the Claimant should be removed to Belgium. The statutory guidance is such that he was obliged to treat the best interests of the Claimant as a primary consideration unless there were cogent reasons to depart from that approach. In my judgment the decision letter does not begin to identify the reasons which would have permitted the decision maker to give less weight to the best interests of the Claimant than would have been afforded had the guidance been followed.

49. I have reached the conclusions set out in the preceding paragraph without reference to authority. In a sense that is not surprising since section 55 of the 2009 Act came into force less than one year ago. However, I was referred to authority during the course of submissions as to how I should approach the interpretation and application of section 55 and I should not leave this ground of challenge without reference to some of the cases which were cited before me.

50. Mr Buttler relied, in particular, upon the decision in T v SSHD [2010] UKSIAC 31/2005. This is a decision of the Special Immigration Appeals Commission in which the presiding judge was its President, Mitting J. It suffices for me to say that the approach to section 55 which I have adopted is and is intended to be wholly consistent with the approach adopted to the section in T. In these circumstances, no useful purpose would be served by a lengthy citation from T.

51. Mr Buttler also submitted that the decision maker should adopt the approach which Thorpe LJ, in particular, advocated in Re A (Male Sterilisation) [2000] 1 FLR 549 when assessing the best interests of a child in any given case. The issue for determination in Re A was whether or not sterilisation was in A’s best interests an issue which was hotly contested. During the course of his speech Thorpe LJ said:-

> “I turn from the outcome in the present case to some more general observations. There can be no doubt in my mind that the evaluation of best interests is akin to a welfare appraisal. The speeches in *Re F (Mental Patient: Sterilisation)* [1990] AC 1, sub nom *Re F (Sterilisation: Mental Patient)* [1989] 2 FLR 376 read in their respective context can only bear this interpretation: see particularly the speech of Lord Goff at 77D-G and 440C-F respectively. Subsequently the Law Commission in their 1995 Report on mental incapacity recommended an extensive evaluation of best interests: see para

> 328. The latest statement of Government policy in *Making Decisions* shows that the Government currently accepts the Law Commission's recommendation: see para 1.10. Pending the enactment of a check list or other statutory direction it seems to me that the first instance judge with the responsibility to make an evaluation of the best interests of a Claimant lacking capacity should draw up a balance sheet. The first entry should be of any factor or factors of actual benefit…. Then on the other sheet the judge should write any counterbalancing dis-benefits to the applicant….. Then the judge should enter on each sheet the potential gains and losses in each instance making some estimate of the extent of the possibility that the gain or loss might accrue. At the end of the exercise the judge should be better placed to strike a balance between the sum of the certain and possible gains against the sum of the certain and possible losses."

I am not convinced that a decision maker discharging an immigration or asylum function need adopt such a formal approach as was thought appropriate in the context of a decision in which the best interests of the person involved is the determinative issue. I can see no particular advantage in seeking to lay down prescriptive rules as to how a decision maker seeks to determine what are in the best interests of a child in the asylum or immigration context. I have little doubt that in a case where there is a serious debate about what constitutes the best interests of the child there would be considerable practical merit in adopting an approach at least similar to that advocated by Thorpe LJ. I stress, however, there is no legal requirement to do so and in many if not most cases the difficult task for the decision maker will be balancing the best interests of the child in question against other powerful competing interests.

52. Mr Eicke drew my attention to a number of recent cases in which the welfare or best interests of a child were taken into consideration when deciding upon whether deportation or removal was justified. Each of the cases preceded the coming into force of section 55 of the Act but each of them took account of the United Kingdom's obligation as a signatory to the UN Convention on the Rights of the Child. In DS (India) v SSHD [2009] EWCA Civ 544 DS sought to argue that the AIT had erred in law when rejecting his appeal against a decision by the Defendant to refuse to revoke a deportation order by failing adequately to consider the impact of DS's deportation on the rights of his child under Article 8 of the ECHR. During the course of his judgment (with which the other two Lord Justices agreed) Rix LJ had this to say about this ground of challenge:

> "33 The leading Strasbourg authority in this respect is Uner v The Netherlands [2006] EHHR 873. That concerned a Turkish national whom the Netherlands wished to deport following a conviction for manslaughter for which he was sentenced to 7 years in prison. He had been living in the Netherlands since he was 12 years old, and had a partner and two young children.

The European Court of Human Rights, Grand Chamber, referred to the Boultif Criteria, which included reference to "the Applicant's family's situation…..whether there are children of the marriage, and if so, their age" (Boultif v Switzerland, ECHR [2001] – IX) and added:

> "58. The court would wish to make explicit two criteria which may already be implicit in those identified in the Boultif judgment:
>
> - the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the Applicant are likely to encounter in the country to which the Applicant is to be expelled…."

34. In the event, the court rejected the Applicant's claim. It said:

> "64. The court concurs with the Chamber in its finding that at the time the exclusion order became final, the Applicant's children were still very young – 6 and 1½ years old respectively – and thus of an adaptable age….given that they have Dutch nationality, they would – if they followed their father to Turkey – be able to return to the Netherlands regularly to visit other family members residing there.
>
> Even though it would not wish to underestimate the practical difficulties entailed for his Dutch partner in following the applicant to Turkey, the court considers that in the particular circumstances of the case, the family's interests were outweighed by other considerations set out above….."

Those considerations were a mixture of the circumstances relating to the members of the family and the seriousness of the Applicant's criminality.

35. In this connection, Mr Vaughan submits that other instruments which he cited speak of the best interests of the child being "a primary consideration". Indeed he went so far as to submit that they amounted to *the* primary consideration. In my judgment, however, there is no support for that approach in Uner. Of course, in other situations, the welfare of a child might be the paramount concern of a court. In the present situation, however, conflicting public interests have to be balanced. I would view the present case as raising a less pressing case in terms of the single child than in Uner. Moreover, I do not accept the submission that the Tribunal paid other than the closest and most anxious consideration to the best interests of the boy, who's presently about 5½ years old. The Tribunal made express reference to Uner (at para 138), described the consequence of DS's conduct leading to his

> deportation as causing "enormous stress" to Ms K and the boy, and refers specifically to the loss of the opportunity of a British education and to greatly reduce contact with DS (at paras 139/1400.
>
> 36. I cannot find that the Tribunal erred in principle in addressing the presence in the family of the boy."

53. In Re AK Judicial Review [2009] Scot CS CSOH 123 Lady Clark of Calton sitting in the Outer House Court of Session had to consider a submission to the effect that the Defendant had failed to take into account a relevant consideration when assessing whether or not the Applicant had submitted a fresh claim falling within Rule 353 of the Immigration Rules. The judgment of Her Ladyship records that the advocate for the applicant submitted that it was not enough for the Respondent to concede that the best interests of the child fell within the proportionality assessment under Article 8. That did not give sufficient importance to the provisions of Article 3 of the UN Convention on the Rights of the Child. The mere balancing exercise envisaged in Article 8 did not meet or apply "the principle" that the best interests of the child is a primary consideration.

54. Lady Clark dealt with this submission in the following passages of her judgment.

> "[40]……The case proceeded on the basis of a legal concession on behalf of the Respondent that the best interests of the child is a primary consideration which required to be applied in the decision making process by the respondent in this case. In my opinion it is significant that "the principle" does not include the words "the paramount consideration" or "the primary consideration". Both these formulations would give greater importance and affect the application of "the principle" in a way not demanded by "the principle" which is phrased in terms as "a primary consideration". I conclude from the wording that "the principle" carries with it the implication that depending on the facts and circumstances of the particular case, there may be other relevant considerations which may be regarded as primary in importance and which may properly be taken into account. I also consider that when one or more such considerations are taken into account, it follows that in a particular case, one or more of these considerations may outweigh the best interests of the child….. I consider that "the principle" is not determinative and can be outweighed. This flows from the meaning that I attach to "the principle".
>
> ……….
>
> [44] It appears also to be implicit in the submission on behalf of the petitioner that Article 3 of the UN Convention lays down some higher standard protecting the interests of the child so that even a mandatory consideration of the best interests of the child as part of the consideration of Article 8 could not meet that standard and therefore give effect to the principle. I do not

> accept that. Article 3 of the UN Convention does not elevate the principle to a higher status which would be implied by the words "the paramount consideration" or "the primary consideration". It is also my opinion not intended to be a reference to the best interests of the child in the very general sense which might be appropriate in care proceedings. What is in issue, in the immigration context, is whether or not the decision affects the Article 8 rights of the child. A failure to give consideration to the best interests of the child would not in my opinion satisfy "the principle". The mere fact that a balancing exercise of circumstances and factors is necessarily involved in Article 8 consideration, does not mean that "the principle" is not given effect. In my opinion a recognition of the best interests of the child must be considered in the balancing exercise is sufficient to give effect to the principle that it is a primary consideration. Other factors or circumstances may be omitted or discounted because they have not been given that status. But a failure to address the best interests of the child in a case where the child is involved, and the decision maker is required to consider Article 8 ECHR would in my opinion amount to a failure to give effect to "the principle"."

In the later case of Re HS Judicial Review [2009] Scot CS CSOH 124 Lady Clark delivered a judgment in very similar terms.

55. I do not read these authorities as being inconsistent with the approach which I have adopted above. Indeed, in my judgment, they are entirely consistent with both my approach and that which was adopted by SIAC in T.

56. In the three cases relied upon by Mr Eicke the consideration of the best interests of the child took place in the context of Article 8 ECHR. That is hardly surprising given that section 55 was not in force; no doubt when Article 8 is raised on behalf of a particular child that will continue notwithstanding the enactment of section 55. It does seem to me to be clear, however, that the obligation arising under section 55 of the Act to have regard to the need to safeguard and promote the welfare of the child arises independently of whether Article 8 is relied upon in a particular case.

57. It is worth observing, of course, that Article 8 was raised in the instant case and considered in the decision letter of 15 December 2009. Yet a close reading of that section of the decision letter reveals that there is no mention of the best interests of the Claimant or the need to safeguard or promote his welfare. Those issues simply do not feature in the decision maker's consideration of whether it would be proportionate to remove the Claimant to Belgium for the purpose of having his asylum claim determined in that country.

58. To repeat, I consider this ground of challenge to be well founded.

Ground b)

59. It seems to me to be incontestable but that the Defendant could not rationally conclude that removal to Belgium would safeguard and promote the Claimant's welfare or be in accordance with his best interests. The reality is that all the evidence put before the Defendant suggested the opposite. However, this ground of itself does not avail the Claimant in any real sense. The obligation placed upon the decision maker was to have regard to the need to safeguard and promote the Claimant's welfare and in the absence of cogent reasons to justify a contrary view to treat the need to safeguard and promote the Claimant's welfare as a primary consideration. That does not mean, however, that this consideration will necessarily trump other considerations; ultimately in any given case the decision maker will make his decision having identified and applied a number of considerations some of which will inevitably compete. In this case the decision maker did not find that removal to Belgium would safeguard or promote the Claimant's welfare or be in his best interests; rather as I have found he did not take those matters into account or failed to attach appropriate weight to those matters.

Ground c)

60. As I have said Mr Eicke submits that the decision maker rejected the conclusions of Dr Perrin. Reluctantly I am inclined to the view that the decision-maker did proceed on the basis that the Claimant was suffering from PTSD. Accordingly this ground cannot succeed.

61. If I am wrong in my interpretation of the decision letter, however, and the proper interpretation is that the decision maker did reject Dr. Perrin's diagnosis I am far from satisfied that he had a sufficient basis for so doing. It is of course true that the complaints upon which the diagnosis of PTSD is founded first surfaced after the Claimant was made aware that he might be removed to Belgium and, therefore, many months after he made his claim for asylum. However, the Claimant is a child. Dr Perrin makes it clear that he is skilled in distinguishing between genuine and bogus complaints. There will, no doubt, be occasions when it is perfectly justified for a decision-maker to reject the contents of a medical report because there is other compelling evidence which justifies a contrary conclusion. However, and to repeat, I have considerable doubts about whether this was such a case. In the light of my finding at paragraph 59 above, however, I need say no more.

Ground d)

62. Mr Buttler submits that the Defendant failed to ensure that proper arrangements were in place for the Claimant's social care, health care and education upon arrival in Belgium prior to making a decision to remove him to that country. Further he submits that the decision-maker was wrong to state that the care plan which had been sent to the Belgian authorities was "drawn up to help his transfer to Belgium". The only care plan available, says Mr Buttler was that dated 24 March 2009, which a) was drawn up to record the services being provided in March 2009, not the services to be provided to facilitate transfer or the services to be provided in Belgium and b) the plan was obviously out of date bearing in mind the subsequent diagnosis of PTSD.

63. The detailed grounds of defence take issue with the suggestion that the care plan provided to the Belgian authorities was that which was dated 24 March 2009. At paragraph 43 of the detailed grounds the Defendant asserts that the Belgian authorities were provided in early October 2009 with a copy of the care plan provided to the Interested Party on 28 September 2009. That care plan is said to be the one dated 18 September 2009.

64. I have before me a letter dated 12 October 2009 from UKBA to the Belgian authorities which demonstrates clearly that the Belgian authorities were sent a care plan but does not demonstrate which plan was sent. That said, it would be extremely surprising if the UKBA sent a care plan dating from March 2009 if it was in possession of the plan which was dated 18 September 2009. That it had this later plan is not in doubt – see a letter dated 29 September 2009 from the Interested Party to UKBA.

65. If, as I conclude must have occurred, the UKBA sent the care plan of 18 September 2009 to the Belgian authorities, those authorities would be on notice that there was a prospect that the Claimant was in need of medical treatment for a psychiatric illness.

66. I should also record that the decision of 15 December 2009 makes it clear that any removal action taken in the future would be undertaken with appropriate care and attention to the Claimant's welfare.

67. I see nothing in the narrow point made by Mr Buttler that the Belgian authorities were not provided with appropriate information about the Claimant or that the Claimant's welfare would not be considered appropriately during the process of removal.

68. As is obvious, however, Mr Buttler makes a more wide-ranging criticism under this ground of challenge. Essentially he submits that the obligation to have regard to the need to safeguard and promote the Claimant's welfare means that the Defendant is obliged to make inquiries and/or carry out checks so as to ascertain how the Claimant would be treated upon his arrival in Belgium.

69. Mr Eicke disagrees. He points out that Belgium is a member of the EU and, therefore, bound by Council Directive 2003/9/EC "laying down minimum standards for the reception of asylum seekers;" Council Directive 2004/83/EC "on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted" and Council Directive 2005/85/EC "on minimum standards on procedures in Member States for granting and withdrawing refugee status". Mr Eicke submits that the Defendant is fully entitled to assume that the Belgian authorities will act in accordance with their obligations under EU law. Similarly, Belgium has international law obligations, at the very least, by virtue of the UN Convention of the Rights of the Child and it is bound by ECHR.

70. In R (Yogathas) v SSHD [2003] 1AC 920 the Claimant challenged a decision by the Defendant to remove him to Germany for the purpose of having his asylum claim determined in that country. He sought to impugn the decision on the ground that if sent back to Germany there was a real risk that he would be returned to his country of origin in circumstances which would amount to a breach of Article 3 of ECHR. Mr

Eicke relies upon the following passage in the speech of Lord Bingham and submits that I should adopt the same approach in the instant case.

> "9. Nothing in the careful and detailed judgments of the judge and the Court of Appeal throws doubt on the fundamental principle enunciated by the House in R v Secretary of State for the Home Department ex p Bugdaycare [1987] AC 514, 531:
>
> "The most fundamental of all human rights is the individual's right to life and when an administrative decision under challenge is said to be one which may put the Applicant's life at risk, the basis of the decision must surely call for the most anxious scrutiny."
>
> The same is true of a decision which may expose the Applicant to the risk of torture or serious ill treatment. But the judges in the Court of Appeal were in my opinion right to give weight, consistently with those fundamental principles, to two important considerations. The first is that the Home Secretary and the courts should not readily infer that a friendly sovereign state which is party to the Geneva Convention will not perform the obligations it has solemnly undertaken. This consideration does not absolve the Home Secretary from his duty to inform himself of the facts and monitor the decisions made by a third country in order to satisfy himself that the third country will not send the Applicant to another country otherwise than in accordance with the Convention. Sometimes, as notably as in Ex p Adan [2001] 2AC 477, he will be unable properly to satisfy himself. But the humane objective of the Convention is to establish an orderly and internationally agreed régime for handling asylum applications and that objective is liable to be defeated if anything other than significant differences between the law and practice of different countries are allowed to prevent the return of an Applicant to the Member State in which asylum was, or could have been, first claimed….."

71. I have no difficulty in accepting Mr Eicke's submission that I should follow the approach adopted by Lord Bingham in Yogathas. That said although the Home Secretary is entitled to give weight to the fact that a friendly sovereign state will comply with international obligations and law binding upon it such as EU Directives this consideration does not absolve the Defendant from his duty to inform himself of the facts which are likely to be relevant in an individual case. I fully accept, of course, that the level of scrutiny of individual circumstances to be demanded from the Secretary of State will depend upon the perceived harm consequent upon the removal. In this case there is no suggestion that Belgium would return the Claimant to Afghanistan in breach of any obligation imposed upon it.

72. In R (J) v Secretary of State for the Home Department [2009] EWHC 1182 (Admin) the complaint was made that the Defendant had acted unlawfully in removing a child to Austria for the purpose of having his asylum claim determined in that country. It

was alleged that the Defendant had been in breach of the Operation Enforcement Manual Policy (paragraph 26.4) which was to the following effect:-

> "Where a case is referred to an enforcement officer to effect removal:
>
> - Establish with the country to which the child is to be removed that adequate reception arrangements are in place;
>
> - Liaise with the Children's Services and/or nominated guardian's responsibility for care of the child in the UK to ensure the removal is effective in the most sensitive manner possible."

The details said to support a breach of this policy are not important to this case. Mr Eicke derives support, however, from a short passage in the judgment of Cranston J to this effect:-

> "42…. In as much as the issue of the application of this policy is concerned, that the Secretary of State must establish with Austria that adequate reception arrangements are in place, I accept Mr Kovats' submission that, given that Austria is a member of the European Union, some reliance may be placed on that fact by the Secretary of State in any consideration by her that her policy has been fulfilled. She was entitled to give weight to that fact and the expectation that Austria would treat the Claimant appropriately."

73. I accept that the decision maker in this case was entitled to expect that Belgium would comply with its obligations towards an unaccompanied child seeking asylum under the EU Instruments specified above, the UN Convention on the Rights of the Child and the ECHR. I appreciate that the Defendant has adduced no evidence in these proceedings to demonstrate that the decision maker had any actual knowledge of how the Claimant would be treated upon his removal to Belgium. However, the decision maker asserts that UKBA knew that Belgium had at least the equivalent health care service to that available in the United Kingdom. I have no reason to doubt what he says. Accepting that factual premise, it was open to him to conclude that the Claimant would receive appropriate medical treatment for his psychiatric illness (whatever its state of severity) upon arrival in Belgium.

74. There is no basis to conclude the that Claimant's welfare would not be appropriately safeguarded during the process of removal so far as reasonably possible – although I accept, of course, that the evidence before the decision maker was that removal in itself would impact adversely on the Claimant's psychiatric health.

75. I am more concerned about the apparent failure to address the social and educational aspects of the Claimant's welfare upon his arrival in Belgium. There is no evidence before me to show that UKBA had any specific knowledge of how these aspects of the Claimant's welfare would be catered for in Belgium. This is not a theoretical point in this case. I assume that a decision under the Dublin II Regulation is normally

made within weeks or at most a few months. In the instant case the Claimant had spent about a year in England becoming more and more fluent in the English language and becoming more and more integrated into an English community. In my judgment on the particular facts of this case, at least, some attention was necessary on the part of the decision maker as to what would occur in relation to schooling and the wider aspects of the Claimant's welfare upon his arrival to Belgium.

76. In my judgment in the one respect identified in the paragraph immediately above this ground of challenge probably has some substance. That said, I regard my finding under this ground of challenge not as a free standing criticism of the decision in this case but rather an aspect of the decision maker's failure to have regard to the need to safeguard and promote the welfare of the Claimant. Consequently, my finding under this ground is inextricably bound with my finding on ground a).

The Ultimate Question

77. Mr Eicke submits that the ultimate question for the decision maker in the instant case was whether or not it was proportionate to remove the Claimant to Belgium. However, he does not submit that the proportionality of removal can be determined lawfully by a decision maker without the decision maker complying with his duty under section 55 of the 2009 Act. Since I have found that the decision maker did not comply with his statutory duty under the section it follows that the decision to remove the Claimant taken in the letter of 15 December 2009 must be regarded as unlawful.

78. In his oral submissions Mr. Buttler went so far as to submit that in this case a proper application of section 55 would inevitably mean that it would not have been proportionate to remove the Claimant. I do not accept that submission for reasons which I will now explain.

79. As is obvious, the decision maker in this case was forced to consider a number of conflicting considerations. First, he had to consider the Dublin II Regulation. It is unnecessary for me to set out large extracts of the text. It is sufficient to note the following. First, the Regulation lays down the criteria and mechanisms for determining the Member State responsible for examining an application for asylum lodged in one of the Member States by a third-country national (see Article 1). Second, Article 3 envisages that the application for asylum shall be determined by one Member State only. Third, Article 6 provides that where the Applicant for asylum is an unaccompanied minor the application shall be determined by the Member State where a member of his or her family is legally present, provided that is in the best interests of the minor but otherwise in the state where the minor has lodged his or her application for asylum. Fourth, a Member State may examine an application for asylum lodged with it by a third-country national even if such examination is not its responsibility under the criteria in the Regulation (see Article 3.2).

80. It follows from the above that while the Dublin II Regulation proceeds on the basis the claim for asylum will be determined in the state which is determined in accordance with criteria contained within the Regulation that need not necessarily be the case.

81. Part 2 of Schedule 3 to the Asylum & Immigration (Treatment of Claimants etc) 2004 contains the following provisions which are applicable in the case of a proposed removal to Belgium:-

> "3(1).This paragraph applies for the purposes of the determination by any person, tribunal or court whether a person who has made an asylum claim or a human rights claim may be removed –
>
> a) from the United Kingdom, and
>
> b) to a state of which he is not a national or citizen.
>
> (2). A state to which this part applies shall be treated, in so far as relevant to the question mentioned in sub-paragraph (1), as a place –
>
> a) where a person's life and liberty are not threatened by reason of his race, religion, nationality, membership of a particular social group or political opinion,
>
> b) from which a person will not be sent to another state in contravention of his Convention rights and
>
> c) from which a person will not be sent to another state otherwise than in accordance with the Refugee Convention.

82. Although these provisions are intended to facilitate the removal of persons who have made a claim for asylum in another Member State before lodging a claim in the United Kingdom there is nothing within the provisions which suggest that removal should take place in every such case.

83. Material parts of the guidance issued under the 2009 Act have been set out earlier in this judgment. It is worth noting however that the guidance also makes it clear that the primary duties of the UK Border Agency are:-

> "To maintain a secure border, to detect and prevent border tax fraud, smuggling and immigration crime, and to ensure control, fair migration that protects the public and that contributes to economic growth and benefits the country".

84. The provision of the Dublin II Regulation, the 2004 Act and the statutory guidance mentioned immediately above are clearly very powerful factors which would tend to support a decision to remove in any given case. In the instant case, however, there are powerful features – individual to the Claimant – which militate against his removal. They are the welfare and health considerations, stressed by Mr Pateman and Dr Perrin, the Claimant's age and the length of time which he spent in this country before the decision was made in December 2009. In these circumstances it seems to me that my role is to quash the decision made in 2009 but go no further. Obviously, the fact that I am quashing the decision means that there will need to be a reconsideration. It is stating the obvious to say that the reconsideration will have to take account of the

length of time which the Claimant has now spent in this country and the apparently beneficial consequences of this lengthy stay.

85. At the handing down of this judgement I will make an order quashing the decision of 15 December 2009. I will deal with the other consequential issues which arise and any application for permission to appeal as the parties prefer i.e. either by receiving written submissions in advance of the handing down and there being no attendance at the handing down or by hearing counsel at the handing down.