Neutral Citation Number: [2008] EWHC 2921 (Admin)

Case No: CO/8382/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28 November 2008

Before :

MR STEPHEN MORRIS QC
sitting as a Deputy High Court Judge

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Between :

THE QUEEN ON THE APPLICATION OF A (by his litigation friend, VALBONA MEJZNININ)	Claimant
- and -	
LONDON BOROUGH OF CROYDON	Defendant

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Mr. Christopher Buttler (instructed by Fisher Meredith LLP for the Claimant)
Mr. Donald Broatch (instructed by Julie Belevir, Council Secretary and Solicitor, LB of Croydon for the Defendant)

Hearing dates: 18 and 19 November 2008

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Judgment

Mr. Stephen Morris QC:

Introduction

1. The Claimant is an Iraqi asylum-seeker, who arrived in this country in February 2008. He claims to have been born on 9 November 1992 and is thus, now, aged 16. If that is correct, and, if he is in need, he is owed a duty under Part III of the Children Act 1989 ("the 1989 Act") by the local authority in whose area he is, including a duty under section 20 of that Act to provide him with accommodation. Moreover, if he is a child, then this will improve his position as regards his ability to remain in this country. However on 4 March 2008 the Defendant, the relevant local authority, determined that he was then aged then 17 (and is thus now 18). This assessment was confirmed by the Defendant by decision dated 21 October 2008 ("the Decision"). On that basis, with effect from 9 November 2008, the Claimant is not a child and the local authority's duties under the 1989 Act are not so extensive and, moreover, he is not entitled to the more favourable immigration treatment accorded to child asylum-seekers.

2. Following orders of Mr. Michael Supperstone QC sitting as a Deputy High Court Judge and Mr. Robin Purchas QC sitting as a Deputy High Court Judge dated, respectively, 22 September 2008 and 22 October 2008, the matter comes before me by way of a "rolled-up" hearing of the application for permission to apply for judicial review, and, if granted, of the substantive application. Since, as appears from this judgment, the claim is clearly arguable, I grant permission and now proceed to consider the substantive application.

3. The issue in the case is whether the Decision not to review the Defendant's age assessment should be quashed on *Wednesbury* reasonableness grounds, on the basis that it erroneously rejected, or erroneously failed to take properly into account, a medical report from a consultant paediatrician, Dr. Diana Birch ("Dr. Birch's Report).

The Factual Background

4. The Claimant states that he was born in Iraq, is Kurdish and lived in Kirkuk. He states that, after both his parents were killed, his uncle arranged for him to leave Iraq in November 2007 and he travelled to Europe mainly by lorry. He arrived in the United Kingdom on 21 February 2008. At that date, on the basis of his claimed date of birth of 9 November 1992, he was 15 years old.

The Defendant's Age Assessment: 4 March 2008

5. On 4 March 2008, the Defendant's social workers interviewed the Claimant and assessed the Claimant's age to determine whether he was a child, for the purposes of s.20 of the 1989 Act, and if so, his age so as to inform an assessment of his needs. The age assessment report, on a standard form, of that date ("the March Assessment") made a number of observations, including observations that the Claimant had not helped his parents with chores, that he was unable to cook and that he used the money provided by the Defendant to buy fast food. On the final page dealing with analysis and conclusions, the standard form contained the instructions: "*If [the conclusion] 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*". The concluding section of the March Assessment was completed on that page in the following terms:

"*[A], presented as being confident, during the assessment interview, his appearance and behaviour indicated that he may be aged at least 18+ years. [A] has provided very little*

information during the assessment interview, to confirm that he was born on the date of birth which he claims to have been born. Giving him the benefit of the doubt his estimated Date of birth is 09 November 1990".

The March Assessment concluded that the Claimant's stated date of birth was incorrect and estimated his date of birth to be 9 November 1990. On that basis, at that time, the Claimant was approximately aged 17 years 4 months. The Claimant is critical of this conclusion, pointing out that it is difficult to see how a conclusion that the Claimant is two years older than his claimed age amounts to "giving him the benefit of the doubt". Moreover, the Claimant contends that the Defendant did not give any reasons to justify disbelieving the Claimant's stated age, since the mere *possibility* of being 18+ years does not support the conclusion that he was not 15 or that he was 17 years old. The March Assessment itself has not been the subject of challenge by way of judicial review. However, the Claimant suggests that it (and the criticisms of it) remain significant because, in the Decision, the Defendant confirms that the March Assessment was correct.

Pathway plan issue

6. Since, in the March Assessment, the Defendant concluded that the Claimant was a child and since he was in need, the Defendant began to look after the Claimant on 4 March 2009 pursuant to its duty under s.20 of the 1989 Act. In correspondence from June 2008 onwards, Fisher Meredith, the Claimant's solicitors, pressed the Defendant to produce an assessment and a "plan" in respect of the Claimant, and in particular a "pathway plan" under the provisions of Sched. 2 para. 19B of the 1989 Act and the *Children (Leaving Care) (England) Regulations 2001*. At that stage, the Claimant maintained that the obligation to produce one had taken effect on 4 June 1989. The Defendant's position was that, whilst there remained a dispute as to the Claimant's age, it could not prepare a pathway plan. By letter dated 21 October 2008 and having confirmed its view that the Defendant was, at that time, 17 years old, the Defendant in any event undertook to produce a pathway plan. Whilst the parties are broadly agreed that the issue is now academic, I have been invited to consider certain matters arising out of this issue. I return to this issue at paragraphs 79 to 81 below.

Dr. Michie's Report

7. On 28 April 2008, at the request of the Refugee Legal Centre ("RLC") who were acting for the Claimant in respect of his asylum claim, the Claimant was interviewed and examined by Dr. Colin Michie, a consultant paediatrician at Ealing NHS Trust. On the same date Dr. Michie produced a "draft medico-legal report" to determine the probable age of the Claimant. (As explained in paragraph 18 below, Dr. Michie's Report was first made available to the Defendant on 20 October 2008.) His conclusion was that the Claimant's "*maturity is consistent with a chronological age of 17 years*" with an error or range of this estimate of 2 years. He also stated: "*it is more likely than not that the client is 17 years old. It is possible that the client is 16 or 18 years old. It is highly unlikely that the client is either 15 or 19 years old*". Those conclusions were based on physical growth characteristics, dental development and non-objective assessment of psychological maturity, and the Claimant's own narrative account. By contrast with Dr. Birch's Report, there were no observations based on psychometric testing of mental development and little on the question of sexual development. Nor was there any assessment of the particular significance of different factors and the relative weight to be accorded to each factor. I note that reports from Dr. Michie have featured in many of the reported cases on issues of age assessment. In each case, Dr. Michie has used very similar wording to express his

conclusion. I also note that in the case of *C* (referred to below), Davis J (at §§6 to 8 and 30) expressed considerable reservations as to how Dr. Michie had arrived at the particular figure for age in question. On the other hand, in *I and O*, Owen J gave more favourable consideration to a report from Dr. Michie.

8. On 4 June 2008 the Secretary of State rejected Claimant's claim for asylum, humanitarian protection and discretionary leave, and in doing so, relied, in part, upon the Defendant's age assessment. The Claimant's appeal against that decision to the Asylum and Immigration Tribunal is currently due to be heard on 1 December 2008.

Dr. Birch's Report

9. On 16 June 2008, again at the request of RLC, the Claimant was interviewed and examined by Dr. Birch, a paediatrician with special interest in adolescence and the medical director of a charity specialising in the assessment and care of single mothers, families, young people and children. She is a fellow of the Royal College of Paediatrics and Child Health ("RCPCH"), of the Royal College of Physicians and of the American Society of Adolescent Medicine. In the past, she has worked for the London Boroughs of Lambeth, Southwark and Wandsworth. On the same date she produced her written report ("Dr. Birch's Report"), running to some 24 pages in total. Her report states that her assessment had been conducted in accordance with the RCPCH's guidelines entitled "The Health of Refugee Children: Guidelines for Paediatrician" ("the RCPCH Guidelines") and by reference to the guidance in the case of *R(B) v. LB Merton* (both referred to below). She interviewed the Claimant at the offices of the RLC. As appears both from the case law to which I have been referred and from Mr. Mullins' own witness statement, Dr. Birch, too, is often involved in providing expert reports for the purpose of local authority age assessments.

10. Dr. Birch's Report concluded that "*it is likely that [A] is aged 14.3 to 16.3 years of age - calculation of 15.28 years i.e. 15 years 3 months*" and that her estimate "*is consistent with his given age of 15 years 7 months*". Dr. Birch was not aware of Dr. Michie's Report when she made her report. Her assessment is expressed in terms of statistical likelihood and based around five principal physical and mental parameters. For *each* of these five parameters, Dr. Birch gave the statistically most likely age indicated by the observations and also gave probabilities of ranges of age. The five parameters are: mental development (based on psychometric testing); physical growth (based on height, weight, body mass index and shoe size); general physical development (based on muscle, arm, waist, skin, body hair and voice); sexual development (taking account in particular the observation that the Claimant's voice had not broken, and observations on his larynx, and facial, pubic and armpit hair); and teeth. As regards this last parameter, Dr. Birch carried out a visual inspection of the Claimant's teeth and observed "*[A] has no third molars emerged on either side of his upper or lower jaws*". She stated that, in general one would expect third molars to be present from an average of 17.7 years in a European youth and earlier in a youth from Iraq and found that the norm is 16.27 for an Iraqi. She concluded that "*[A]'s dental age is estimated at approximately 14-16 years* and that, on that basis, there is an 86% probability that he is under 17.2 and 68% probability that he is under 16.1. The analysis was based on stated scientific research, Mincer, fully cited in the Appendix to the Report.

11. Dr. Birch's Report then drew together the findings and probability for each of the five parameters For the five parameters, the average age of people with the Claimant's characteristics ranged from 14.7 years (sexual development) to 16.6 years (physical growth).

She then prepared a weighted average of all of the probabilities she has calculated to conclude that the overall age calculation is 15.28 years with a standard deviation (of 1) of +/- 2.1yrs. That standard deviation means that on her calculation 72% of the population would fall within a range of 13.18 and 17.38 years.

12. The Claimant submits that the true force of Dr. Birch's findings is the probability that the Claimant falls below a certain age. The meaning of her overall conclusion is that, in her view, 86% of the population with features of the Claimant will be below 17.38 years old and 68% of population with those features will be below 16.33 years old. Put another way, only 14% of the population will be more than 17.38 years old. The Claimant contends that these conclusions are irreconcilable with the social workers' conclusions.

Request for re-assessment and commencement of proceedings

13. On 30 June 2008 Fisher Meredith sent Dr. Birch's Report to the Defendant requesting that the March Assessment be reconsidered and asked the Defendant to reassess the Claimant's age in the light of that Report. Fisher Meredith also sought to rely upon extracts from a report from a Dr. George which suggested that Claimant's identity papers were authentic. Initially the Defendant did not respond substantively to this request for reconsideration. In August 2008, Fisher Meredith threatened to apply for judicial review.

14. On 4 September 2008, these judicial review proceedings were issued, on the basis, first, of an alleged failure to review the age assessment when new material had come to light, and secondly, of a failure by the Defendant to produce a care plan or pathway plan as required under the legislation.

15. On 24 September 2008, the Defendant agreed "*to review the decision dated 4 March 2008*" and indicated the procedure it intended to adopt in conducting that review.

16. On 29 September 2008 Fisher Meredith suggested that in respect of Dr. Birch (and Dr. George) that if the Defendant needed further information, a list of specific questions should be sent to them by the Defendant by 30 September. On 3 October 2008 Fisher Meredith provided the Defendant with a copy of Dr. George's report it had received on 30 September 2008, pointing out that Dr. George no longer considered the identity card to be genuine and stating that the Claimant no longer relied upon this card as evidence of his stated age.

17. In accordance with the procedure it had outlined, on 10 October 2008, the Defendant sent to the Claimant a "minded to" letter, setting out, with reasons, its provisional conclusion that the March Assessment was correct, notwithstanding the further evidence presented. The reasons were substantially similar to those ultimately contained in the Decision. The Defendant invited the Claimant to comment and make representations by 17 October 2008.

18. On following Monday, 20 October 2008, Fisher Meredith submitted the Claimant's representations on the "minded to" letter. At that time, no response from Dr. Birch herself had been received. As regards Dr. Michie's Report, according to Mr. Mullins' witness statement, it appears that at some time (although it is not clear when) the Claimant indicated to one of the Defendant's social workers that he had been examined by Dr. Michie. In response to a request from the Defendant on 7 October 2008, Fisher Meredith made inquiries of the RLC and, as a result, disclosed Dr. Michie's Report in this letter of 20 October 2008.

19. On the next day 21 October 2008, the Defendant, by letter sent to Fisher Meredith, took the decision now challenged in these proceedings. In a further letter sent the same day, the Defendant stated that since "our review decision is that [A] is 17 years old", the Defendant would progress the pathway plan being sought.

The Decision

20. The Decision, in the form of a letter written by Steve Mullins, Practice Manager, Croydon Unaccompanied Minors Team, started:

"*I refer to the "minded to" letter dated 10 October 2008. I have now considered the further representations made by yourselves in your letter dated 20 October and the Report of Dr. Michie dated 28 April 2008. I have given full and careful consideration to the information before the Authority.*

I have completed [my] review of the decision dated 4 March 2008 and conclude that [A] is 17 years old" *(emphasis added)*

The Decision then set out, in 32 numbered paragraphs, the Defendant's reasons for its conclusion, addressing the following matters:

- Paragraphs 1 to 14: Dr. Birch's Report.
- Paragraphs 15 to 18: the Identity Card issue.
- Paragraphs 19 to 22: the Claimant's own witness statement.
- Paragraphs 23 and 24: Dr. Michie's Report
- Paragraphs 25 to 27: "Current placement and comments of those who deal with [A]".

These paragraphs are considered in more detail below.

21. Then, the Decision concluded as follows:

"***Conclusion***

28 In my view, no reliable documentary evidence has been produced to determine [A]'s age. I have set out my concerns about the Report of Dr. Birch above; I cannot agree with her conclusions.

30 Further, the report of Dr. Michie, commissioned on behalf of [A], supports the Authority's age assessment.

31 In reaching my conclusion I have taken in account all the factors in the pool of relevant material and have reached a composite assessment. These factors include the credibility of the history given, his physical appearance, his behaviour at the time of the age assessment, and subsequent interaction from his social worker and others over a period of approximately 6 months. It also includes, of course, consideration of the reports of Dr. Birch and Dr. Michie, although neither of these is per se determinative.

32 My conclusion is that [A] is 17 and that the age assessment by the Authority dated 4.3.08 was correct, and should not be interfered with." *(emphasis added)*

22. I make two immediate observations on these concluding paragraphs. First, the Claimant maintains that, by paragraph 28, the Decision rejected Dr. Birch's conclusions for the reasons set out in paragraphs 1 to 14. The Defendant contends, by contrast, that the reasons in paragraph 1 to 14 did not lead Mr. Mullins to reject Dr. Birch's conclusions. Rather, as appears from paragraph 31 of the Decision Letter, her report and conclusions were in fact taken into account, but, on balancing them with other considerations, it was decided not to follow her conclusions. Secondly, there is a dispute between the parties as to the nature of the decision taken in the Decision. Mr. Broatch, counsel for the Defendant, contended that it was no more than a decision as to whether or not there was sufficient material to cause the social workers who carried out the March Assessment to reconsider the Claimant's age. By contrast, the Claimant contends that the Decision was a "full merits review" of the March Assessment. In this regard, it is significant that paragraph 31 refers to Mr. Mullins himself reaching a "composite assessment" and in paragraph 32 he states *his conclusion* that the March Assessment was correct. (Paragraph 3 of the Defendant's letter of 29 September 2008 is also relevant in this regard.) I consider that the Claimant's contention here is correct, and that the process undertaken by Mr. Mullins was a full merits review.

23. At the hearing on 22 October 2008, the case was adjourned and directions were given for the Claimant to serve amended grounds and for the Defendant to serve amended grounds of resistance, both to address the position as it then stood as a result of the Decision.

24. On 26 October 2008 Dr. Birch prepared an "Addendum Report". It appears that, rather than being a response to the Decision, this was in fact written in response to the "minded to" letter. In any event, this Addendum Report was not submitted prior to the Decision. In the event it has not been necessary to refer in any detail to the material in the Addendum Report, in order for me to determine this claim.

25. The Defendant served a witness statement from Mr. Mullins dated 13 November 2008, which is directed principally to "*the Authority's approach as regards the approach to reports of medical practitioners*" and, in particular, as to "*UMT's concerns as to Dr. Birch's reports*". Both parties seek to rely upon this witness statement, in different ways. Although Mr. Broatch for the Defendant did not appear to accept this, I consider that this is material which is submitted by way of elucidation of reasons in the Decision and it is appropriate for me to consider some of this material alongside the Decision, where it was expressly relied upon by Mr. Broatch: see *R(B) v. LB Merton*, below, at §42. I revert to the contents of this statement in paragraphs 59 and 60 below.

The RCPCH Guidelines

26. Much reliance was placed, both in the primary material and in argument, and has been placed in earlier cases, upon the RCPCH Guidelines. Relevant parts provide as follows:

Paragraph 5.6 provides:

*"**5.6 Puberty and the Assessment of Age.** Paediatricians may be asked to give their opinions whether the young person is a child under the age of 18. This request may be made by the child's legal representative, who may be seeking to show that the young person in question is under the age of 18, as those accepted as such should not normally be held in detention. The Paediatrician's assessment should only be done in the context of a holistic examination of the child. When making their assessments, Paediatricians may find it useful*

to be aware of the Asylum Casework Instructions used by the Immigration Nationality Department of the Home Office. An excerpt from these is given at the end of this section of the guidelines…

In practice, age determination is extremely difficult to do with certainty and no single approach to this can be relied upon. Moreover for young people aged 15 – 19, it is even less possible to be certain about age. There may also be difficulties in determining whether a young person who might be as old as 23 could, in fact, be under the age of 18. Age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side. Assessments of age measure maturity, not chronological age. However, in making an assessment of age, the following issues should be taken into account.

Paragraph 5.6.3 addresses dental age in the following terms:

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

Paragraph 5.8 dealing with nutrition, refers to the relationship between growth and nutrition and includes the statement: *It is important to refer children where there is a more than a two centile discrepancy between height and weight ...".*

The Guidelines also refer to, and set out, extracts from Asylum Casework Instructions, including the following passage under the heading "*3.13 Medical Assessments of Age*":

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

The Guidelines conclude, by way of summary:

"The determination of age is a complex and often inexact set of skills where various types of physical, social and cultural factors all play their part, although none provide a wholly exact or reliable indication of age, especially for older children.

Assessments of age should only be made in the context of a holistic examination of the child.

As there can be a wide margin of error in assessing age; it may be best to word a clinical judgment in terms of whether a child is probably, likely, possibly or unlikely to be under the age of 18."

Relevant Legal Principles

27. The relevant legal principles to be applied to the issue of age assessment by a local authority for

the purposes of s.20 of the 1989 Act are largely common ground. S. 20(1) itself provides:

"Every local authority shall provide accommodation for any child in need within their area who appears to them to require accommodation as a result of -

(a) there being no person who has parental responsibility for him;

(b) his being lost or having been abandoned; or

(c) the person who has been caring for him being prevented (whether or not permanently, and for whatever reason) from providing him with suitable accommodation or care"

28. As regards the issue of assessments and plans, pursuant to Sched. 2 para. 19B of the 1989 Act and Regs 3(1), 7(2) and 8 of the Children (Leaving Care) (England) Regulations 2001, a local authority must assess the needs of an eligible child and thereafter provide a "pathway plan" within three months of him becoming an "eligible child". An "eligible child" is a child aged 16 or 17 and who has been looked after for 13 weeks. Here, on the *Defendant's case* as to age, the obligation to produce a "pathway plan" arose on or around 4 September 2008. By contrast, on *the Claimant's own case* on age, no such obligation has yet even arisen, since the Claimant only reached 16 on 9 November 2008; instead, on the Claimant's case, there was an obligation to produce a care plan under the Framework for Assessment of Children in Need and Their Families issued pursuant to s.7 Local Authority Social Services Act 1970.

29. I have been referred, in particular, to four decisions of this Court which specifically consider age assessments under the 1989 Act: *R(B) v. London Borough of Merton* [2003] 4 All E R 280 (Stanley Burnton J (as he then was)); *R(I and O) v. SSHD* [2005] EWHC 1025 (Admin) (Owen J), *R(C) v. London Borough of Merton* [2005] EWHC 1753 (Admin) (Davis J) and most recently the decision of *R(M) v. London Borough of Lambeth* [2008] EWHC 1364 (Admin) (Bennett J). I have also been referred to three cases arising in the context of housing and homelessness.

30. I do not propose to set out in detail these authorities. *R(B) v. LB Merton* was the first, and is the leading authority in the field, establishing general principles to be applied, and in fact applied in practice, by local authorities. *I and O* and *C* are two particular cases of the application of relevant principles. I return to these two below on particular points which arise in the present case. As I have already pointed out, reports from Dr. Michie or Dr. Birch, or indeed both, feature in all four cases. From these authorities, the following general points can be made:

(a) The decision as to age is a decision to be taken by the local authority: *B* §39; the local authority's social workers are lay people with hands on experience, often substantial, of children.

(b) The local authority must make its own decision. That decision must be based on adequate information: *B* §39.

(c) Judicialisation of the process of age assessment by the local authority is to be avoided *B* §§36, 50.

(d) The local authority is obliged to give adequate reasons for its decision, albeit those reasons need not be long or elaborate: *B* §§45, 48.

(e) As stated in the RCPCH Guidelines, age determination is an inexact science and margin of error can sometimes be as much as 5 year either side; for someone who is close to the age of 18, there is no reliable medical or scientific test to determine whether a person is or is not over 18: *B* §22.

(f) Since there is no objectively verifiable determinant, it is important to take account of the history of the person. However an untrue history is not necessarily indicative of a lie as to age, since lies may be told for other reasons: *B* §28.

(g) It is naive to assume that an applicant is unaware of the advantages of being a child: *B* §29, *I and O* §32.

(h) As a matter of procedure, the applicant should be given an opportunity to comment upon the local authority's views through a "minded to" process: *B* §56.

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

(a) Whilst it is not necessary for the local authority to obtain a medical report, a medical opinion will always be helpful: *B* §§34, 51.

(b) Reliable medical opinion on the issue can only be got from one of the few paediatricians with experience in the area, but they may be of limited help (as in that case Michie was): *B*§ 23.

(c) When conducting or reviewing an age assessment, the local authority is under a duty to consider any medical report submitted: *C* §§30 and 31, *I and O* generally.

(d) Where a local authority decides not to follow the views in a medical report, it is under a duty to give reasons for not following those view: *C* §31

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

32. It follows that any reasons which are given for not following a medical report must be sound or cogent and the court is entitled to review those reasons on grounds of irrationality. If the reasons given for rejecting a medical report on age assessment are not sound or cogent**,** the rejection of the report is irrational, and absent further good reasons, the decision taken is itself open to challenge as being *Wednesbury* unreasonable on grounds of irrationality. Whilst it is true that the local authority decision is made by laymen, in the present case the process was in fact highly "legalised" in the sense that the Decision was taken in the context of litigation which had already commenced (and presumably with legal advice available) and in the knowledge that

it was likely to be challenged.

33. In the recent case of *M*, Bennett J held, first, that Article 6 ECHR does not apply to a local authority's determination of age and, secondly, that the question of whether an individual is a child for the purposes of sections 17 and 20 is not one of precedent fact which the court may review on the balance of probabilities. An appeal has been heard by the Court of Appeal and judgment is awaited. For present purposes, the parties are agreed that I should proceed on the basis of the position as stated by Bennett J. The only proviso to that position is that the Claimant has reserved the right to argue his case on the basis of "precedent fact", in the event that the appeal to the Court of Appeal is successful.

34. There is a further noteworthy aspect of the *M* case. As indicated above, reports from Dr. Michie and Dr. Birch feature in many cases of a similar nature to the present. In *M*, the Defendant in the present case and the London Borough of Lambeth have sought a general ruling that *"for the purposes of assessing whether a child is a child, paediatric evidence of the sort produced by Dr. Michie and/or Dr. Birch in these cases is scientifically ill-founded and of no evidential value*". The background to this application is explained at §§165 to 171 of Bennett J's judgment, on which I make three observations. First, he recorded the exasperation of the local authorities in having to face judicial review of their rejection of "*what they believe to be completely unscientific reports from consultant paediatricians*". Secondly he refers to the fact that Dr. Michie's evidence has received a mixed reception in the courts. Thirdly, I note that, *in that case*, Lambeth had instructed its own consultant paediatrician who had concluded that the methodology of Dr. Michie and Dr. Birch lacked any or any real scientific basis. In the event the learned judge declined to determine this issue as a preliminary issue, as it was much better dealt with at a final hearing "within the full factual matrix of each case." It remains to be seen whether, following the Court of Appeal's decision, there will be any such determination. Accordingly, and as matters stand, I approach the question of medical evidence in general, and the evidence in this case, on the basis of the principles set out in paragraph 31 above.

The Parties' contentions

35. The Claimant has put his case in a number of different ways. The Amended Grounds (in Mr. Buttler's skeleton) puts forward seven grounds. In oral argument, these were refined and can be summarised as follows:

(1) The Defendant rejected the conclusions of Dr. Birch for reasons (at paragraphs 1 to 14 of the Decision) which were not sound and/or were erroneous; and it is, at least, possible that the Defendant would have taken a different decision had those errors not been made. All the reasons given were unsound, but in particular those relating to dental assessment, margin of error and subjectivity were unsustainable and of great materiality (formally, grounds 1 to 4).

(2) Even if the Defendant did not reject, outright, the conclusions of Dr. Birch, the Decision failed to grapple with Dr. Birch's findings and conclusions and failed to explain why it preferred other material over the conclusions of Dr. Birch (ground 2 para. 58 and ground 5).

(3) The Decision should be quashed and, since it was in fact a "full merits" review of the age assessment, the Defendant should be required to carry out a fresh "full merits" review.

36. The Claimant also raises two other grounds: ground 6 raises the issue of precedent fact and ground 7 goes to the issue of the pathway plan.

37. The Defendant's case is as follows:

(1) The Decision is not just about Dr. Birch's Report. Whilst the Defendant accepts that it was not entitled to reject Dr. Birch's Report out of hand, it did not, in fact, reject Dr. Birch's Report. Rather, Dr. Birch's Report was part of the material upon which the Defendant took its decision, but it was not determinative. Taking account of the entire pool of available material, the Defendant was entitled to reach the conclusion it did reach and there is no basis for judicial review.

(2) If the Decision is set aside, the Defendant is only required to reconsider whether there is any material sufficient to warrant a further review of the March Assessment.

(3) In any event, relief should be denied, as it will serve no purpose. On any reconsideration, the Defendant is bound to reach the same conclusion as it reached in the Decision.

(4) As to the pathway plan, the Claimant's position is unfounded and in any event academic.

Analysis

38. I consider the Decision on two distinct bases. First, assuming that the Decision effectively rejected Dr. Birch's Report for the reasons set out in paragraphs 1 to 14 of the Decision, was that rejection irrational in the sense that the reasons given were unsound and lacking in cogency? Secondly, assuming that, despite paragraphs 1 to 14, the Decision did not reject, outright, Dr. Birch's Report, was the Decision that the conclusions in Dr. Birch's Report were outweighed by the other considerations a rational and cogent conclusion?

39. In my judgment, the first basis is in fact the correct analysis: the Decision (at paragraph 28) did effectively reject Dr. Birch's Report and its conclusions. Nevertheless I also consider the case on the alternative basis.

(1) The Decision's analysis of Dr. Birch's Report; paragraphs 1 to 14

40. Paragraphs 1 to 14 of the Decision, dealing with Dr. Birch's Report, contain, in substance, twelve distinct points (paragraphs 7 and 8, and 12 and 13 each raising one point). In reaching his conclusion (at paragraphs 14 and 28) effectively to disregard Dr. Birch's Report, it appears, at least on the face of the Decision, that Mr. Mullins relies on all of these points.

41. The Claimant takes issue with all twelve points, contending that none of the criticisms contained in them are justified. In the course of argument, it became common ground that some of the points were of greater significance for the Decision than others, and in this judgment I concentrate on the former. However before doing so, I consider these "lesser points".

The "lesser points" of criticism

42. Seven of the twelve points fall into this category. First, in my judgment, the Claimant's criticisms of some of these lesser points made in the Decision are well founded. Many of the points are unsound and irrational. Paragraph 1 of the Decision which states that Dr. Birch's Report is an "age assessment" and not a "medical assessment" is factually incorrect and, in any event, a distinction, the purpose or relevance of which the Defendant has not been able to explain. The complaint, in paragraph 2, that Dr. Birch carried out a physical examination which included an examination of the Claimant's genitalia was based on unfounded grounds. At paragraph 9, the Decision appears to take issue with Dr. Birch's assessment of shoe size. But Dr. Birch's Report does explain, quite clearly, how *foot* size is relevant. The criticism that the data relied upon is from an American source makes no sense. Paragraph 11 which points out that Dr. Birch had placed the mid-range estimate at an age lower than the age claimed by [A] shows a misunderstanding of the nature and purpose of Dr. Birch's Report, which is to provide an objective statistical age probability based on the observed characteristics of the Claimant, and not to give a direct opinion of how old the Claimant is.

43. Of the remaining "lesser points", two of these - a "concern" questioning Dr. Birch's medical equipment (paragraph 3), and the Claimant's ability to speak English (paragraph 5) - also seem to me to be questionable. As to the seventh - Dr. Birch's observations of symptoms of post-traumatic stress disorder - the comparison in the Decision with Dr. Michie's observations in this regard seems more valid, but here too both parties accepted that Dr. Birch's observations were not really material to her statistical findings on mental development (at section E.I, 1 to 9 of Dr. Birch's Report).

44. Secondly, the categorisation of these paragraphs as "lesser points" emerged in the course of argument. The Defendant, in its skeleton and in oral argument, suggested that, even if there was something in the Claimant's criticisms of these points, such criticisms were "beside the point", since they did not make a material contribution to the Decision in general or the assessment of Dr. Birch in particular. This is a point which assists the Claimant as much as the Defendant. Even if one or more these criticisms made by Mr. Mullins were sound, since they were not material, they can be discounted as substantive reasons justifying his conclusions on Dr. Birch's Report. Either way, these points can be left out of account. I should add, however, that it is not entirely clear that these points did not in fact have an influence upon Mr. Mullins in reaching those conclusions. There is nothing in the Decision itself which indicates that these were not considered to be material. Given that there are so many of these lesser points amongst the reasons given, it might appear that they were included to add weight to the conclusions upon Dr. Birch's Report.

The remaining five points in paragraphs 1 to 14 of the Decision

45. That leaves five substantive points as possible reasons for rejecting Dr. Birch's reports. As to two of these, counsel for the Defendant accepted that they did not undermine much in Dr. Birch's Report and were not sufficient reason to discard Dr. Birch's Report as a whole. These are the points made at paragraph 4 and at paragraphs 7 and 8 of the Decision

46. Paragraph 4 of the Decision states:

"*<u>More importantly</u>, Dr. Birch takes whatever [A] tells her to be as fact. <u>For example</u>, in relation to family background, it is stated that [A]'s parents were of average height and this is take[n] as a fact. This information is later used in relation to [A]'s physical development. Whilst it is not the role of Dr. Birch to assess [A]'s credibility, there is nevertheless no*

documentary record of [A]'s family history for her to rely on." *(emphasis added)*

47. First, in general, Dr. Birch's report puts forward statistical analysis of probability of age, and is not principally based on narrative history or on what "A tells her to be fact". Secondly, in relation to Dr. Birch's conclusions on height (as one of four factors leading to her assessment of physical growth), Dr. Birch does refer, at page 11 of her report, to what A told her about his own parents' heights. At the same time she points out that "*it is not accurately estimable*". Nevertheless, in my judgment, her statement that "*it is said that they [his parents] are average in height*" is used by Dr. Birch, albeit to a limited degree, as some form of corroboration for the statistical conclusion that A's height of 167.5cm would indicate an age of 14.25 years. Thirdly, and as Mr. Broatch fairly accepted in argument, this is the one and only point in Dr. Birch's Report where she can be said to rely on what A had told her in reaching her statistical conclusions. However, paragraph 4 of the Decision effectively states that the reliance upon such narrative is a general feature of Dr. Birch's Report as a whole (see the words "for example") and that this is an important reason for rejecting Dr. Birch's Report. The first statement represents a clear mistake as to the content of Dr. Birch's Report and the second is no longer relied upon by the Defendant. Paragraph 4 substantially overstates the point about parental height and goes on to make a point of general criticism of Dr. Birch's Report for which there is no basis. Accordingly the reasoning in paragraph 4 is in my judgment not a sound reason for rejecting Dr. Birch's Report.

48. Paragraphs 7 and 8 of the Decision address Dr. Birch's findings relating to the Claimant's weight and "body mass index" ("BMI"). Dr. Birch found that the Claimant's weight would be the average weight of a boy aged 17.25 years and higher than average for his stated aged. His BMI was also higher than average for his claimed age. Dr. Birch went on to state that his “high” weight might be accounted for as a result of an unbalanced diet (rather than this being an indicator of him being older) and stated that BMI is more applicable to the assessment of obesity (than age). At paragraph 7, Mr. Mullins states that according to A's social worker, A is healthy looking and not overweight. He then continues at paragraph 8:

"*The BMI calculations tend to contradict Dr. Birch's conclusions. ... It is true that GPs use the BMI calculation to assess whether a person is of healthy weight, underweight, overweight or obese. Nonetheless, a BMI may give some indication of a young person's age. Although it is not a calculation specifically designed for this purpose, it may constitute one useful piece of material in the general pool of factors. I do not find Dr. Birch's conclusions on this point helpful*" *(emphasis added)*

49. First, as to whether this criticism of Dr. Birch was justified, it appears from Dr. Birch's Report that the Claimant's "high" weight and BMI could indicate either that the Claimant is in fact older than he claims to be or that he is "overweight" for his age. Mr. Mullins' view is that the claimed reason for the latter conclusion is not made out, because there is no sufficient evidence of an unbalanced diet and thus it cannot be discounted that the higher weight and BMI figures are in fact an indication of actual age. I am satisfied that, by the two penultimate sentences of paragraph 8 of the Decision, Mr. Mullins is saying that, in his view, BMI is an indicator of age *in this particular case*. In my judgment, this conclusion and the conclusion in the final sentence (effectively discarding Dr. Birch's views on the point) are unsound for three reasons. Mr. Mullins fails to take account of Dr. Birch's finding (at paragraphs 3, 8 and 12 of the Physical Examination section) that the Claimant is overweight by reference to the distinct objective fact of his weight when compared to his height. (This view is consistent with paragraph 5.8 of the RCPCH Guidelines). Secondly, Dr. Birch's suggestion of an unbalanced

diet is supported by references in the Defendant's own records of the fact that he was eating takeaway food. Thirdly, the significance of weight and BMI are issues more properly within the field of expertise of a paediatrician, which are not countered by any other medical evidence, and upon which the non-expert views of social workers are insufficient counterweights on these points.

50. Secondly, in oral argument, Mr. Broatch's position was that, in any event, this criticism of Dr. Birch was merely one matter which pointed away from Dr. Birch's conclusions, which went into "the pool of relevant material" and accepted that simply because there is one statistic which was more consistent with the Defendant's position on age, then that was sufficient to discard Dr. Birch's Report altogether. In my judgment, therefore, this criticism, even if it had been justified, cannot be a reason, on its own (or indeed in combination with any of the identified factors) for rejecting Dr. Birch's Report.

51. That leaves three remaining reasons given in the Decision, and, it follows from Mr. Broatch's position as regards the significance of the foregoing points, that these three are the essential reasons for Mr. Mullins "not agreeing with" Dr. Birch's Report. I deal with each in turn.

(1) Dental Assessment

52. As set out in paragraph 10 above, Dr. Birch found that the Claimant's dental age was estimated at 14-16 years. Paragraph 10 of the Decision states:

"*In relation to the evaluation of [A]'s teeth, the conclusions drawn are based on Dr. Birch looking into [A]'s mouth. I cannot attach any weight to this as it is carried out in a non-clinical setting and dental x-rays do not support it. Furthermore, it is not Dr. Birch's area of expertise. I would normally expect that a clinician who does not have a relevant area of expertise, would refer a subject to someone who does.*" *(emphasis added)*

53. According to paragraph 5.6.3 of the RCPCH Guidelines, dental age is a highly important factor in age determination. Estimates from dental development are accurate to within the narrower range of +/- 2 years and "form *the* basis of most forensic estimates of age". Despite being aware of the RCPCH Guidelines in general, the Decision attaches no weight at all to Dr. Birch's assessment of dental age. Mr. Mullins gives three reasons for this.

54. First, he states the matter is not within Dr. Birch's expertise. However, the RCPCH Guidelines are guidelines for *paediatricians* and plainly consider that dental age assessment is a matter which can properly be conducted by a paediatrician. The Defendant makes no similar criticism of Dr. Michie (upon whom it places reliance) and who made the same physical observation of the Claimant's third molars. In *I and O*, Owen J positively relied upon the dental examination carried out by a paediatrician - Dr. Michie in that case - stating (at §53) that "*Dr. Michie's reports derived further authority from his extensive specialist expertise, and most importantly from the fact that unlike the social workers he was qualified to undertake dental examinations* ... ". In my judgment, Dr. Birch, just as Dr. Michie, was sufficiently qualified to make the physical observations, and to draw the statistical conclusions, which she did. As to the last sentence of paragraph 10, it became clear in argument there is no basis for any implied suggestion that the Defendant *normally or usually* receives dental assessments from dental specialists, rather than as part of a report from a paediatrician.

55. Secondly, as regards x-rays, the RCPCH Guidelines themselves, in addressing dental age

assessment itself, make no reference to the need for x-rays and, more generally, positively advise against the use of x-rays in age determination. Mr. Broatch indicated that the Defendant's practice was to receive dental reports, and where it did, these would include x-rays. But he accepted that dental reports were received only "sometimes". This criticism of Dr. Birch is unfounded.

56. Thirdly, as regards the objection that Dr. Birch's physical observation of the Claimant's teeth took place in a "non-clinical setting", the RCPCH Guidelines say nothing about the particular setting for any observation. No reason has been advanced as to how this may have affected what was merely a visual inspection and one whose results are confirmed by Dr. Michie's Report. This objection to Dr. Birch's conclusion on dental age is also unfounded.

57. In my judgment, the Decision did not merely question Dr. Birch's dental assessment or give it less weight; rather it ruled it out of consideration altogether. The reasons for doubting the dental evidence were themselves not cogent. Moreover, when taken with the relatively high significance of dental age as an objective factor in any age assessment, to go further and attach no weight at all to Dr. Birch's dental age assessment was irrational. There was no contrary medical evidence upon which to reach such a conclusion. In this respect, the Decision overall wholly failed to take into account a highly material consideration.

(2) The relevant margin of error and the assistance provided by medical reports in age assessments

58. Paragraphs 12 and 13 of the Decision state:

"*As regards medical practitioner reports generally: the Authority's approach is in accordance with the views of the Royal College of Paediatrics and Child Health in their Guidelines for Paedriaticians dated November 1999, and that recently set out in the ILPA report dated May 2007. In summary, there is no reliable medical or other scientific test to determine a young person's age with any degree of accuracy. As the RCPCH points out, age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side. The ILPA report states that medical assessment methods (bone age, dental age assessment (with x-rays), anthropometric measurements) are associated with a margin of error of at least 2 years in either direction.*

My view is that the lack of reliable medical or scientific test to determine age, and the large margin of error of the current medical scientific methods used, means <u>medical practitioner reports can only provide a general guide to an applicant's age. The Authority considers they are only of limited assistance in the assessment of where, in the range of 15-20, years a young person falls</u>" *(<u>emphasis</u> added)*

59. This reasoning is elucidated in Mr. Mullins' witness statement as follows:

"*5. The UMT has developed a general approach to medical practitioner reports. It most commonly receives report [sic] from Dr. Birch. Previously, the Authority received numerous reports from Dr. Michie. ...*

...

10. The UMTs concerns about medical practitioner reports generally are that it does not accept, consistent with the view of the Royal College of Paediatrics and Child Health in their Guidelines for Paediatrics date[d] November 1999 that there is any reliable medical or other scientific test to determine an applicant's age and in particular whether he is under 18. Further, it accepts the view set out by the RCPCH that age determination is an inexact science and the margin of error can sometimes be as much as 5 years either side. The UMT considers that medical practitioner reports can only provide a general guide to an applicant's age and that within a wide range.

...

12. It is my view, shared by the assessing social workers and reviewing officers within the Authority's UMT that medical practitioner reports can only provide general guide to an applicant's age within a wide range" (emphasis added)

60. Mr. Mullins's statement also identifies further concerns as to Dr. Birch's reports, including the following, at paragraph 8:

"b) Dr. Birch uses a range of +/- 2.1 years which is not consistent with the views of the RCPCH and no scientific or medical reason is given for this. The reason given - practical value - is unhelpful where the assessing social workers are trying to assess the age of a particular applicant.

c) Dr. Birch's assessment starts from the statistical premises that an applicant is 'average'. This is an unfounded assumption, and she declines to go on to consider where, in the range she puts forward an individual falls as to do so would introduce an unjustified subjective element into a scientifically objective assessment. Croydon considers that it is necessary to go on to analyse the statistics put forward by taking into account other factors, which emerge during the assessment." (emphasis added)

61. In my judgment, paragraphs 12 and 13 together with the further explanation given at paragraphs 10 and 12 of Mr. Mullins' statement contain the heart of the reasons in the Decision for rejecting Dr. Birch's Report. Paragraphs 12 and 13 on their own make clear that the Defendant considers that, in general, paediatrician reports provide "limited assistance" to the Defendant in reaching its decision. However, when the explanation given for this in Mr. Mullins' statement is taken into account, the Defendant is in fact saying that such reports provide no, or practically no, assistance at all when it comes to determining where, in the range from 15 to 20, a young person falls. In this regard, the Defendant relies expressly on the oft-cited *general* statement in the RCPCH Guidelines at paragraph 5.6 "*that age determination is an inexact science, that the margin of error can sometimes be as much as 5 years either side*" and that "*for people aged 15-18 it is even less possible to be certain about age*". Against this background, the Defendant's conclusion (at paragraph 10 of Mr Mullins' statement) that such reports "*can only provide a general guide to an applicant's age and that within a wide range*" necessarily indicates that the Defendant's view is that, whilst such reports may possibly be able to give a guide as to *the range* of ages within which an applicant may fall, they cannot assist as to where *within* that range he falls. Particularly where the issue is whether someone is under 18 or not, since it cannot be possible to say where, in a range of 15-20, an applicant falls, a medical report cannot assist the Defendant.

62. However this reasoning does not tell the full picture. Mr. Mullins, at paragraph 8 b) of his statement, observes, as a reason not to follow Dr. Birch's Report, that she "*uses a range of +/- 2.1 years which is not consistent with the view of the RCPCH*". The "view of the RCPCH" referred to is a margin of error "which can sometimes be as much as 5 years".

63. In *I and O*, the same reason was given by Immigration and Nationality Directorate for declining to follow a paediatrician's report (Dr. Michie in that case). Owen J held that, in so concluding, the IND had fallen into error and as a result its decision was irrational. Having referred to passages from the RCPCH Guidelines set out in paragraph 26 above, Owen J continued at §§41 to 45 of his judgment:

"41. As can be seen at paragraphs 5 and 10 above, Mr Moore appears to have rejected, or at the least to have reduced the weight that he attached to Dr. Michie's reports, on the basis that although Dr. Michie gave a margin of error of plus or minus 2 years, the Guidelines give a margin of error of plus or minus 5 years.

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

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

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

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

that he is acknowledged as a contributor to them. In my judgment the claimants' criticism that the defendant has either misunderstood or misapplied the Guidelines when considering the reports from Dr. Michie, is well founded."

64. In my judgment, the same analysis and conclusion apply in the present case. Mr. Broatch contends that the present case is distinguishable from the facts in *I and O*, because, in paragraph 12 and in his statement, Mr. Mullins expressly refers to the fact that the margin of error is "sometimes" +/- 5 years and thus there has been no misunderstanding or misapplication of the Guidelines. However, in my judgment, the statement, in paragraph 8 b), that Dr. Birch's margin of error is "not consistent with" the RCPCH view can only be understood as indicating that the RCPCH view which Mr. Mullins has, in fact, applied *is* a margin of error of +/- 5 years. If Mr. Mullins accepted that, in some cases, even the RCPCH's view was that the margin was less than this, he could not have stated that Dr. Birch's range was inconsistent with the RCPCH view. Moreover, all the other points made by Owen J (namely, specialists within the paediatrics field, the narrower margin of error where there is a dental examination, and the excerpt from the Asylum Casework instructions) apply with equal force in the present case. Even if he did not misunderstand the RCPCH Guidelines, Mr. Mullins certainly misapplied them. Moreover this error in turn undermines the conclusion (at paragraphs 10 and 12 of Mr. Mullins' statement) that medical reports do not assist in "15-20" cases.

65. Mr. Broatch invited me not to follow the reasoning of Owen J in *I and O*. But, in my judgment, to do that would involve an approach which is directly inconsistent with RCPCH Guidelines and with the case law as a whole as to the value of medical evidence and might have the practical result of allowing the Defendant to ignore a paediatrician's report in a case where there is no contrary medical evidence at all.

(3) Subjectivity and "aimed" to support the Claimant's age

66. Paragraph 14 of the Decision, the concluding paragraph of the assessment of Dr. Birch, states:

"*In my view, the Report of Dr. Birch dated 16 June 2008 is subjective and aimed specifically at supporting [A]'s claimed age. The Report fails to provide any compelling factual information or other material, that would lead me to conclude that the age decision of 4 March 2008 is wrong*" (*emphasis added)*

67. The Claimant maintains that the claim that Dr. Birch's Report was "subjective and aimed specifically at supporting the Claimant's claimed age" amounts to an unfounded allegation of bias on her part and as such has necessarily and unfairly tainted Mr. Mullins' approach to Dr. Birch's Report. Further, the Claimant points to the fact that Mr. Mullins in his statement does not seek to resile from, or rephrase the terms of, paragraph 14 of the Decision. In oral argument, Mr. Broatch suggested that the words used were intended to mean something other than personal bias on the part of Dr. Birch.

68. In this regard, Mr. Mullins' witness statement states as follows:

"*11.... All the Reports from Dr. Birch which the Authority has seen find the applicant is either younger than the claimed age or her calculation of the applicant's average age is consistent with the claimed age. In respect of Dr. Michie's report the Authority has noted that he sometimes finds an applicant to be his assessed age, younger than his assessed age and sometimes older than his assessed age. ... "*

69. In my judgment, whilst it is not clear what is intended by the word "subjective", the words used in paragraph 14 suggest, at the very least, that when preparing her report, Dr. Birch herself was working with the intention of producing a conclusion which supported the Claimant's stated age. The alternative suggestion that it was only the submission of the report, once prepared, by the Claimant's solicitors which was so aimed is not what is conveyed by the words used. In this regard, Dr. Birch's Report sets out in detail her professional qualifications, statements as to the manner in which she approached her report and the standard expert witness declarations concerning her overriding duties. In my judgment there is no evidence to suggest that she was acting with a closed professional mind or with the intention of producing a pre-determined result, and the criticism in paragraph 14 is unjustified.

70. Mr. Broatch suggested that paragraph 14 should be considered in the light of Mr. Mullins' statement where he expressed his doubts not just about medical reports in general, but about Dr. Birch's reports in particular. However, a criticism that Dr. Birch relies upon her own assessment of credibility and demeanour cannot apply to the present report, which is very substantially based on statistical conclusions. Mr. Broatch went on to suggest that what really lay behind paragraph 14 was the Defendant's view that Dr. Birch's reports have a tendency to support the applicant's age and that it is a fair inference to draw that applicants' solicitors select Dr. Birch as their expert because she is more likely than other clinicians to give a favourable view. This, he said, is not impugning Dr. Birch's integrity. In my judgment, even if paragraph 14 of the Decision could be read in this way, it would not, without more, provide a good reason to reject Dr. Birch's Report. (The position might have been different if there was a medical report which directly took issue with Dr. Birch's detailed analysis - which Dr. Michie's Report did not).

71. More generally, Mr. Broatch's explanation of paragraph 14 and Mr. Mullins' witness statement seems to echo the more general objection to all reports from Dr. Birch and Dr. Michie made by the Defendant in the recent case of *M* (referred to in paragraph 34 above). However, as matters stand, in my judgment the Defendant was not entitled not to consider Dr. Birch's Report because of such a general objection. There is no general ruling in the form sought in *M*; moreover, unlike in *M*, the Defendant does not, in the present case, rely upon any medical evidence to demonstrate the general unreliability of Dr. Birch's reports. Accordingly, under the relevant principles set out in paragraph 31 above, the Defendant was required to take into account, and engage with the reasoning in, Dr. Birch's Report. As long as medical reports of this type are admissible and until a clear finding that they are irrelevant, there is a duty to give them due and proper consideration. The evidence of Mr. Mullins suggests that the Defendant did not do this.

72. In my judgment, the Decision did reject the conclusions in Dr. Birch's Report for the reasons in paragraph 1 to 14. Those reasons were unsound and/or were not material to the Decision and thus the rejection of Dr. Birch's Report was irrational. Had the Defendant given proper consideration to Dr. Birch's Report, the outcome in the Decision may well have been different. This conclusion is sufficient to allow the claim for judicial review.

(2) Taking account of the conclusions in Dr. Birch's Report with other considerations

73. If, contrary to the foregoing, the Decision did not reject Dr. Birch's Report outright, the question would then arise as to whether the conclusion that it was outweighed by other factors was irrational. The Claimant contends that Mr. Mullins failed adequately to grapple with the contents of Dr. Birch's Report and failed to explain why he preferred other considerations.

74. On this hypothesis, the starting point would be acceptance of Dr.Birch's statistical conclusions as to 86% probability of the Claimant being under 17.38 and the question then would be what other factors led the Defendant to conclude that the Claimant nevertheless fell within the 14% minority of cases where persons with his features would be over 17.38. The Decision appears to identify a number of factors. However it is accepted that neither the abandonment of reliance on the ID card (paragraphs 15 to 18) nor the points made on the Claimant's witness statement (paragraphs 19 to 22) were part of Mr. Mullins' reasoning. That leaves two further factors: Dr. Michie's Report and the views of social workers dealing with the Claimant.

75. As to Dr. Michie's Report (paragraphs 23 and 24), the Defendant accepts that, in the Decision, it was saying no more than Dr. Michie's Report supported the Defendant's own conclusion. Dr. Michie's Report is not directly relied upon as medical evidence to counter the conclusions reached by Dr. Birch. With one minor exception, Dr. Michie's Report is not even cited in the reasons in paragraphs 1 to 14 for rejecting Dr. Birch's Report. Nor is it stated expressly that in this case Dr. Michie's Report is to be preferred to that of Dr. Birch. If this is said implicitly, then reasons would have had to have been given for such preference, and none are given. Indeed, it does not appear that Dr. Michie was asked subsequently to comment upon the contents of Dr. Birch's Report. There is a marked contrast in the nature and detail of the two reports. Dr. Michie's Report expressly takes into account his views of the Claimant's own narrative account. Its conclusion on probability is far less detailed than that of Dr. Birch. Dr. Birch's Report is grounded far more in a series of statistical findings leading to a composite statistical conclusion. It is not for me now to conduct an assessment of the relative merits of the two reports. The point remains however that the Defendant did not do so either. In my judgment, the Defendant's reliance upon the mere fact that Dr. Michie's conclusion supported the Defendant's own conclusion was not a sufficient reason for the Defendant to conclude that the Claimant fell into the 14% minority of cases identified by Dr. Birch.

76. As to the views of social workers dealing with the Claimant, (paragraphs 25 to 27 and 31), in general this is undoubtedly an important factor for the Defendant to weigh in the balance. I accept that observations of behaviour over a period of time by one or more experienced social workers is cogent material to be taken into account by the local authority decision maker. Here the social worker's view is that "he presents as a 17 year old" and the principal reasons given are that he had settled into his accommodation, that he was forthright in asking for what he wanted and challenged the social worker "on occasions". On their own, these might be cogent material. However, it is not clear that this assessment also took account of the detailed observations in his social services records, some of which might appear to contradict these assertions. More importantly, since on this hypothesis it is accepted that there is an 86% probability that the Claimant is less than 17.38 (at 16 June), in my judgment, there is no sufficient explanation given as to why these relatively briefly stated views of social workers outweigh that finding of Dr. Birch.

77. A further factor is that the Defendant, in the Decision itself (at paragraph 31) (and in oral argument) did positively rely upon the March Assessment as being correct and upon this being a significant factor in the Decision. However, the reasoning in the March Assessment is itself relatively superficial and its conclusion is vague: see paragraph 5 above. What is more its observations on the Claimant's physical appearance are at odds with those in Dr. Birch's Report. In particular, Dr. Birch made the important observation that the Claimant's voice had not broken and, contrary to the March Assessment, that his larynx was not enlarged. Mr. Mullins did not address these matters of medical expertise in the Decision and gave no reasons for standing by

the conclusion reached by the social workers in the March Assessment.

78. In my judgment, even if I had concluded that the Decision did not reject Dr. Birch's Report outright for the reasons given in paragraphs 1 to 14, its conclusion that other factors outweighed Dr. Birch's conclusions was unsound for failure to take into account adequately those conclusions and for failure to give reasons explaining the preference for other factors. It was thus irrational on this basis.

The Pathway plan issue

79. As regards the question of the preparation by the Defendant of a pathway plan, there is an issue as to the nature of the duty that the Defendant was under, whilst the Claimant's age remained in dispute. In principle, I agree with the Defendant's position here. Whilst the question whether, and, if so, what, duty arises must depend upon the person's actual age, and not upon the date when that age is determined, the existence of the dispute as to age has given rise to real practical difficulty for the Defendant. In the present case, this difficulty is compounded by the fact that, on the Claimant's own case on age, the Claimant is not entitled at all to the very pathway plan he has been seeking. Indeed, in the light of my conclusion on the age assessment here, it is still not known whether the Defendant was under a duty to the Claimant, as a 17 year old to prepare a pathway plan or rather, as a 15 year old, to prepare a care plan under the Framework. Whilst it may well be that, one way or the other, the Defendant was in breach of a duty to prepare a plan of some sort, at this point I am unable to state which duty has been breached. All I can say is that if, in practice, it would have been possible for the Defendant to have taken steps of assessment, which would have been suitable, regardless of the type of plan it was required to prepare, then the Defendant should have taken those steps.

80. In any event, the parties are agreed that this issue is now academic, since, the Defendant agreed by its letter of 21 October 2008, in principle, to produce a pathway plan. Whilst the Defendant makes no mention of its position in the event that the Claimant's case on age is accepted, I am assuming that, in any event, the Defendant will proceed to produce whatever plan is appropriate.

81. Finally on this aspect, the Claimant, or rather the Claimant's solicitors, have made, in this context, complaints of a more general nature about the Defendant's approach to pathway plans for unaccompanied asylum-seeking children. In my judgment this is not the appropriate forum to consider such matters.

Relief

82. Accordingly, in the light of my conclusion at paragraph 72 above, the Claimant has established grounds for judicial review of the Decision. The Defendant suggests that I should not grant relief, since the Defendant will undoubtedly reach the same conclusion again. In my judgment, that is not a reason for withholding relief. As in *C* (at §36), I have found that the Decision here was flawed, and I consider that the Claimant is entitled to a decision from the Defendant taken on a proper basis. Accordingly I quash the Decision.

83. As to how the matter now proceeds, that ultimately is a matter for the Defendant itself. No doubt the Defendant will have well in mind the errors of approach identified in this judgment. As to the nature of the next steps, as indicated in paragraph 22 above, the Decision did constitute a full merits review of the March Assessment (rather than a preliminary decision as to

whether there was sufficient material to warrant such a full merits review). In any event, the distinction is more illusory than real. Were the Decision to be viewed only as a preliminary decision, there was clearly in my judgment more than sufficient material to warrant such a full merits review.

Consequential Matters

84. At the close of the hearing and with the agreement of the parties, I indicated that this written judgment would be handed down and that submissions as to costs and any other issues consequential upon the judgment could be made in writing. Whilst I do not rule out the possibility of an oral hearing (at my behest or on request from one or both parties) on these matters, I have no wish to cause the parties to incur, unnecessarily, further cost that such a hearing would entail. Accordingly I direct that each party is to file submissions in writing on costs and any other matters arising to be received by the Court by 3 December 2008 at the latest. Each party is to be at liberty to apply in writing by 1 December 2008 to vary the time for written submissions and/or for an oral hearing on these consequential matters. If a further oral hearing is necessary, this is to be fixed through the Administrative Court office. Otherwise once these written submissions are received, I will give a further decision on these matters and a final order will then be drawn up.

85. Finally I should add that I am grateful to both Mr. Broatch and Mr. Buttler for the assistance they have provided to the Court.