Case No: CO/881/2003

Neutral Citation Number: [2003] EWHC 1689 (Admin.)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand,
London, WC2A 2LL

Monday 14th July 2003

Before :

THE HONOURABLE MR JUSTICE STANLEY BURNTON

- -

The Queen on the application of:

B — Claimant

- and -

The Mayor and Burgesses of the London Borough of Merton — Defendant

- -

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

- -

Robert Latham (instructed by Shelter Legal Services) for the Claimant
Nicholas O'Brien (instructed by the Head of Legal Services of the London Borough of Merton) for the Defendant

- -

Judgment
As Approved by the Court

Mr Justice Stanley Burnton :

Introduction

1. The Claimant is an asylum-seeker. He has no means of support in this country. He claims to be aged 17. If so, he is not an asylum-seeker within the meaning of the Nationality, Immigration and Asylum Act 2002, which does not apply to those who are not aged at least 18 years (section 18(1)(a)), and the Secretary of State for the Home Department has no responsibility for his support under that Act. But, if he is under 18, and is in need, he is owed a duty under Part III of the Children Act 1989 by the local authority in whose area he is, including a duty under section 20 of that Act, to provide him with accommodation.

2. However, on 13 February 2003 the Defendant determined that he was aged at least 18. On that basis, he was not a child and the local authority owed him no duty under the Children Act 1989.

3. In these proceedings the Claimant seeks the judicial review of that determination.

4. Both parties have asked the Court to give guidance as to the requirements of a lawful assessment by a local authority of the age of a young asylum seeker claiming to be under the age of 18 years. There are significant numbers of unaccompanied children entering the United Kingdom and claiming asylum. An acronym has come into use: UASC (Unaccompanied Asylum-Seeking Child).

The facts

5. The Claimant's case is as follows. He was born in the Ivory Coast on 6 February 1986. His father was a Catholic; his mother a Muslim. She was Senegalese. He was educated in part in Catholic schools and confirmed into the Catholic faith in 2000. His mother died in 2001 and was buried in Senegal. His father and he went to Senegal for the funeral, and while there his father was murdered. He then spent a year living on the streets in Senegal. He speaks French, but not English.

6. The Claimant states that he arrived in the United Kingdom from Senegal on 1 February 2003. On 7 February he was taken to the Refugee Council, which secured accommodation for him for the weekend.

7. On Monday 10 February 2003 he applied for asylum at Croydon. He could not name the airport where he had arrived in this country. The National Asylum Support Service (NASS) decided that he was not a minor and should be treated as an adult; they refused him support on the ground that they were not satisfied that he had made his asylum claim as soon as reasonably practicable after his arrival in the United Kingdom.

8. On 12 February the Refugee Council referred the Claimant to the Defendant borough for assistance under section 17 of the Children Act 1989. The Defendant did not assess him immediately, and asked him to return on 13 February.

9. On that day, he was interviewed by Christine Rodney, a social worker of the Defendant's Department of Housing and Social Services. He had with him the NASS letter of 10 February stating that the Home Secretary did not consider him to be a minor and refusing him support, and he produced it to Ms Rodney. The duration of the interview is in issue, the Claimant estimating it at 25 to 30 minutes and Ms Rodney at 45 minutes, but it is accepted by both sides that my decision cannot turn on this issue. Ms Rodney does not speak French. The interview was conducted through an interpreter on the other end of a telephone: Miss Rodney would give the interpreter the question, the telephone was then passed to the Claimant for him to hear the French translation and to give his answer, and the telephone would then be passed to Ms Rodney for her to hear the translation of the Claimant's answer and to ask the next question.

10. Ms Rodney did not keep a verbatim record of the interview. She used a pro-forma document, the Framework of Assessment for Children in Need and their Families, and completed it following the interview. She noted that he had gone to a Catholic school, but also that he identified with the Islamic faith and its culture. She took a family history, which included the murder of his father. She noted:

> "Both (B's) parents are dead. His father was slayed by masked men. (B) was able to escape. (B) spent a year in Senegal on the streets before being assisted in coming to the UK."

11. Under the heading of "Ethnicity", Ms Rodney noted:

> "(B) is a Black African, he is of the Catholic faith. …"

Under the heading "Summary", she noted:

> "(B) is a young man who claims to be 17 years old. (B's) appearance is that of a much older man. My calculated guess (is that) he is in his late teens. Unfortunately, (B's) history is that of … experiencing loss and violence and this alone will affect him emotionally."

12. The original manuscript of the form shows that the number 17 was written over another number. The typescript made from the manuscript has the figure 16. Ms Rodney does not deal with this discrepancy in her witness statement. The most likely explanation is that the figure of 16 was originally written on the form, on the basis of her calculation of his age from the date of birth he had given and which she had written on page 1 of the form.

13. Ms Rodney concluded that although the Claimant was in need, he was not a child. Her assessment was as follows:

> "(B) is not a child in need. I am not disputing that he is in need in his own right. I have followed the procedure by undertaking an assessment and from this assessment I am taking the stance of the Home Office."

14. In her witness statement, Ms Rodney stated:

> "(Mr B) has the physical appearance of a person older than 17. He does not have a youthful appearance and in my view is at least 18-20 years old.
>
> Throughout the interview (Mr B) was very mature and confident. I am of the view that (Mr B's) level of confidence is unusual for an unaccompanied minor."

Mr Latham relied upon the difference between this statement and that in the form that he was "in his late teens", and said that this part of her witness statement was an *ex post facto* attempt to justify her decision.

15. Ms Rodney also referred in her witness statement to inconsistencies in the Claimant's account of his history. In paragraph 23, she stated:

> "There were a number of inconsistencies in (Mr B's) account of his history which made (me) doubt his credibility as follows:
>
> > a. (Mr B) did not remember what one of his educational diplomas was for. I am of the view that this is unusual for a 17 year old.
> >
> > b. (Mr B) indicated that he was in school until 4 months ago but later in the interview said that he had been on the streets in Senegal for a year.
> >
> > c. (Mr B) said that 4 months ago he had to stop school because his parents could no longer afford the fees, yet he said that his father had died a year ago and his mother before that.
> >
> > d. (Mr B) said that he had been befriended by two strangers (one in the UK who took him to the Refugee Council and one in Senegal who took him to this country). (Mr B) was unable to identify these people. I am of the view that this account was a little far fetched."

16. At the end of the interview, Ms Rodney gave the Claimant a decision letter, dated 13 February 2003, signed by her team manager. It stated:

> "This Department has taken the stance of the Home Office.
>
> The Secretary of State does not accept that you are a minor and is satisfied that you should be treated as an adult. Accordingly, you will need to return to the Refugee Council and request that they advocate on your behalf with the Home Office."

The parties' contentions in summary

17. The Claimant contends:

i) The inquiries made by the Defendant were inadequate. It is not possible to determine age on the basis of appearance only, and the Defendant should have arranged for a medical examination before making its decision.

ii) There was procedural unfairness, in that he should have been given an adequate opportunity to answer the points that the Defendant was minded to hold against him.

iii) The Defendant did not itself make a determination of the Claimant's age, but simply adopted the conclusion of the Home Secretary.

18. The Defendant contends that the assessment process was rational, adequate and lawful; the decision made by it was a reasonable decision on a question of fact; and therefore that it cannot be impugned.

19. Mr Latham also submitted that the determination of the age of the Claimant was a determination of his civil rights within the meaning of Article 6 of the European Convention on Human Rights. If it is, clearly the decision of the Defendant's social worker is not that of an independent and impartial tribunal. However, Mr Latham also accepted that judicial review of the Defendant's decision would render the process as a whole Convention compliant.

The background

20. In a case such as the present, the applicant does not produce any reliable documentary evidence of his date of birth or age. In such circumstances, the determination of the age of the applicant will depend on the history he gives, on his physical appearance and on his behaviour.

21. There is no statutory procedure or guidance issued to local authorities as to how to conduct an assessment of the age of a person claiming to be under 18 for the purpose of deciding on the applicability of Part III of the Children Act 1989.

22. The determination of an applicant's age is rendered difficult by the absence of any reliable anthropometric test: for someone who is close to the age of 18, there is no reliable medical or other scientific test to determine whether he or she is over or under 18. The Guidelines for Paediatricians published in November 1999 by the Royal College of Paediatrics and Child Health states:

> "In practice, age determination is extremely difficult to do with certainty, and no single approach to this can be relied on. Moreover, for young people aged 15-18, 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 a much as 5 years either side.
>
> …

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

23. Different people living in the same country, with the same culture and diet, mature physically and psychologically at different rates. It is difficult for a layman to determine the age of someone born in this country with any accuracy. A general practitioner is very unlikely to have the knowledge or experience to improve on the accuracy of an intelligent layman. To obtain any reliable medical opinion, one has to go to one of the few paediatricians who have experience in this area. Even they can be of limited help, as in the instant case and is referred to below.

24. The difficulties are compounded when the young person in question is of an ethnicity, culture, education and background that are foreign, and unfamiliar, to the decision maker.

25. Shelter obtained a report on the Claimant from Dr Colin Michie, a consultant paediatrician with a particular interest in investigating physiological changes with age who had conducted over 300 examinations in order to estimate age in the last year alone. He stated:

> "It is possible that (B) has provided a correct birthdate. His social history supports this year of birth with some accuracy. Further his height and weight, skin fold thickness, the skin signs seen in young adults and his dental examination were consistent with a chronological age of 18 ±2 years when compared with published charts of these measures (see references). This observation is supported by non-objective assessment of the psychological maturity of the client during the interview. A more narrow error margin is not possible using these methods. The birthdate given to me today by (B) falls within these wide error limits."

26. Mr Latham relied on Dr Michie's report as supporting the Claimant's case. But it equally supports the Defendant's: his range of 18 plus or minus 2 years is also consistent with Ms Rodney's assessment. Indeed, it is more supportive of Ms Rodney's assessment than the Claimant's case, since the median age given by Dr Michie is 18.

27. Of course, there may be cases where it is very obvious that a person is under or over 18. In such cases there is normally no need for prolonged inquiry; indeed, if the person is obviously a child, no inquiry at all is called for. The present is not such a case. The difficulty normally only arises in cases, such as the present, where the person concerned is approaching 18 or is only a few years over 18. But the possibility of obvious cases means that it is not possible to prescribe the level or manner of inquiry so as sensibly to cover all cases.

28. Given the impossibility of any decision maker being able to make an objectively verifiable determination of the age of an applicant who may be in the age range of, say, 16 to 20, it is necessary to take a history from him or her with a view to determining whether it is true. A history that is accepted as true and is consistent with an age below 18 will enable the

decision maker in such a case to decide that the applicant is a child. Conversely, however, an untrue history, while relevant, is not necessarily indicative of a lie as to the age of the applicant. Lies may be told for reasons unconnected with the applicant's case as to his age, for example to avoid his return to his country of origin. Furthermore, physical appearance and behaviour cannot be isolated from the question of the veracity of the applicant: appearance, behaviour and the credibility of his account are all matters that reflect on each other.

29. In this context, as in others, it would be naïve to assume that the applicant is unaware of the advantages of being thought to be a child. Draft Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers state:

> "Assessment of age is a complex task, which is a process and not an exact science. This is further complicated by many of the young people attempting to portray a different age from their true age."

It advises the decision maker/interviewer:

> "It is also important to be mindful of the "coaching" that the asylum seeker may have had prior to arrival, in how to behave and what to say …"

30. The lack of a passport or other travel document may itself justify suspicion, as it did in the present case, particularly if the applicant claims to have entered this country overtly, for example through an airport, in circumstances in which a passport must be produced.

Decisions in other contexts

31. This is not the only context in which decisions may have to be made as to whether a person is over 18. Where the person is not brought before the court to give evidence, section 99 of the Children and Young Persons Act 1933 applies. It does not expressly stipulate what enquiries are appropriate where there is a material dispute as to age. Section 152 of the Magistrates' Courts Act 1980 provides that where a person's age is material for the purposes of the provisions of that Act regulating the powers of a magistrates' court, his age at the material time shall be deemed to be or to have been "that which appears to the court after considering any available evidence to be or to have been his age at that time". Part I of the Criminal Justice Act 1982 is concerned with the treatment of young offenders, and section 1(6) of that Act makes similar provision in relation to the determination of a person's age by the court or the Home Secretary for the purposes of that Act. The wording of these provisions is indicative of the difficulty of precise and objective determination of age in the absence of reliable documentary evidence.

32. Mr O'Brien sought to rely on the decision of the Divisional Court in *Walworth v Balmer* [1966] 1 WLR 16, in which, on a prosecution for knowingly selling liquor to a person under 18, the only evidence before the magistrate had been the appearance of the boys, who were present in court, to whom the liquor had been sold. Neither the prosecution nor the defence had sought to question the boys, and no evidence had been called as to their age. It was held that the magistrate, who was satisfied as to their age, had rightly convicted the defendant. I

do not find that case of assistance. In the first place, the youth of the boys appears to have been obvious. Secondly, the defendant had the opportunity to question the boys or to call evidence as to their true age. He having failed to do so, the magistrate was entitled, indeed bound, to decide the case on the evidence before him. There could have been no complaint of lack of due process or of an unfair procedure.

Other guidance as to the appropriate procedure

33. A draft document entitled "Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers", issued by the London Boroughs of Hillingdon and Croydon, who are participating in a pilot project for practitioners in social work with unaccompanied asylum-seeking children, makes sensible suggestions. It states that it is beneficial to have two assessing workers: clearly, two heads may be better than one. It implies a preference for age assessment to be undertaken over a period of time and involve other professionals, such as residential social worker staff, teachers, and other young people. It states:

> "It is very important to ensure that the young person understands the role of the assessing worker, and comprehends the interpreter. Attention should also be paid to the level of tiredness, trauma, bewilderment and anxiety that may be present for the young person. The ethnicity, culture, and customs of the person being assessed must be a key focus throughout the assessment.
>
> It is also important to be mindful of the "coaching" that the asylum seeker may have had prior to arrival, in how to behave and what to say. Having clarified the role of the social services, it is important to engage with the person and establish as much rapport as the circumstances will allow. This process is sometimes known as "joining". The assessing worker needs to acknowledge with the young person that they will have had to already answer many questions, and that it may be difficult and distressing to answer some of the questions.
>
> In utilising the assessment framework, the practitioner should ask open-ended non leading questions. It is not expected that the form should be completed by systematically going through each component, but rather by formulating the interview in a semi-structured discussion gathering information at different stages, the use of circular questioning is a useful method as it is less obvious to the person being assessed that the questions relate directly to age and hence may reveal a clear picture of age related issues."

34. The draft includes a form for use when assessing the age of an applicant, with spaces for information as to his or her physical appearance and demeanour, manner of interaction with the assessing worker, social history and family composition, developmental considerations (i.e. information about the types of activities that the person was involved in before arriving in the UK), education, his or her level of independence and self-care, health and medical assessment, information from documentation and other sources and, finally, the conclusion of the assessment. In relation to the health and medical assessment, the form comments that

"A medical opinion and view on age will always be helpful", a statement with which it is difficult to quarrel. Side notes make helpful but common sense suggestions, such as "Life experience and trauma may impact on the ageing process".

Home Office Policy

35. Policy Bulletin 33: Age Disputes, published by the Immigration and Nationality Directorate of the Home Office, states:

> "8.1 If the applicant claims to be a minor but his/her appearance strongly suggests that s/he is over 18 the applicant will be treated as an adult until such time as credible documentary or medical evidence is produced which demonstrates that s/he is the age claimed. In borderline cases the Immigration Service will continue to give the applicant the benefit of the doubt and to deal with the applicant as a minor. In accordance with existing policy they will continue to inform the Refugee Council's Panel of Advisors of anyone who has claimed to be a minor, even when the age is disputed and the decision has been taken to treat the applicant as an adult.
>
> …
>
> 9.1 An asylum seeker who declares on arrival that s/he is under 18, and is given the benefit of the doubt by the Immigration Service, will be referred to the local authority social services department (SSD) for support under the Children Act 1989. The SSD will conduct an assessment and on the basis of that assessment may reach the conclusion that the person is aged over 18.
>
> 9.2 Where an application is received from an asylum seeker who declares that s/he is under 18, but it is accompanied by a letter from the SSD stating that, in their opinion, the person is aged over 18, s/he should be deemed to be an adult for NASS purposes until such time as s/he can prove otherwise. The burden of proof lies with the asylum seeker. It is up to him/her to prove that s/he is a minor. The applicant should be advised accordingly. A proforma letter, to be adapted as necessary, is attached at Annex A."

The emphasis is in the original.

Discussion

36. The assessment of age in borderline cases is a difficult matter, but it is not complex. It is not an issue which requires anything approaching a trial, and judicialisation of the process is in my judgment to be avoided. It is a matter which may be determined informally, provided safeguards of minimum standards of inquiry and of fairness are adhered to.

37. It is apparent from the foregoing that, except in clear cases, the decision maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility.

38. I do not think it is helpful to apply concepts of onus of proof to the assessment of age by local authorities. Unlike cases under section 55 of the Nationality, Immigration and Asylum Act 2002, there is in the present context no legislative provision placing an onus of proof on the applicant. The local authority must make its assessment on the material available to and obtained by it. There should be no predisposition, divorced from the information and evidence available to the local authority, to assume that an applicant is an adult, or conversely that he is a child. Of course, if an applicant has previously stated that he was over 18, the decision maker will take that previous statement into account, and in the absence of an acceptable explanation it may, when considered with the other material available, be decisive. Similarly, the appearance and demeanour of the applicant may justify a provisional view that he is indeed a child or an adult. In an obvious case, the appearance of the applicant alone will require him to be accepted as a child; or, conversely, justify his being determined to be an adult, in the absence of compelling evidence to the contrary.

39. However, the social services department of a local authority cannot simply adopt a decision made by the Home Office. It must itself decide whether an applicant is a child in need: i.e. whether the applicant is a child, and if so whether he or she is in need within the meaning of Part III of the Children Act 1989. A local authority may take into account information obtained by the Home Office; but it must make its own decision, and for that purpose must have available to it adequate information. It follows that if all the Defendant had done was, as stated by its letter of 13 February 2003, to have taken the stance of the Home Office, its decision would have been unlawful.

40. In fact, however, the evidence satisfies me that the Defendant did make its own assessment. That it did so, and the reasons given for its decision, are inconsistent with the letter of 13 February 2003. The issue is raised by Mr Latham whether in these circumstances the court should permit the Defendant to justify its decision by reference to matters that were not referred to in that letter.

41. In my judgment in *Nash v Chelsea College of Art & Design* [2001] EWHC Admin 538, I sought to summarise the principles applicable to this issue.

> "34. In my judgment, the following propositions appear from the above authorities:
>
> > (i) Where there is a statutory duty to give reasons as part of the notification of the decision, so that (as Law J put it in *Northamptonshire County Council ex p D*) "the adequacy of the reasons is itself made a condition of the legality of the decision", only in exceptional circumstances if at all will the Court accept subsequent evidence of the reasons.

> (ii) In other cases, the Court will be cautious about accepting late reasons. The relevant considerations include the following, which to a significant degree overlap:
>
> > (a) Whether the new reasons are consistent with the original reasons.
> >
> > (b) Whether it is clear that the new reasons are indeed the original reasons of the whole committee.
> >
> > (c) Whether there is a real risk that the later reasons have been composed subsequently in order to support the tribunal's decision, or are a retrospective justification of the original decision. This consideration is really an aspect of (b).
> >
> > (d) The delay before the later reasons were put forward.
> >
> > (e) The circumstances in which the later reasons were put forward. In particular, reasons put forward after the commencement of proceedings must be treated especially carefully. Conversely, reasons put forward during correspondence in which the parties are seeking to elucidate the decision should be approached more tolerantly.
>
> 35. To these I add two further considerations. The first is based on general principles of administrative law. The degree of scrutiny and caution to be applied by the Court to subsequent reasons should depend on the subject matter of the administrative decision in question. Where important human rights are concerned, as in asylum cases, anxious scrutiny is required; where the subject matter is less important, the Court may be less demanding, and readier to accept subsequent reasons.
>
> 36. Secondly, the Court should bear in mind the qualifications and experience of the persons involved. It is one thing to require comprehensiveness and clarity from lawyers and those who regularly sit on administrative tribunals; it is another to require those qualities of occasional non-lawyer tribunal chairmen and members."

42. Subsequently, in *R (Ashworth Mental Hospital) v Mental Health Review Tribunal* [2001] EWHC Admin 901, I accepted that the statement in paragraph (i) of paragraph 34 of my judgment in *Nash* was too widely expressed. Reasons that merely elucidate reasons given contemporaneously with a decision will normally be considered by the Court: see *R v Westminster City Council, ex parte Ermakov* [1996] 2 All ER 302.

43. Unlike *Ermakov*, this is not a case in which statute required that reasons be given for the decision, let alone that reasons be given at the same time as the decision. The factors to which I referred in *Nash* point strongly to the admission of the Defendant's evidence as to its true reasons for its decision. In particular, the original reason given can be ascribed to a

lack of thought when the letter was written, and on that basis is not wholly in conflict with the evidence now put forward: compare that part of the assessment form quoted in paragraph 13 above with the letter of 13 February 2003. There has been no undue delay; Ms Rodney is not a lawyer and a degree of latitude is appropriate when considering the letter she drafted. Most importantly, it is clear that the evidence before me does represent the true basis of, and gives the reasons for, Ms Rodney's decision, and in my judgment those reasons are adequate. The relatively minor inconsistency referred to in paragraph 14 above does not lead me to doubt the genuineness of her notes or of the reasons she has put forward for her decision.

44. On this basis, the issues are: was the information available to the Defendant adequate, and was the decision procedurally fair?

45. However, I accept Mr Latham's submission that a local authority is obliged to give adequate reasons for its decision that an applicant claiming to be a child is not a child, and who is therefore refused support under Part III of the Children's Act. The consequences of such a decision may be drastic for the applicant, and he is entitled to know the basis for it, and to consider, if he can, with legal assistance if it is available to him, whether the decision is a lawful one. In my judgment this is the position at common law, irrespective of the issue as to the applicability of Article 6 of the European Convention on Human Rights, as to which I say nothing. It is noteworthy that in the analogous context of a decision by the Home Secretary to refuse support under section 55 of the Nationality, Immigration and Asylum Act 2002, in *(R) Q v Secretary of State for the Home Department* [2003] EWHC 195 Admin (Collins J) and [2003] EWCA Civ 364, [2003] 2 All ER 905 (Court of Appeal), the Home Secretary accepted that he was under a duty to give reasons for a decision adverse to an asylum seeker: see paragraph 21 of the judgment of Collins J, cited at paragraph 80 of the judgment of the Court of Appeal. I see no relevant distinction between those cases and the present. I bear in mind that the hypothesis is that the applicant is determined to be over 18, and therefore able to comprehend (if necessary in translation) the reasons given to him.

46. The availability of an internal review or complaints procedure, to which I refer below, does not obviate the need for reasons: reasons are required so that the applicant may make an informed decision whether to ask the local authority to review its decision or to make a complaint concerning the decision, quite apart from the need for him (or rather a legal adviser) to be able to ascertain whether the decision is lawful or amenable to judicial review.

47. Mr O'Brien told me that in practice reasons are given, but submitted that it is sufficient for a local authority to state that it refuses to provide the applicant with support under the Children Act because he is not a child. In my judgment, such a brief statement is a statement of the decision of the local authority, not of the reasons for its decision.

48. However, in general, the reasons need not be long or elaborate. On what is ultimately a simple if difficult issue, it should not be necessary to go to the lengths seen in, for example, adjudicators' determinations in asylum cases. In the present case, it would have been sufficient to have stated that the decision was based on the appearance and behaviour (or demeanour) of the claimant, and on the matters referred to in paragraph 23 of Ms Rodney's statement (referred to in paragraph 15 above), which led her to conclude that he was not truthful.

The adequacy of the information available to the Defendant

49. Mr Latham submitted that the information available to the Defendant, and its procedure, were inadequate. If so, the decision reached by the Defendant would be liable to be set aside as being one that no reasonable authority could have arrived at in the circumstances. He submitted that the form used by Ms Rodney was unsuited to the inquiry on which she was engaged: it was designed for an inquiry as to whether a child and his family were in need, not whether the person claiming to be a child is such. He suggested that the questions put to the Claimant, and his answers, should have been noted verbatim, by Ms Rodney or by someone else present during the interview, so that the Claimant's legal advisers and the court could be assured that the questions were open-ended, fair and appropriate. The procedure used, involving the use of an interpreter at the other end of the telephone, was replete with risk of confusion and misunderstanding. He suggested that medical evidence was required, and should have been obtained. He pressed the advantages of observation of the applicant over a period of time, preferably by a number of professionals, as mentioned in paragraph 33 above.

50. In my judgment, the court should be careful not to impose unrealistic and unnecessary burdens on those required to make decisions such as that under consideration. Judicialisation of what are relatively straightforward decisions is to be avoided. As I have stated, in such cases the subject matter of decision is not complex, although in marginal cases the decision may be a difficult one. Cases will vary from those in which the answer is obvious to those in which it is far from being so, and the level of inquiry unnecessary in one type of case will be necessary in another. The Court should not be predisposed to assume that the decision maker has acted unreasonably or carelessly or unfairly: to the contrary, it is for a claimant to establish that the decision maker has so acted.

51. Ms Rodney did not make her decision on the basis of the appearance and demeanour of the Claimant alone. It is not suggested that the Claimant was unaware of the purpose of his interview. She took a full family and personal history, including the Claimant's educational history. It was not necessary to obtain a medical report, which for reasons stated above would not have been helpful and was unlikely to have been so. It was not necessary for the local authority to provide support for a period of some days or weeks to give the opportunity for others to observe the Claimant, and for him to be observed and assessed over that period, if the information available was sufficient for a decision to be made, which it was.

52. However, where an interpreter is required, it is obviously greatly preferable for him or her to be present during the interview. The procedure adopted in this case carried with it the risk of misunderstandings, and great care was required of Ms Rodney and of the interpreter to ensure that no mistakes were made. As far as I am aware, the interpreter made no note, in either English or French, of the questions asked by Ms Rodney or of the Claimant's answers, either in verbatim or rolled up form (i.e., with the questions and answers combined). Such a note by the interpreter would have been highly relevant to the Claimant's suggestions that what he said was not correctly noted, or was misunderstood, by Ms Rodney, who heard his answers at second hand. I am concerned at the contradiction between Ms Rodney's note that the Claimant "identifies with the Islamic faith and its culture" and her later note that "he is of Catholic faith". The contradiction is not referred to in her witness statement, and was not one of the reasons for her decision to reject the

Claimant's credibility. If she correctly noted his statements, he made an obvious and unintelligent contradiction. In view of my decision in this case, I need say no more about it.

53. In cases such as the present, the social worker must of course bear in mind her unfamiliarity with the background of the applicant. There is no reason to believe that Ms Rodney did not do that. I should also mention that her sympathy with the Claimant's situation is apparent from her notes.

54. In my judgment, it is not necessary as a matter of law for there to be a verbatim note of the interview; but such a note would enable the court to be more confident of its accuracy and to address any suggestion that the interviewer put words into the mouth of the applicant by asking leading questions that led the young applicant to accept what was suggested to him. It is not necessary for the note to be countersigned by the applicant, although again that may be helpful for a local authority evidentially. The Claimant complains that he was not asked to counter-sign Ms Rodney's notes, but since he cannot speak English, there would have been no point in asking him to do so. Indeed, it would have been thoughtless to have asked him to counter-sign them.

Other requirements of fairness

55. So far as the requirements of fairness are concerned, there is no real distinction between cases such as the present and those considered in *Q*. It follows that the decision maker must explain to an applicant the purpose of the interview. It is not suggested that that did not happen in this case. If the decision maker forms the view, which must at that stage be a provisional view, that the applicant is lying as to his or her age, the applicant must be given the opportunity to address the matters that have led to that view, so that he can explain himself if he can. In other words, in the present case, the matters referred to in paragraph 15 above should have been put to him, to see if he had a credible response to them. The dangers of misunderstandings and mistranslations inherent in the absence of the interpreter reinforced the need for these matters to be put, to give the Claimant an opportunity to explain.

56. The Claim Form clearly alleged that the Claimant should have been given an adequate opportunity to answer the points that the Defendant was minded to hold against him. Ms Rodney does not suggest that this was done. It follows that her decision should be set aside unless the Defendant has established that his responses to the matters on which she relied could not reasonably have affected her decision. The Claimant addresses these matters in paragraph 14 of his second witness statement. Not surprisingly, he gives no explanation of the implausibility referred to in paragraph 15(d) above. His explanations of the matters referred to at (b) and (c) are unsatisfactory, and in essence amount to an assertion that Ms Rodney must have misunderstood him. It is the risk that there was some misunderstanding of what he said, a risk that is accentuated by the inconsistency between her notes of the two statements as to his religion to which I have referred, and the possibility that he might have been able to rectify any misunderstanding if the matters relied upon had been put to him, that leads me to conclude, albeit with considerable hesitation, that the Defendant has not satisfied the onus of establishing that even if they had been put to the Claimant, the same decision would inevitably have been made.

57. Mr O'Brien submitted that this case is to be distinguished from *Q* because of the availability of the complaints and review procedure required by section 26 of the 1989 Act and regulations made under it, which provide a suitable alternative remedy to judicial review. Mr Latham countered that the complaints procedure is not a suitable remedy, because someone in the position of the Claimant requires immediate relief. Section 26(3)(a) requires a local authority to establish a procedure for investigating any complaint or representation made by "any child … who is not being looked after by them but is in need". The Representations Procedure (Children) Regulations 1991 require a response to a representation or complaint within 28 days of its receipt, and this is indeed too long a period in the context of a child in need who has no available accommodation or support. The availability of internal review was not referred to by the Defendant in correspondence or in the Defendant's acknowledgment of service, and I have no evidence before me as to the complaints or review procedure operated by the Defendant, and in particular how it would have been operated if it had been implemented by the Claimant. In these circumstances, I am not satisfied that there was a suitable alternative procedure available to the Claimant to challenge the Defendant's decision.

58. In the result, therefore, the Defendant's decision will be set aside. The Defendant must reconsider the age of the Claimant. It will do so on the information now available to it.

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MR JUSTICE STANLEY BURNTON: My judgment has been delivered in draft. I am grateful to counsel for their corrections. For the reasons set out in the judgment, the decision of the defendant as to the age of the claimant will be set aside.

MR LATHAM: My Lord, I do not know whether you have seen a draft order submitted by O'Brien.

MR JUSTICE STANLEY BURNTON: No.

MR LATHAM: We are agreed on the first three elements. Firstly that the decision should be quashed. Secondly that the defendant should reconsider paying this application and be treated as a child. Thirdly that there should be a community legal services assessment of the claimant's costs.

MR JUSTICE STANLEY BURNTON: That is all uncontentious I take it?

MR LATHAM: That is all uncontentious. I would ask for my costs having succeeded. Mr O'Brien

opposes that and perhaps we should hear his grounds for opposing it.

MR JUSTICE STANLEY BURNTON: Yes, Mr O'Brien?

MR O'BRIEN: Your Lordship knows, and as was apparent in oral argument, this is a matter which has vexed a number of London boroughs.

MR JUSTICE STANLEY BURNTON: This is a bit of a test case.

MR O'BRIEN: It is a bit of a test and frankly the easiest thing to do would have been to say: all right, we will do it again but because there was a dispute as to the basis upon which one approaches the interview, one almost needed a decision in at least one of these cases in order for everybody to decide how to go about it. I would invite your Lordship to make either no order to costs or that the London Borough of Merton pay a portion of the applicant's costs. Clearly one matter which was resolved was the -- in the original grounds it was suggested that there were well established medical tests to determine this matter, but the test was done and it established, if anything, that our judgment --

MR JUSTICE STANLEY BURNTON: When you say a proportion, what proportion?

MR O'BRIEN: I would say not exceeding 50 per cent.

MR LATHAM: My Lord, I would ask for all my costs --

MR JUSTICE STANLEY BURNTON: Let me go back to Mr O'Brien for a moment. Mr O'Brien, in my experience test cases do not result in a different order for costs generally.

MR O'BRIEN: I have nothing to add, my Lord.

MR LATHAM: My Lord, had it been Shelter who were (inaudible) merits of not repaying costs of a test case, it may be somewhat different.

MR JUSTICE STANLEY BURNTON: Is this is a publicly funded case or is Shelter funding it?

MR LATHAM: It is funded by the Community Legal Services. My Lord, in my submission, we have succeeded. My Lord, as far as the issue of the medical reports were concerned, that was an issue which was knocked on the head very early, and, my Lord, we could have amended, but the costs involved by not amending --

MR JUSTICE STANLEY BURNTON: My recollection is you were contending that there had to

be. You were on the verge of contending there had to be a medical inspection.

MR LATHAM: My Lord, we put forward the medical report and the evidence suggesting how difficult it is to reach a medical assessment on the basis of physical appearance. My Lord, the substantive issue was whether the decision should be quashed and we succeeded on that. The duty to give reasons -- and this is where Mr O'Brien suggested that the duty was discharged simply by saying that the applicant was not a child. My Lord rejected that argument and the issue of procedural unfairness, and, my Lord, it was never conceded that there was any procedural unfairness in this case. In those circumstances we have succeeded on all the live issues argued and I would ask for my costs. Might I add this: in view of the changes in the CLS regime it is very significant to solicitors who conduct publicly funded work to obtain a costs order.

MR JUSTICE STANLEY BURNTON: Why is that?

MR LATHAM: My Lord, if they do not obtain a costs order their costs are assessed at a much lower rate. My Lord, the basis is to encourage publicly funded lawyers to only back cases which are going to win.

MR JUSTICE STANLEY BURNTON: I was unaware of that, that is why I am asking you.

MR LATHAM: It has a limited impact on counsel's fees, but, my Lord, it can have as big a difference as 50 per cent as to what solicitors can claim. I also indicate that having taken a case from this court, there is another case where the question of public funding was in issue. My Lord, (inaudible) this case shows quite clearly that the Vauxhall principles apply without regard to the issue of public funding. That is the irrelevance in determining inter partes.

MR JUSTICE STANLEY BURNTON: Thank you very much. I hope as my judgment makes clear, I have every sympathy with Merton in this case and sympathise with all parties, including Shelter, in their desire to obtain a ruling of the court on the appropriate procedures to be followed in such cases. The fact that this is a test case, in my judgment, is not a good reason to deprive the successful claimant of his costs, and although the defendant succeeded on many issues, ultimately they lost because the reasons they gave for their decision

originally were wholly inadequate and there had not been compliance with the requirements of fairness. In those circumstances it seems to me that I must award the claimant his costs.