

Neutral Citation Number: [2009] EWHC 1993 (Admin)

Case No. CO/12041/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Friday 3 July 2009

B e f o r e:

MR JUSTICE BURTON

Between:

THE QUEEN ON THE APPLICATION OF P

Claimant

v

LONDON BOROUGH OF CROYDON

Defendant

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(Official Shorthand Writers to the Court)

Mr Azeem Suterwalla (instructed by Harter & Loveless) appeared on behalf of the Claimant
Miss Peggy Etiebet (instructed by Legal Department, London Borough of Croydon)
appeared on behalf of the Defendant

J U D G M E N T

1. MR JUSTICE BURTON: This has been the hearing of an application for permission to apply for judicial review which has been, by order of Sir Michael Harrison, rolled up together with the application itself if permission were granted in respect of a decision by the London Borough of Croydon, in relation to age assessment of a young man from Afghanistan. The decision was made after an age assessment report carried out by a social worker and a placement manager on 15 July 2008. The assessment was carried out in accordance with the Age Assessment Joint Working Protocol between the Immigration and Nationality Directorate of the Home Office ("IND") and the Association of Directors of Social Services ("ADSS"), and in accordance with the Practice Guidelines for Age Assessment of Young Unaccompanied Asylum Seekers. It was also carried out in accordance with guidance given by Stanley Burnton J(as he then was) in R (on Application of B) v Mayor and Burgesses of the London Borough of Merton [2003] 4 All ER 286, [2003] EWHC 1689 Admin, colloquially called "the Merton guidelines".
2. The conclusion of the assessors at the outcome of the report was that the date of birth of the young man (called P for the purposes of this application) was estimated to be 1 January 1991 which made him at that stage 17½. In accordance with the practice, notice was given to him and those advising him of that conclusion. The opportunity was taken - again quite normally - to challenge and disagree with that conclusion. P asserts that he is considerably younger than the age based on that estimated date of birth. He is not able to put forward an express date of birthday, as I understand it, either. His estimated date of birth is 1 January 1994, as supported by a report which was obtained by his solicitors from a Dr Birch, dated 13 August 2008. Dr Birch is a paediatrician with special interest in adolescence. That report was supplied to the London Borough of Croydon. By a letter dated 1 October 2008, they concluded that they would stand by the content of the assessors' report, and did not accept the content of that report from Dr Birch as persuasive.
3. The claimant took steps to obtain a further report from Dr Birch.
4. The following chronology took place, there having been a delay on both sides while waiting for decisions of the courts. One of them was a decision by Collins J in A v London Borough Croydon and Others [2009] EWHC 939 Admin, 8 May 2009; and the other was a decision in the Court of Appeal R (on Application of A) v London Borough of Croydon and Others [2008] EWCA Civ 1445. The only material relevance of the Court of Appeal decision is that the court expressly concluded that Article 8 was not engaged in relation to age assessment cases. The relevance of that is the basis upon which there is challenge to the decision of the London Borough of Croydon in this case by reference to Wednesbury principles to which I shall return.
5. Mr Suterwalla has asserted that the test that should be applied is some kind of enhanced Wednesbury, and certainly if Article 8 had applied there would have been little doubt that an enhanced Wednesbury test would apply. Article 8 does not apply. Equally this is not a case by way of a test of an asylum claim where, once again, on the basis of authorities such as R v Secretary of State for the Home Department ex parte Bugdaycay [1987] 1 AC 514 and R (Farrakhan) v Secretary of State for the Home Department [2002] QB 1391, an enhanced test might be appropriate. The way, in the end, that Mr

Suterwalla puts it is by reference to those and other authorities such as the well known decision in R (Daly) v Secretary of State for the Home Department [2001] 2 AC 532. The more serious the consequences to a claimant as a result of a decision said to be Wednesbury unreasonable, the more rigorous and anxious should be the scrutiny of it.

6. In this case it is pointed out by the claimant and his advisers that the consequence to him in relation to this age assessment may be two-fold. First, although it would have no impact at all on his asylum claim, which would either succeed or not dependent on the facts relevant to that asylum claim - it might be that being a younger person might add more credibility to his assertions, but that would be entirely a matter of fact - the issue might however arise if his asylum claim were unsuccessful. In those circumstances the practice of the Home Secretary is, in relation to failed asylum seekers, to allow discretionary leave to remain until 17½, whereas if the defendant is right in this case that age has already been attained by this claimant, so the consequence of his failure on any asylum claim would be removal.
7. Secondly, unless and until he is removed - without going into the detail at this stage - it is asserted by Mr Suterwalla that he would have more chance of achieving benefit and assistance under Section 20 of the Children Act than he would by reference to NASS if he were older.
8. I am satisfied that there is in fact in this case in relation to legal approach no real difference between the parties, and that this case will stand or fall by - albeit a careful and, as it always ought to be, an anxious consideration of the Wednesbury principles – what is nevertheless a conclusion by reference to ordinary Wednesbury principles, in this case whether the decision is one to which no reasonable body could come, which would include failing to take account of material considerations and of course the usual supervision of the court to ensure that there had been fair procedures.
9. The other case to which I referred as being one for which the parties were waiting, the decision of Collins J, has some relevance for this decision, not simply because it related to an age assessment case - and there are helpful dicta in the decision and indeed helpful clarification of the Merton guidelines - but because Dr Birch, who is the expert relied upon by the claimant in this case, was also an expert in that case. I shall return briefly to consider this further, but there is no doubt at all that - in the clearest possible terms and with full reasoning - Collins J was wholly unimpressed by the reliability of Dr Birch.
10. Once the chronology cranked up again after that pause, there was a letter of 28 May by the solicitors for the claimant to say that it is clear from the judgment of Collins J that the opinions of third parties caring for young persons are clearly relevant to the question of the young person's age. They wrote to enquire why the London Borough of Croydon had not asked formally for the view of the claimant's key worker, Rory Hall, about their client's age. Rory Hall had a close relationship with the claimant, it was said. He had been his key worker since 18 August 2008. He is very well placed to give his opinion. Perhaps unfortunately, as it turned out, that letter did not disclose that in fact the solicitors had already been in touch with Mr Hall and had an expectation as to what he would say if asked.

11. On 4 June, an email - which has now been disclosed helpfully for the purposes of clarification on this issue - was sent by the senior social worker, Ms Zosia Gloebiosska, responsible for the claimant, and who was, in the event, one of the two social workers who sat on the review (to which I shall refer). It recorded that Ms Gloebiosska had spoken to Rory Hall, and records that he was of the view that he was not qualified to make an age assessment, but was happy for her to provide copies of the claimant's monthly key worker reports to the claimant's solicitors. She went on:

"I wish to add that I have not altered my opinion on the claimant's age despite Dr Birch apparently informing him that her recent assessment indicated that he is under the age of 17."

12. On 23 June 2009 the claimant's solicitors wrote to the Legal Director of the defendant relating to preparation for today's hearing, which was then ten days off. They enclosed a copy of the supplementary report of Dr Birch which had been previously supplied, dated 23 April 2009, but was now re-served together with annexures. There was also included in the letter of 23 June a copy of the witness statement of Mr Perkis, the partner at the solicitors' firm who was dealing with the claimant's case. That witness statement contained the following statement:

"Rory Hall - key worker - has said to me that he does not think that the claimant is as old as his assessed age. Rory Hall has said that he does not think the claimant is out of place in his placement with the other young people where he lives."

No date was given as to when the conversation with Mr Hall took place, and no attendance note has yet been disclosed by Mr Perkis (who is here in court before me today but has indicated that he has not brought his file with him).

13. Thus for the first time there is put before the defendant not just the request that they speak to Mr Hall but the assertion that Mr Hall has not only spoken to Mr Perkis and expressed a view about the claimant's age but expressed a view in fact favourable to the claimant's case. That was sent to the Legal Department. It was not sent expressly for the purpose of being put before the defendant on a review. In fact the claimant's solicitors at that stage did not know that there had been or was being a review, in any event, because it was only in the response to the letter of 23 June, by letter of 24 June from the Director of Democratic and Legal Services, that they advised the claimant's solicitors -

" that a review of [P's] age assessment is being conducted and a report will be served on you by the end of the week. Kindly find attached copies of the key worker's monthly reports for the period August 2008 to April 2009."

They were clearly the documents which Mr Hall had said he was happy to have provided to the claimant.

14. On 25 June the claimant's solicitors supplied a copy of the claimant's witness statement dated 16 June 2009 and also reminded them that they had not received a response to their letter of 28 May in relation to Mr Hall. On 26 June there was a response to that letter, enclosing a copy of the age assessment review, which was dated 25 June, and stated:

"Contrary to your assertions in your letters of 28 May and 25 June respectively, our client department did consult with [P's] key worker Rory Hall and this is recorded in the review report. Kindly be advised that Rory Hall is currently away on annual leave. The key worker's report for the month of May 2009 will be forwarded to you on his return."

15. The age assessment review is and was relied upon by the defendant as its answer to the challenge by the claimant to the conclusions of the original report. It took into account Dr Birch's two reports, both her original report of 13 August and the supplementary report of 23 April 2009. The defendant stands by it. I shall return to its content.
16. The challenges then to the decision by the defendant, both in the original assessment and in the review report, put forward by Mr Suterwalla on this application are as follows:

First, that the original assessment was procedurally unfair and the decision based upon it should be set aside by reference to the fact that the key decision in the assessment was not adequately put to him or explored with the claimant.

17. The assessment was based upon an interview, handwritten notes of which are produced, and ended, after careful analysis of the interview and the comments of the two social workers, with the following conclusion:

"[P] did not provide any documentary evidence supporting his claimed date of birth during the assessment process. [P's] physical presentation in the assessing social worker's opinion would tend to indicate that he is older than his claimed age. [P] had a clearly defined stubble area on his face and had some wrinkling of the skin around his forehead which may be more indicative of him approaching early adulthood rather than entering his formative teenage years. Throughout this interview P was able to recall many specific details, such as age of his father when he died, mother and brother's current age, how long the journey took from Afghanistan to the United Kingdom. However when it comes to recalling specific information which might give some insight into his specific age, he became vague/uncertain. Initially when asked about his schooling, [P] advised that he was not sure whether he went to school for one or two years. He also initially stated that he left school such a long time ago he could not remember when this was. When asked to elaborate on this statement [P] advised that in fact he left school only a year ago and stated he was 13 years of age when he left school. [P] was not able to provide an explanation as to why his two statements about when he left school were so different.

In summary, the numerical uncertainty as to when [P] left school combined with his general physical appearance and demeanour would tend to indicate, in the assessing worker's opinion, that [P] is older than his claimed age. The assessing workers feel that [P] is likely to be of a borderline adult age but have given him the benefit of the doubt in reaching their conclusion that he is a minor albeit one who is older than his claimed age."

18. A query has been raised by Mr Suterwalla in relation to the latter wording, on the basis that if they were to give him the benefit of the doubt, why did they not find in his favour? It is quite plain however what they mean, namely that they gave him the benefit of the doubt to this extent: albeit that he was considered to be of borderline adult age, they erred on his side in concluding that he was less than 18.
19. It is apparent that the social workers relied on a number of matters set out throughout the report by way of conduct, demeanour and appearance. One of the matters which was referred to in the conclusions was the fact that he appeared to have been shaving, which would have assisted with his being older rather than younger. His explanation in that regard, even in his witness statement served in these proceedings, has not been persuasive. His witness statement states at paragraph 7:

"The social workers asked me if I had shaved. I told them I had not shaved. I do not really need to shave at that time. I had used a machine that belonged to a friend to clean up my face."

Mr Suterwalla, not surprisingly, accepted that what that meant was that he had used an electric razor belonging to a friend; and so he had shaved.

20. Those kinds of matters are plainly the kind of significant questions which can form the basis of conclusions as to age in this very difficult area.
21. The assessors relied also on some of his answers. Under "Education", the following is noted:

"[P] advised that he went to school for one or two years. [P] initially said he could not remember how long ago it was when he went to school because it was a long time ago. when asked about this time period again, he said that he left school one year ago and said he was around 13 years of age when he left school."

This is based upon notes which are also in the bundle and which read:

"Went to school for one or two years. Initially said he could not remember. It was a long time ago. Asked again how long ago this was, he said one year ago."

22. This inconsistency was obviously regarded, and rightly so, of importance by the assessors. If it was only a year since he was at school, that would make him younger. If

it was a long time ago when he was at school, that would make him older. His initial reaction was to say "he could not remember ... it was a long time ago".

23. The suggestion is that he realised that he had put his foot in it, and then tried to claw it back. It is exactly the kind of thing for which experienced assessors would be looking.
24. The criticism by Mr Suterwalla is that there has not been compliance in that regard with what he submits to be part of the Merton guidelines. Stanley Burnton J, at paragraph 55 of Merton, said:

"55 So far as the requirements of fairness are concerned 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."

That, says Mr Suterwalla, suggests that one or both of the following ought to take place. First when two inconsistent statements from which conclusions are going to be reached are made by an interviewee, there ought to be probing of that inconsistency at the time, in order to give the opportunity for application for correction.

25. In this case the explanations and conclusions, to which I have referred, in the report, which are not fully reflected in the notes are as follows:

"[P] advised that he was not sure whether he went to school for one or two years. He initially stated he left school such a long time ago he could not remember when this was. Then when asked to elaborate on this statement, [P] advised that he left school only a year ago. Then [P] was not able to prove an explanation as to why the two statements about when he left school were so different."

Mr Suterwalla submits that that last sentence is not reflected in the notes.

26. I am not prepared to find that that is an additional sentence that does not accurately reflect what occurred. In any event, it seems to me that what is fair during the course of the hearing is a question of fact. It may be that in the kind of case with which Stanley Burnton J was dealing, where there were a large number of inconsistencies (see paragraph 15 of his judgment), which combined to amount to a conclusion that the credibility of that claimant fell to be challenged, there might be the greater need for a more formalised system of investigation and questions. Speaking for myself, I do think it is important that it should be recalled that this is not a criminal investigation, not an investigation of a witness, examination of a witness, by police officers or by counsel. As Collins J said in his judgment, it is important to establish a rapport between the questioners and the claimant.
27. Secondly Mr Suterwalla submitted that at the end of a hearing there should be time taken by the assessors to consider their provisional verdict, that they should then return to see the claimant and put to him or her a provisional view that he or she was lying, to give him or her the opportunity to comment on it. With this I do not agree. It seems to

me that does not fit with the kind of rapport that is expected by the court to take place in these kind of very difficult circumstances. It must all be a question of fact and degree. What is relevant is the practice, followed in this case, namely that when the decision is taken - and if there is a challenge to it - the full reasons for the conclusions given (made by the assessors) are handed to the claimant and those advising him so that coolly and with legal advice he will then have the opportunity to go back with explanations.

28. That is what occurred here. Further if, contrary to my conclusion, there was any procedural failure in relation to the interview, in my judgment this is a case in which one can perfectly well conclude that there would have been no difference because, a fortiori, he would have given, under pressure, the answer he gave later when he was not under pressure and with the benefit of legal advice. That answer is contained in the letter before action in these proceedings and again in the witness statement served with these proceedings. He said as follows:

"I would not have said to the social worker that it was a long time ago that I left school. This can only have been a misunderstanding that must have arisen through interpretation of what I said. My time in school was frequently interrupted for the reasons I have said and I cannot be sure about exactly how long I was in school. This is because of the frequent interruptions in schooling because of the fighting in the area."

29. All that would have occurred therefore, assuming that he had said this at the time, after some further challenge by the assessors, would have been that he would have denied saying what he had been recorded as having just said. His denial would have been recorded. That would not in any way have prevented the assessors from reaching the same conclusion that they did reach.

30. Further - in considering the explanation that was given in the witness statement and the letter before action - the review report stated as follows:

"15 I am not satisfied that this explanation meets the assessing social workers' view as to the numerical uncertainty as to when he left school as opposed to how long he attended school. I note also that [P] confirmed that he understood the interpreter and was told to alert the assessing social workers if he no longer understood the interpreter or if he needed any questions to be clarified and this was not done."

That, in my judgment, is a perfectly satisfactory response to the explanation when it was given.

31. In those circumstances I am satisfied that there is no justification in attacking the original interview or report. I note that there is nothing in the Guidelines or the Protocol to which I have referred which gives any support to Mr Suterwalla's submissions.

32. There is a reference at page 420 of the bundle:

"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 It is essential to feed back to the young person the conclusion of this assessment and a written form is included for this purpose."

The written form ends with the analysis of information gained and with the direction:

"The assessing worker should draw together the information obtained and present his/her views and judgment on the age of the person being assessed, giving clear reasons for the conclusion. If this differs from the stated age clear reasons for the decision should be given."

That is what the assessors did.

33. Secondly, the fall-back argument by Mr Suterwalla is that the decision of the assessors was Wednesbury unreasonable. In the light of my finding that they were entitled to rely on the inconsistencies in relation to when he went to school, that argument does not get off the ground, as Mr Suterwalla accepted. Even without it, it is clear from the authorities that - although assessors should be slow to rely only on an assessment of appearance and demeanour and behaviour - they can do so. And this may have been a case in which they could have reached those conclusions even without the questions of credibility to which they referred. I do not need to reach that conclusion. Therefore the challenge to the original decision falls away.
34. I turn to the challenges to the review report. The first basis of challenge referred to the suggestion that the assessors failed to take into account the reports of Dr Birch. It would be invidious and unnecessary for me to read out the considerable number of paragraphs from Collins J's judgment in which he makes unfavourable comments about Dr Birch. I shall not refer to them.
35. Mr Suterwalla, very sensibly, has not sought to revive the whole of the report of Dr Birch in argument before me. In any event, it is clear that the review report did not exclude from its consideration the content of Dr Birch's report. They had considered it and given it such weight as they considered right.
36. The only issue which Mr Suterwalla sought to revive out of Dr Birch's report related to a case as to measurement. He notes that Dr Birch reached conclusions about the age of P by reference to her measurement of him on 30 August 2008 at 163 cms and at 23 April 2009 as 165.5 cms. Dr Birch's conclusion was that a growth spurt of 2.5 cms in those eight months was more consistent with a younger rather than an older boy. Mr Suterwalla, very fairly, drew my attention to the defendant's measurement at 165 cms on 29 October 2008, which would mean that if Dr Birch's measurements were right he had grown 2 cms in less than two months and then only another 0.5 cms in the following six months. That looks odd even to an untutored layman. Collins J's views as to Dr Birch's measuring skills are certainly amongst those which count against her. I, again, do not propose to read them out.

37. More significantly, the review assessors did address Dr Birch's report. Mr Suterwalla complains that they record that Dr Birch's April 2009 report indicated that P had grown slightly. He criticises the use of word "slightly" although it may be that they are using the word "slightly" as against the October 2008 figure rather than the August 2008 figure. The reviewers continued:

"We are not satisfied that these measurements are sufficiently accurate to show me that the view of the assessing social workers is or may be wrong, as Dr Birch is not an expert in measuring physical characteristics."

38. I do not conclude that it is Wednesbury unreasonable for the reviewers to have considered and rejected the point made by Dr Birch by reference to her measurements.
39. The next point that was made by Mr Suterwalla related to Mr Hall. I have read the correspondence and the evidence about Mr Hall. The position is that the assessors dealt with Mr Hall by reference to the information he had given to Ms Gloebiosska on or about 2 June, so that it is not the case that they ignored Mr Hall. They addressed him in these terms in paragraph 12:

"Rory Hall, key worker, expressed an opinion to me that he is not an experienced trained social worker who is qualified to make an assessment of P's age. His monthly key working reports strongly indicate that P's behaviour is entirely appropriate in the placement and that he is able to cope with semi-independent living."

Thus there is an express dealing with the point, on the face of it, which Mr Perkis had made in correspondence as answered by Mr Hall.

40. What was not addressed was the content of Mr Perkis' statement (at paragraph 3) which I have quoted above. Whether it be that that statement, albeit sent on 23 June, did not reach the assessors before they finalised their report on the 25th, or that it was not read by them, the fact is that they did not deal with it. Their approach was that they had been invited to ask Mr Hall what his view was; they had asked it; he did not have one, and therefore he was immaterial. What we now know - if Mr Perkis' evidence be correct - is that he did have one, which he had expressed to Mr Perkis.
41. Miss Etiebet, for the respondent, invites me to say that had the assessors known that Mr Hall was said to have made such a statement, there would have been no difference, because they would or could have assumed that he did make that statement, but outweighed it by reference to all the other factors that they put forward, including their reliance on his own reports.
42. Mr Suterwalla submits that it is on any basis a material factor. He draws attention to the dicta of Collins J, which make it plain that the views of informed third parties such as social workers are significant and, indeed, because of the view he took of Dr Birch in that case, often more useful than doctors. Indeed Miss Etiebet accepts that it is Croydon's policy to take account of the views of social workers. There is no dispute between the parties that if Mr Hall, a key worker (though not a social worker) did

express this view, it would have been a matter, given the closeness of his contact with the claimant, which would have been taken into account at the time of the review.

43. Mr Suterwalla makes one final criticism of the review report, and that is that matters were included in the report upon which his client was given no opportunity to comment, in particular the conclusions in paragraph 10 of the review report. I would not myself be minded to be influenced by that argument if it stood alone. It seems to me that the review report would be entitled to look again at all the information, including information that was made available to them by social workers.
44. The failure to consider the evidence by Mr Perkis about what Mr Hall had said to him, if he be right, is symptomatic of the fact that in this case there was, in my judgment, too speedy a resort to the review report. It is not surprising that after the gap of time while the outcome of the various proceedings was awaited, and of course, no doubt, also bearing in mind the imminence of these proceedings which had, I assume, already been fixed, there would no doubt have been a desire by the defendant to get a move on with the review report, in order to get the result out so as to resolve these proceedings. If favourable to the claimant, then these proceedings would not have been necessary; and if unfavourable to the claimant, a persuasive report might have caused the claimant's advisers to back off.
45. What happened - it is clear from the correspondence to which I have referred - was that the claimant's advisers were not anticipating that there would be a review, and were informed that it had taken place and indeed that the report was being finalised, perhaps before they had supplied the information which they would otherwise have supplied if they had wished it to be considered. By chance, they supplied the statement of Mr Perkis a day before the report fell to be finalised. But it may be, as I have already indicated, that it did not reach the assessors in time to be considered.
46. The proper course in my judgment would have been that the defendant should have told the claimant's advisers that they were planning to hold a review, and given them the opportunity to put in any final comments or documentation, which would have expressly put on the green light for the production of Mr Perkis' statement. Had that come in a couple of days before the review report had been considered by the assessors, I have no doubt that a competent, reliable assessor would have taken the opportunity to have gone back to Mr Hall, and put to him what Mr Perkis had said and obtain an answer.
47. Miss Etiebet did exactly that yesterday, no doubt when she read Mr Perkis's statement. An email was sent from her chambers to the defendant. A response was obtained from the defendant which recorded a conversation which the emailer had had with Mr Hall's manager, who reported back therefore on a double hearsay basis.
48. Mr Hall, on that double hearsay basis, reported that he had spoken to P's solicitor - that is obviously Mr Perkis - on three occasions, and they are recorded: the first time he told him he was not involved in the age assessment process and could not give any specific information: on the second occasion the solicitor asked him for an opinion and he told him he could not offer any opinion because he was not qualified to do so, however he

could contribute to the monthly reports: on the third occasion he told the solicitor again that he was not competent to give an opinion, but he made his observations through his monthly reports.

49. There is not, quite apart from the fact that this is double hearsay, an express addressing of Mr Perkis' statement. If there were to be a challenge it may be that Mr Perkis could be invited to produce his attendance note, and that Mr Hall could have been invited to have made for the assessors a proper statement, rather than sending that message through his manager.
50. I am unable to say, having seen that, that any of that would have made no difference to the outcome. I am satisfied that there is a real risk that material information - namely a view by someone who, it is common ground, would have been in a position to give that view, albeit not a qualified age assessor, namely the person who spends five hours a week with the claimant, which could have been of value on the review assessment report and, if it had been in favour of the claimant, might have made a difference.
51. In those circumstances I am satisfied that there should be permission granted to apply for judicial review, and that the review decision should be quashed and a fresh review be held as soon as possible at which, I have no doubt, the question as to whether Mr Hall has or has had a view, and if so what it is, and/or whether he has expressed a view, and if so what it was and whether it has now changed, will be material for consideration. I raise no other issue about the way in which the procedures have been carried out which, for the reasons I have given, appear to me to be perfectly proper.
52. In those circumstances - although the review will be a full one - I expect that this will be the only fresh information which the reviewers will want to consider. I cannot obviously say what the outcome will be once they have considered. That is why I make the order.
53. MR SUTERWALLA: I am grateful for the careful judgment. There are three matters, if I may very briefly deal with them. The first is your decision in respect of the original age assessments. It is always a difficult matter but we seek permission to appeal on that decision for two reasons. First, we say that your Lordship's careful observations in respect of the Merton judgment and what was meant in that judgment and what is required - what is tended to be required - of age assessors carrying out age assessments is a very important matter in respect of the proper conduct of - - - -
54. MR JUSTICE BURTON: But not determinative in this case.
55. MR SUTERWALLA: It is determinative in the sense that it goes to your decision not to quash the age - - - -
56. MR JUSTICE BURTON: It is always difficult to think that the Court of Appeal will be interested in an appeal by someone who won. Any problem there was is of course always capable of cure if you have a review.
57. MR SUTERWALLA: In my respectful submission, it is a part win. That much I concede. I am sure there will be argument about costs. Perhaps I should not have

shown my hand at this stage. But it is a part win to be honest. That is the first point we make. We say it is an important point especially in the light of all the other elements which are going on around age assessments at the moment. You will be aware of the fact that the Article 6/Article 8 matter has not been resolved yet. The House of Lords is due to hear that case in about two weeks. And we have Collins J's judgment which shuts off the door, if I may term it, in those terms in respect of paediatric evidence. So this point becomes more important.

58. The second point is the matter of anxious scrutiny. I see you have dealt with that carefully but, in my submission, this is an area in which there is room for debate in respect of what the standard of review should be in this sort of case. For those two reasons we seek permission to appeal on that aspect of the judgment dealing with the original age assessment.
59. The other two matters are these. You have seen that we did ask, by way of written submission, for permission to be stayed in respect of an Article 6 argument adopting the arguments of the claimants in the Court of Appeal.
60. MR JUSTICE BURTON: You have won without it. It may be - I do not want to encourage litigation at all - that the review which now takes place, taking into account Mr Hall, will still come out against you. So there will nothing to stop you at that stage making some challenge and, if by then an Article 6 or Article 8 argument becomes available to you, you can use it then. But you have won at the moment. Your client is not leaving and not adjudicated upon. I do not think there is any point in this case at all.
61. MR SUTERWALLA: In respect of costs, we say this: as I have already accepted, it is a part win because we did not obtain a quashing order in respect - - - -
62. MR JUSTICE BURTON: Are you legally aided?
63. MR SUTERWALLA: We are legally aided.
64. MR JUSTICE BURTON: Does it matter?
65. MR SUTERWALLA: No. It does not matter. That is following on from the decision in Boxall, recently approved in the Court of Appeal. My submission is that the appropriate order in this case, given that it is a part win, is 50 per cent of our costs and we would seek that and a detailed assessment.
66. MISS ETIEBET: On the issue of appeal, we would oppose it effectively because an appeal is against an order or at least issue, not the reasons for it.
67. MR JUSTICE BURTON: No. I am not minded to give leave to appeal. Are you asking for leave to appeal? I do not suppose you are.
68. MISS ETIEBET: No.

69. MR JUSTICE BURTON: So I will give neither side leave to appeal. What about costs?
70. MISS ETIEBET: On costs we say that the only ground on which the claimant has prevailed is the one that was raised on 24 June and thereafter. So we say any costs should effectively be from that date because all the other grounds raised previous to that he has failed on. The reason that he has prevailed is because we ought effectively to have adjourned this hearing off, undertaken a further review and then presented on that decision. We say he should only be entitled to his costs as from 24 June.
71. MR SUTERWALLA: If we can deal with costs first: we would say that is not the proper approach. We have succeeded in having the decision quashed. That formed one out of two parts of the claim. Therefore the appropriate approach for the court, in our respectful submission, would be to mark that accordingly with the relevant ratio of 50 per cent.
72. Can I revisit the issue of Article 6 - I am reminded by those instructing me. It is a thorny issue because it is very possible that - notwithstanding the further review takes place - that review is not challenged, in which case we are left in a position where there is no Article 6 matter outstanding in this particular claim. It effectively does not have any legs at all. In our submission - - - -
73. MR JUSTICE BURTON: What will the Article 6 hang on?
74. MR SUTERWALLA: The Article 6 argument can hang on either the original age assessment or the review decision.
75. MR JUSTICE BURTON: Why can you not have an Article 6 argument on the review decision if you do not like the outcome? I am not suggesting you only challenge it because you do not like the outcome. Assuming you wanted to challenge it, you could challenge it on Article 6 grounds.
76. MR SUTERWALLA: Assuming we did not want to challenge it and we could not challenge it - - - -
77. MR JUSTICE BURTON: Why are you going to want to go on Article 6 on something academic?
78. MR SUTERWALLA: It would not be academic because if an Article 6 review process was in place, that could fundamentally affect the content of any review decision. It could be on traditional public law grounds. We would not be able to impugn a new review decision.
79. MR JUSTICE BURTON: I am sure your mind would be sufficiently astute to think of some point to make. I am not going to do anything else. I think you have made a very fair proposal to the court that you should get half your costs, and that is what you shall have and legal aid assessment.

80. These emails, can we keep them?

81. MISS ETIEBET: They can be kept on file.
