Neutral Citation Number: [2009] EWHC 2982 (Admin)

Case No: CO/11526/2008

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

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 10 January 2010

Before :

HH Judge Thornton QC

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Between :

R on the application of Shekib Ahmad	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

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- -

Declan O'Callaghan (instructed by **Duncan Lewis & Co**) for the **Claimant**
Lisa Giovannetti (instructed by **the Treasury Solicitor**) for the **Defendant**

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Judgment

Judge Anthony Thornton QC:

Introduction

1. This judgment is concerned with Shekib Ahmad ("SA")'s amended grounds for seeking judicial review following the grant of permission to apply by Judge Pearl on 18 February 2009. SA was a refugee from Afghanistan. As stated in his statement of facts, he hails from the Gozargh district of Kabul, is ethnically a Tajik and is an orphan, his father having been a member of Jamaat-e Islami who was killed by members of the rival Hezb-e Islami and his mother having been killed by a bomb thrown at the family home. He entered Greece illegally and, by virtue of the provisions of the Dublin Regulation, was treated as having claimed asylum in Greece following his arrest and his subsequently being fingerprinted there. He was placed in a camp and left Greece soon afterwards. He travelled through Italy and France and then arrived and entered the United Kingdom ("UK") through the Port of Dover clandestinely and illegally in the back of a lorry on 9 October 2008. Save between 9 October 2008 and 17 October 2008 when he was in the care of Kent County Council Social Services, SA remained in detention until he was released on 13 February 2009 on being provided with accommodation supported by the National Asylum Support Service ("NASS"). In his amended grounds for seeking judicial review dated 8 June 2009, SA claims a declaration that he was unlawfully detained from 17 October 2008 until 13 February 2009 and general, aggravated and exemplary damages for his claimed unlawful detention.

2. These proceedings are brought against the defendant, the Secretary of State for the Home Department who is the appropriate minister to be joined as a defendant when judicial review is sought of any decision of the Secretary of State or of any official within the Department or of any Agency or Unit within that Department. In this judicial review application, the decisions, actions and inactions of officials within the UK Dublin and Third Country Unit ("DTCU"), a Unit within the UK Border Agency, and of NASS, a Service within the Immigration and Nationality Directorate, are being challenged or considered as part of SA's claims. Both the UK Border Agency and NASS are part of the Home Department. For ease of reference, any such decision, action or inaction is attributed in this judgment to the defendant.

Procedural history

3. These proceedings have been transformed since they were started. The pre-action phase of the proceedings started when SA first arrived at the Port of Dover and was detained when he attempted to leave a search shed and then claimed, or was to be treated as claiming, asylum in the UK. The border

officers who interviewed him rapidly discovered that he was subject to the safe third country framework of the Dublin Regulation and to being immediately returned to Greece as a safe third country without his substantive asylum claim first being considered by the UK authorities. For ease of reference, I will refer to SA in this judgment as a safe third country asylum seeker.

4. SA claimed in his interview that, on leaving Greece, he had travelled to the UK via Turkey and France during a six-month journey. In his initial interview when detained on 9 October 2008, SA claimed to be fifteen and he was immediately referred to Kent County Council Social Services and, given his claimed age, was placed in local authority care. He was provided with a full Merton-compliant age assessment on 17 October 2008. This concluded that he was over eighteen. He did not formally challenge that conclusion although, during the first of two interviews by UK Border Agency officials on 18 October 2008, he again falsely claimed to be fifteen. During these interviews, he was confronted with the evidence that he had previously been fingerprinted in Greece that the defendant had received from Eurodac and he then admitted that he had spent approximately two months in Greece and had had his fingerprints taken there. He was then detained in immigration detention facilities for further enquiries to be made with the Greek authorities.

5. On 28 October 2008, the defendant sent a formal request to the Greek authorities asking them to accept responsibility for the consideration of SA's asylum claim under article 10.1 of the Dublin Regulation. On 18 November 2008, the defendant issued a decision that SA's asylum claim would not be considered in the UK and certified it on safe third country grounds and, on 19 November 2008, the defendant served SA with the first set of removal directions for his removal to Greece. These were cancelled on 21 November 2008 when SA's recently instructed solicitor contacted the defendant and threatened judicial review proceedings on the basis that SA was entitled to claim asylum in the UK. The notice of cancellation included a statement that the defendant would reinstate the removal directions unless SA's solicitors obtained a Crown Office reference number for the threatened judicial review proceedings within three working days. On 21 November 2008, Greece notified the defendant that it accepted responsibility to take charge of SA's asylum claim. A second set of removal directions were served on 26 November 2008 since no Crown Office reference number had been obtained within three working days. These were cancelled on 1 December 2008 following the issue of judicial review proceedings on 28 November 2008 and their service on the defendant on 1 December 2008. However, SA still remained detained.

6. SA's judicial review proceedings sought relief on the grounds that his removal to Greece on safe third country grounds would infringe his article 3 rights and would be unlawful. SA also sought a stay of his removal directions and a declaration that he had been, and was continuing to be, unlawfully detained. The basis of SA's principle claim was that, if he was returned to Greece, he would have a well-founded fear of being both refouled by Greece to Afghanistan and ill-treated in breach of his article 3 rights by the Greek authorities. In support of these claims, he relied on objective evidence that he contended showed that Greece's procedures for dealing with asylum claims were significantly flawed and its treatment of asylum seekers claiming asylum in Greece amounted to such significant ill-treatment as to infringe their article 3 rights. SA's claim was also based on the fact that the asylum seeker in **Nasseri**[1] had been granted permission to appeal to the House of Lords, that the appellant's contentions in that case were similar to those that SA was relying on and that the grant of permission showed that SA's contentions were arguable, notwithstanding the contrary view taken by the Court of Appeal in **Nasseri**[2]. SA contended that he was being unlawfully detained because there was no imminent likelihood of SA being removed to Greece until **Nasseri** had been decided by the House of Lords given the then recent grant of permission to appeal in that case.

7. On 19 December 2008, the defendant decided to release SA from detention and communicated that decision to SA. No reasons were given for that decision and the detailed reasons for refusing his claims and for removing him to Greece without considering his asylum claim were sent to him on 9 January 2009. On learning from SA's solicitors that SA had no suitable address to be released to, the defendant asked SA's solicitors to submit an application for NASS accommodation. Whilst such accommodation was being found, SA remained detained. On 9 January 2009, the defendant withdrew the earlier third country certificate that had been issued since it had been issued prematurely and issued a fresh third country certificate. The letter gave detailed reasons for rejecting all SA's claims and it notified SA that the defendant was intending to remove SA to Greece but that arrangements would not be made for that removal until his judicial review proceedings had been determined. On 13 February

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1 **R (Nasseri) v Secretary of State for the Home Department** [2009] 2 WLR 1190, HL.

2 **R (Nasseri) v Secretary of State for the Home Department** [2008] 3 WLR 1386, CA.

2009, SA was released to accommodation in Wolverhampton that had been found for him by the accommodation provider instructed by NASS to find him a release address.

8. On 18 February 2009, Judge Pearl granted SA permission to apply for judicial review because of the contention that SA's claims were closely related to the basis of claim put forward by the asylum seeker in **Nasseri**. On 6 May 2009, the House of Lords dismissed the appeal in **Nasseri**, a decision which left SA with no continuing basis for pursuing his asylum claim to remain in the UK. Furthermore, SA's claim that he was being unlawfully detained was no longer sustainable since he had been released on 13 February 2009. In consequence, SA's solicitors informed the defendant that SA no longer pursued his challenge to his intended removal to Greece and on 8 June 2009 amended grounds for seeking judicial relief were served on his behalf. These are the grounds that seek a declaration and damages based on the contention that SA's detention was unlawful for the whole period of seventeen weeks and six days that is in question.

Background to SA's asylum claim

9. It is necessary to set out the background to SA's asylum claim since it played an essential part in the defendant's two decisions to detain SA and to continue to detain him over the whole of the period in question. The starting point is the Dublin Regulation[3] which established the criteria and mechanisms for determining which member state of the European Union ("EU") should be responsible for examining an asylum application from an asylum seeker from a non-EU state. The stated intention of the Dublin Regulation was that it was to establish a Common European Asylum System based on the full and inclusive application of the ECHR so as to ensure that nobody is sent back to persecution, thereby maintaining the principle of non-refoulement. The Dublin Regulation provides a hierarchy of criteria for determining which member state is responsible for examining an asylum application. Greece was the responsible state for SA's application since it was the member state over whose borders he first crossed to enter the EU from Afghanistan and from whom he first claimed asylum. The Dublin Regulation also provides the machinery for dealing with the return of an asylum seeker to the member state which is responsible for examining his asylum claim when he has subsequently entered a second member state and has claimed asylum there.

10. There are two types of illegal safe third country entrants into the UK who claim asylum. The first type, known as take charge applicants, consist of those who arrived in the responsible member state and were fingerprinted by the authorities but the examination of their asylum claims were not fully completed before they left that member state and arrived in another member state illegally. The second, known as take back applicants, are those who were in the territory of a member state without permission and who then either withdrew their asylum application and then made an application in another member state or who went to another member state without permission after the rejection of an asylum application in the first member state.

11. SA is a take charge case. The UK was required to call upon Greece within three months of SA's arrival in the UK to take charge and Greece had, since SA was an urgent case, to reply within one month of that request with its decision on the request[4]. Where, as in this case, Greece accepted responsibility for SA's asylum application, the UK had to carry out the transfer as soon as practically possible and at the latest within six months of Greece's acceptance of the UK's request[5]. Implementation of this transfer obligation would not be suspended unless an appeal or review of the proposed transfer direction had been started and such proceedings would not themselves suspend the transfer unless the courts or competent bodies of the UK so decided. If the transfer was not effected within six months of Greece's acceptance of the request, or of the decision on an appeal or review where the initial decision has been given suspensive effect, responsibility for dealing with SA's asylum application reverted to the UK. These detailed and mandatory provisions have the effect that any necessary decision to remove SA to Greece as a safe third country asylum seeker could only be held up if and when SA started judicial review proceedings and thereafter a court or the defendant, for good reason, suspended the effect of the removal decision pending the resolution of those proceedings.

12. The UK implemented these provisions by the creation of the following three-part statutory process:

(1) A safe third country regime, the effect of which is to create an irrebuttable presumption in any determination or any proceedings involving an asylum or human rights claim that a

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3 Council Regulation (EC) No 343/2003 (OJ 2003 L50, page 1) (sometimes called "the Dublin II Regulation").

4 CR (EC) 343/2003, Articles 17(1), 17(2) and 18(1).

5 Ibid., Article 19(3).

country, such as Greece, is not a place where one such as SA's life or liberty is threatened by reason of his nationality or from which he will be sent to another state in contravention of his ECHR rights or otherwise than in accordance with the Refugee Convention.

(2) A third country certification procedure, the effect of which is, once such a certificate is issued by the defendant, to enable the defendant to refuse to consider the asylum claim of one such as SA, being one who is subject to safe third country removal to another member state, once a third country certificate has been issued by the defendant.

(3) An unfounded claim certification procedure, the effect of which is, once such a certificate is issued by the defendant, is to prevent one such as SA from pursuing an in-country appeal on any relevant ground once he is subject to a decision to remove him or he has been served with removal directions[6].

SA was served with a third country certificate on 18 November 2008. This was withdrawn on 9 January 2009 because it had been issued prematurely and a fresh third country certificate dated 9 January 2009 was issued on the same day. SA was also served with a certificate dated 9 January 2009 that his human rights asylum claim was clearly unfounded.

13. There was, therefore, only a very limited basis for a safe third country asylum seeker in the UK whose case was covered by the Dublin Regulation to claim that removal directions are unlawful. The only relevant basis available to SA in 2008 was that his being returned to Greece would amount to a breach of article 3 of the ECHR since Greece would refoule him to Afghanistan, that is return him in breach of his legal rights to the borders of a territory where he had a reasonable fear of being persecuted. However, since Greece was listed as a safe third country by the 2004 Act, that contention was not sustainable unless the Administrative Court was willing and able to declare that the relevant provisions of the 2004 Act listing Greece as a safe third country were not compatible with SA's article 3 rights and the relevant provisions of the Human Rights Act.

14. The possibility of such a non-compatibility declaration arose as a result of the unorthodox manner in which Greece had been responding to the crisis created by the wave of illegal entrants across its borders who were fleeing various internal conflicts around the world and who were applying for asylum in Greece, many as a last resort. The basis for such a declaration was two-fold:

(1) Greece would, or was considered likely to, refoule asylum seekers to their county of origin; and

(2) Greece would, or was considered likely to, ill-treat returned asylum seekers so badly on being returned to Greece as to amount to torture or to inhuman or degrading treatment.

In the period immediately before SA arrived at the Port of Dover in October 2008, there were a significant number of asylum seekers who had arrived from Greece having fled the conflicts in Afghanistan, Iraq, Iran, Somalia and Sudan, whose asylum claims were the responsibility of Greece and who had a real fear that Greece would refoule them or would otherwise treat them in ways that were in breach of their article 3 rights.

15. Evidently, the number of such asylum seekers in Greece had risen from 4,500 in 2004 to over 25,000 in 2007. It was reported that very few of these applications were successful, most applications were not properly processed or adjudicated upon and large numbers of applicants were then fleeing onwards to other member states and, on being returned to Greece, were finding that their renewed applications were not being processed. This led to concerted pressure being placed on Greece by other member states, by the European Commission and, by the European Court of Justice following the initiation of infraction proceedings against Greece in March 2008 for failing to comply with the Dublin Regulation. Further pressure was exerted on Greece by the issuing by the UNHCR of a statement of position on 15 April 2008 which advised governments to refrain from returning asylum seekers to Greece under the Dublin Regulation until further notice.

16. Greece responded to this barrage of criticism by enacting a new refugee law on 11 July 2008 which allowed asylum seekers returned under the Dublin Regulation to reopen their cases and by beginning to process asylum claims in accordance with its duties under that Regulation. It had been a particular criticism that the effect of Greece's failure to process the applications of returned asylum seekers expeditiously or at all was that those claims remained automatically dismissed under the local

[6] Paragraphs 3, 4 and 5 of Part 2 of schedule 3 of the Asylum and Immigration (Treatment of Claimants etc) Act 2004.

law governing so-called interrupted claims. This was because such claims could only be maintained if the returning asylum seeker reappeared within three months of the original decision that had automatically dismissed his asylum claim after he had first left Greece illegally. Very few returning asylum seekers returned within that three-month time limit. The outcome of this change of the relevant law and practice in Greece was that, by mid-2008, as the available evidence suggested, although there were concerns about the conditions in which asylum seekers might be detained in Greece, they were no longer subjected to ill-treatment of such severity as would result in a breach of article 3 by a returning state if they were returned to Greece.

17. The UK was the refuge sought by many asylum seekers subject to perceived breaches of their article 3 rights by Greece and during 2008 many of these sought redress by way of judicial review in the Administrative Court and by way of applications for a rule 39 indication from the European Court of Human Rights that they should not be returned to Greece. This litigation was aimed at preventing or staying their return to Greece whilst Greece continued to deal with its asylum seekers in ways that appeared to contravene article 3.

18. The first of the reported cases in England which had direct relevance to SA's case was **Nasseri** which was decided at first instance by McCombe J on 2 July 2007[7]. The asylum seeker in that case was an Afghanistan national who feared that he would be refouled by Greece. McCombe J did not have to decide whether, factually, the claimant's article 3 rights would be imperilled by his enforced return to Greece because he found in the claimant's favour in a more fundamental and controversial manner. The judge addressed the irrebuttable presumption that Greece was a safe country imposed by the statutory certification of Greece as a third country. He held that that provision was incompatible with article 3 because it precluded a factual investigation by the court of an asylum-seeker's claimed fear of refoulement.

19. This decision was reversed by the Court of Appeal in judgments handed down on 14 May 2008[8]. The Court of Appeal held that the there was no general incompatibility between paragraph 3(2) of schedule 3 of the 2004 Act and article 3 of the ECHR but that it was permissible for an asylum seeker to attempt to show by evidence of Greece's present practice that there was limited incompatibility in relation to Greece, as a listed state and the rights of a particular applicant arising from the facts of his case. The Court of Appeal therefore considered whether, on the facts of that case, there was real risk of that asylum-seeker's refoulement to Afghanistan by Greece and to his subsequent ill treatment there having been refouled. Having considered the available evidence, the Court of Appeal concluded that there was no such risk since there were currently no reports of unlawful deportation, removal or refoulement by Greece to Afghanistan, Iraq, Iran, Somalia or Sudan and no reports of unlawful refoulement to any destination.

20. On 29 May 2008, the defendant instructed the Treasury Solicitor to oppose any stay application made by any Greece third country asylum seeker pending the filing and determination of a petition for permission to appeal to the House of Lords being filed by the asylum seeker in **Nasseri** and also actively to continue to defend any judicial review application by such asylum seekers.

21. Meanwhile, three separate judges in the Administrative Court refused permission to apply for judicial review of removal directions to Greece on refoulement grounds to three further illegal entrants to the UK and also refused to grant a stay of those removal directions pending applications for permission to appeal to the Court of Appeal. I will refer to these conjoined appeals as **AH (Iran) and others**[9]. All three claimants made conjoined applications for permission to appeal. At the oral conjoined hearing that was heard on 6 August 2008 for permission to appeal and for a stay pending an application to the House of Lords by the asylum seeker in **Nasseri**, the Court of Appeal refused all three appellants permission to appeal and also refused to grant a stay of their removal directions on the claimed or any other ground**.** In these three cases, the factual basis of each asylum-seeker's application was similar. Each feared refoulement by Greece if returned: in the case of **Zego** to Eritrea, in that of **Kadir** to Iraq and in that of **AH** to Iran but, in each case, the evidence considered by both the judge and the Court of Appeal showed that Greece was not refouling asylum seekers to those three countries.

22. In relation to the argument that a stay of removal directions should be imposed pending the determination of the appeal proceedings in **Nasseri,** Burnton LJ explained that the Court of Appeal, like each judge at first instance, had refused a stay because the facts showed that none of the three

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7 [2008] 2 WLR 523, McCombe J.

8 **AH (Iran), Zego (Eritrea) and Kadir (Iraq) v SSHD** [2008] 3 WLR 1386, CA.

9 [2008] EWCA Civ. 985.

asylum seekers had a justifiable fear that Greece, in defiance of its Dublin Regulation obligations, would subject them to refoulement. Burnton LJ also stated:

> "27. There remains the question of consistency: the principle that like cases should be treated alike. The Secretary of State has agreed to and this court has granted a stay of removal in the case of **Nasseri**, and it is said that the principle of consistency requires this court to treat the cases before us, which are indistinguishable from **Nasseri**, similarly. In my judgment, the short answer is that given by Mr Beer in his skeleton argument. These cases are distinguishable from **Nasseri**. In that case, the Secretary of State agreed to a stay pursuant to a policy to do so where there is a petition for leave to appeal pending before the House of Lords in order not to appear to stultify the appeal by making it academic. The Court of Appeal granted as stay because of the Secretary of State's agreement to it. Those considerations do not apply in the present cases.
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> 28. I would, therefore, in each of the cases before us, refuse permission to appeal and therefore refuse a stay of removal.
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> 29. I understand there are a number of cases in which a stay has been sought on grounds similar to the present. I would expect cases on all fours with those before us to be decided similarly. The pendency of the petition for leave to appeal to the House of Lords in **Nasseri** does not of itself justify a stay of proceedings to remove the asylum seeker to Greece under the Dublin Regulation, at least where the asylum seeker is a national of a country to which the evidence is that Greece is not returning failed asylum seekers."

23. The Court of Appeal was informed of two cases, **Kadir** and **Gutale**, where applications had been made to the ECHR on behalf of two further asylum seekers and interim Rule 39 relief had been granted whereby the ECHR had indicated to the UK Government that neither asylum seeker should be deported to Greece until further notice so as to give the ECHR the opportunity of considering their stay applications fully. The Court of Appeal declined to follow the suggested lead provided by these two cases on the grounds that the materials that the Court of Appeal had been provided with were much fuller than the scantier materials apparently provided to the ECHR and the Court of Appeal therefore saw no reason why the Rule 39 indication in relation to the asylum seeker in **Kadir** justified the grant of a stay to the three different asylum seekers whose applications were being considered by the Court of Appeal.

24. On 27 October 2008, the House of Lords granted permission to appeal in **Nasseri.** Notwithstanding that development, the defendant instructed the Treasury Solicitor to continue to defend all judicial review claims and to oppose any applications for a stay in other Greece third county cases pending the judgment of the House of Lords in **Nasseri**. The defendant obtained further evidence that reinforced the earlier evidence previously considered by the Court of Appeal in **Nasseri** that there was, or there appeared to be, no risk of refoulement by Greece to Afghanistan, Iraq, Iran, Somalia, Sudan or Eritrea. This evidence included a letter received by the Foreign and Commonwealth Office from the President of the Legal State Council in Greece dated 31 October 2008 dealing with current practice in Greece in relation to third country asylum claims by asylum seekers from war-torn countries.

25. On 11 December 2008, the ECHR communicated its decision that a complaint from an asylum seeker was inadmissible. This claim had alleged that the asylum seeker's removal to Greece by the UK government would be unlawful. The grounds for that ruling were that there was nothing to suggest that those who were returned to Greece faced a real risk of refoulement and that any concerns about conditions of detention in Greece should be raised with the Greek domestic authorities (**KRS v UK**[10]**)**. The ECHR also held that the application was manifestly ill-founded and that its previous rule 39 indication should be lifted.

26. On 3 November 2008, the asylum seeker in **Sharif**[11] made a renewed oral application for permission to apply for judicial review or for a stay of the proceedings, basing both applications on the fact that the appellant in **Nasseri** had recently been granted permission to appeal to the House of Lords and of the relevance of the decision of the House of Lords in that case to the asylum claims of other Greece safe third country asylum seekers. Pitchford J directed, at that hearing, that written submissions should be filed by both parties. These were served on 15 November 2008 on behalf of the asylum

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[10] Application no. 32733/08.

[11] **R (on the application of Abdrisaq Ibrahim Sheikh Sharif) v SSHD**, CO/8717/2008.

seeker and by the defendant on 10 December 2008. A reply was served on behalf of the asylum seeker on the 17 December 2008. Pitchford J's decision was handed down on 10 March 2009. He directed a stay in that case pending the decision of the House of Lords in **Nasseri** and on 20 March 2009, the defendant instructed the Treasury Solicitor to agree to stay any judicial review proceedings raising Greece safe third country issues pending the House of Lords' decision in **Nasseri**.

27. The House of Lords decision in **Nasseri** was handed down on 6 May 2009. In dismissing the appeal, the House of Lords reviewed the evidence that had been lodged. Lord Hoffmann, delivering the principal speech, concluded as follows:

> "43. The position in Greece appears to be, as Laws LJ suggested, that the practice for dealing with asylum applications in Greece may leave something to be desired and very few applicants are accorded refugee status. If, as is usually the case, their applications are rejected, they are given a document directing them to leave the country and their continued presence there is uncomfortable. But there is no evidence, either in the documents before the Court of Appeal or the new evidence tendered to the House, that any Dublin returnee is in practice removed to another country in breach of his article 3 rights. Even if the rights of a person in such a situation to apply for a Rule 39 direction are regarded as a mere make-weight, I agree with Laws LJ that the absence of any evidence that such removals occur is of critical importance.
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> 44. Mr Rabinder Singh said that the Secretary of State was wrong to rely upon the fact that returned asylum seekers, directed to leave Greece, might stay there contrary to Greek law. I do not know whether the status of the Convention, the Regulation and the directives in Greek domestic law would make staying there a breach of Greek law or not. It may be that the asylum seeker would be entitled to say that the refusal of his application is contrary to European and Convention law and that his failure to remove himself is not unlawful. But the Secretary of State is not concerned with Greek law. Like the operation of the Greek system for processing asylum applications and the conditions under which asylum seekers are kept, that is a Greek problem. The Secretary of State is concerned only with whether in practice there is a real risk that a migrant returned to Greece will be sent to a country where he will suffer inhuman or degrading treatment. I agree with Laws LJ that there is no evidence of such a risk and would therefore dismiss the appeal.[12]"

Defendant's difficulties in dealing with Greece third country asylum seekers

28. The defendant and the Treasury Solicitor who acted for the defendant in all relevant proceedings faced immense difficulties caused by the influx of Greece safe third country asylum seekers claiming asylum and protection from refoulement to their home war-torn states. This evidence only referred to the difficulties faced by the defendant and the Treasury Solicitor in grappling with these asylum claims in general terms but I was informed that there were nearly one thousand Greece take back and take charge asylum seekers whose claims were processed in the period during which **Nasseri** was moving from the first instance decision on 2 July 2007 to the final decision by the House of Lords on 6 May 2009. All these claims had to be carefully processed and kept under continuous review and a significant number of them were the subject of judicial review applications. Meanwhile, the evidence continued to develop as to how Greece was improving its processing and adjudication of asylum claims, as to the extent of the rapidly diminishing risk of refoulement posed to those returned to Greece and as to the relevant judicial and political responses of EU member states, the European Commission and the ECHR to Greece's treatment of third country asylum seekers and of their asylum claims. This evidence had to be continuously monitored and reviewed. Finally, there were an unprecedented number of applicants, over forty were referred to in the documents, who applied to the ECHR for interim rule 39 relief in the space of a few months in 2008.

Defendant's general policy towards Greece third country asylum seekers in October 2008

29. In the light of the lengthy history of concern about Greece's willingness to fulfil its Dublin Regulation obligations and the ensuing litigation in England and elsewhere, it can be seen that the defendant had, by October 2008, developed a policy and approach towards Greece safe third country asylum seekers as follows:

> (1) There was no distinction to be made between take Greece charge cases, such as SA and the asylum seeker in **AH (Iran) and others**, and take back cases, such as the asylum seeker in

[12] [2009] 2 WLR 1202, HL(E).

Nasseri. Any procedural and regulatory differences between the two types of case created by the Dublin Regulation did not affect the way that both types of cases should be treated.

(2) The defendant had an overriding obligation to comply with the mandatory provisions of the Dublin Regulation which required the immediate return of safe third country asylum seekers to Greece unless there were very good and legally relevant reasons that permitted a delay in their return.

(3) Since May 2008 at the latest, when the Court of Appeal allowed the defendant's appeal in **Nasseri**, the objective evidence of Greece's processing and treatment of asylum seekers from war-torn states showed that any safe third country asylum seeker would not be at risk of being refouled by Greece and that their article 3 rights would not be infringed by Greece if they were removed by the UK to Greece.

(4) There was no reason to stay, hold up or delay any such removal pending any judicial review or appeal application or the determination of **Nasseri's** application of permission to appeal to the House of Lords even though the asylum seeker in that case had sought permission to appeal. This policy was supported by the Court of Appeal decisions in both **Nasseri** and **AH (Iran) and others** and by the considerable body of recent evidence and state practice that is summarised above.

(5) However, the defendant remained willing to withdraw removal directions if judicial review proceedings were started whilst a detailed internal review of the grounds put forward was carried out. Removal directions would only be reinstated if that review suggested that the judicial review proceedings had no merit or if the Administrative Court directed a stay of the intended removal or of removal directions pending the determination of those judicial review proceedings.

(6) On 20 March 2009, following the stay decision of Pitchford J in Sharif, the defendant instructed the Treasury Solicitor to agree to stay any judicial review proceedings raising Greece safe third country issues pending the decision in **Nasseri**.

30. Pursuant to this policy, the defendant issued removal directions for all Greece safe third country asylum seekers as soon as Greece accepted its take back or take charge obligations in any particular case and contested all applications for permission to apply for judicial review and for a stay of removal directions save for those where the internal review or the court dictated otherwise. Many hundreds of Greece third country asylum seekers were removed but the removal of many hundreds of other asylum seekers was held up following the appropriate internal review.

31. In SA's case, the defendant agreed on 19 December 2008 to release SA once a suitable release address was provided. No reason was given to SA for this decision which was made soon after SA's grounds for seeking judicial review had been served and during the consequent internal review of those grounds. It was also given at a time when the defendant was actively considering whether to review the policy with regard to the removal of safe third country asylum seekers pending the decision in **Nasseri** as a result of the on-going application for a stay in **Sharif's** case[13]. The defendant's decision refusing SA's asylum claim as detailed in his grounds for seeking judicial review was sent to SA's solicitors in the refusal decision dated 9 January 2009 that accompanied the reissued third country certificate and a certificate that SA's claims were clearly unfounded which were also dated 9 January 2009. The refusal decision did, however, confirm that removal directions would not be issued until SA's judicial review proceedings had been determined. Judge Pearl granted SA permission to apply for judicial review on 18 February 2009, principally on the ground that the House of Lords had granted permission to appeal in **Nasseri**. No further steps were taken to remove SA until after the decision of the House of Lords was handed down, at which point it was conceded on behalf of SA that he had no further basis for resisting his removal to Greece.

Law relating to detention

32. The law relating to the lawfulness of detaining asylum seekers in custody under the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002 is now well settled. The defendant has issued detailed guidance in Chapter 55 of the Enforcement Instructions and Guidance document issued

[13] See paragraph 26 above.

to all involved in immigration decisions and appeals. This guidance, taken with the decided cases, particularly the decision of the Court of Appeal in **I**[14], may be summarised as follows:

(1) The power to detain SA arises from statutory powers contained within the Immigration Acts 1971 to 2007. Specifically, in SA's case, immigration officers had the power to detain SA on his arrival in the UK pending examination by an immigration officer as to whether he should be refused leave to enter and, on being refused leave to enter, pending a decision on whether to issue and then issue removal directions. These powers are to be used in accordance with the law and the stated policy of the defendant in relation to the detention and release from detention of those subject to immigration controls and procedures.

(2) There is a presumption in favour of temporary admission and temporary release. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release and all reasonable alternatives to detention must be considered before detention is authorised (Guidance, paragraph 55.3).

(3) The power of detention should not be used where it is apparent to the defendant that he is not going to be able to operate the machinery provided for removal for those who are intended to be removed within a reasonable period (**Hardial Singh**[15] as approved by Lord Bingham in **A**[16]).

(4) As a matter of policy, the defendant will only use his powers to detain for one or more of the six stated reasons in the Guidance document. The two relevant reasons in SA's case are that SA was likely to abscond if given temporary admission or release and his removal from the UK was imminent (Guidance, paragraph 55.6.3).

(5) The power to detain must be applied in accordance with the general principles adumbrated by Dyson LJ in **I**. These are that:

(i) The Secretary of State must intend to deport [or remove] the person and can only use the power to detain for that purpose;

(ii) The deportee may only be detained for a period that is reasonable in all the circumstances;

(iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation [or removal] within that reasonable period, he should not seek to exercise the power of detention;

(iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal [or deportation].

(7) The period of detention that is reasonable in all the circumstances involves consideration of all relevant circumstances including (but not confined to) the length of the period of detention; the nature of the obstacles that stand in the path of the defendant preventing deportation; the diligence, speed and effectiveness of the steps taken by the defendant to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences (**I**).

(8) If it becomes apparent that the defendant will not be able to remove the detainee within a reasonable period, the detention will then become unlawful (principle (iii) in **I**, see (5) above).

(9) The lodging of a suspensive appeal or other legal proceedings that need to be resolved before removal can proceed will need to be taken into account in deciding whether continued detention is appropriate. There may be other grounds for justifying a person's continued detention e.g. a risk of absconding or risk of harm to the public or the person's removal may still

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14 **R (on the application of I) v Secretary of State for the Home Department** [2002] EWCA Civ. 888.
15 **R v Governor of Durham Prison, ex parte Hardial Singh** [1984] 1 WLR 704, Woolf J.
16 **A & X v SSHD** [2005] AC 97, HL(E), paragraph 8.

legitimately be considered imminent if the appeal or other proceedings are likely to be resolved reasonably quickly (Guidance, paragraph 55.14).

(10) The risk of absconding is a permissible reason to detain. The risk of absconding is also relevant as a factor in determining the length of a reasonable period in all the circumstances (Guidance, paragraph 55.6.3; **Collaku**[17]).

The lawfulness or unlawfulness of SA's detention

(1) Introduction

33. There are four periods of detention to consider. These are:

(1) Between 9 October 2008 and 17 October 2008;

(2) Between 17 October 2008 and 19 November 2008;

(3) Between 19 November 2008 and 19 December 2008; and

(4) Between 19 December 2008 and 13 February 2009.

34. The submissions on behalf of SA are succinct but, if sustainable by the facts, unanswerable. They are that from the moment that SA was released from the care of Kent County Council Social Services on 17 October 2008, it was or should have been obvious to the defendant that his removal from the UK was neither imminent nor possible within a reasonable period of time. This was obvious because of the on-going claim for asylum in **Nasseri** as exemplified by the outstanding petition for permission to appeal that had been lodged with the House of Lords in July 2008, particularly in the period starting on 27 October 2008 when an Appellate Committee granted **Nasseri** permission to appeal. Other factors relied on in support of the obviousness of SA's entitlement to be released on or soon after 17 October 2008 were his on-going judicial review proceedings, the evidence of continuing breach by Greece of is article 3 obligations towards third country asylum seekers and the failure to find suitable accommodation and to make arrangements for SA's release that occurred in the period from the communication of the decision to release him on 19 December 2008 and his release on 13 February 2009.

35. The submission on behalf of the defendant in response was that it was always reasonably perceived by the defendant's officials that SA's removal was to take place within a reasonable period of time and, indeed, that when the decisions to detain were taken on 17 October 2008 and 19 November 2008, removal was imminent and it remained imminent until the decision to release SA from detention was taken on 19 December 2008. Furthermore, SA was reasonably detained throughout the period of his detention on the separate ground that he was a risk of absconding and that risk had not been sufficiently reduced to allow him to be released from detention until suitable accommodation became available for him to occupy on 13 February 2009. He could not have been released in the period between the release decision on 19 December 2008 and his actual release date on 13 February 2009 because reasonable accommodation arrangements had to be finalised before he could be released and those unavoidably took seven weeks and six days to finalise. Moreover, the defendant is not responsible in fact or law for any fault by those seeking to find accommodation for SA to move into. In the circumstances of this case, therefore, the overall period of detention and the individual component parts of that period were reasonable and were not of such a length as to turn SA's initially lawful detention into one that was unlawful. Finally, nothing occurred prior to 19 December 2008 or subsequently, to change an initially lawful detention into one which had become unlawful.

(2) Period 1: Between 9 October 2008 and 17 October 2008

36. SA accepts that it was reasonable and lawful to detain SA in the eight days following his arrival in the UK, albeit that for most of that period SA was not detained but was in the care of Kent County Council pending an age assessment to test the validity of his claimed age of fifteen. However, it is necessary to consider why he was initially detained and continued to remain in detention or in local authority care in that period. On arrival in the UK, SA had no obvious means of identifying himself or of verifying his account of what he had been doing and where he had been since he had left Afghanistan, on his account, some four years previously. This explanation was of particular concern and doubtfulness since he also claimed to be fifteen when first interviewed. This claim necessitated immigration officials referring SA to Kent County Council Social Services for a full Merton-compliant assessment and to be taken into its care as a child pending the result of that assessment. This

[17] **R (Collaku) v SSHD** [2005] EWHC (Admin) 2855, Collins J.

assessment reached the firm conclusion that he was over eighteen. SA never formally challenged that assessment but in his interview on being returned into detention he again asserted that he was fifteen and, on 8 January 2009, he refused to allow the defendant to see his Merton assessment. Following his assessment, he was forthwith transferred from care back into detention on 17 October 2008. This adverse assessment further dented his credibility and reliability when being considered as an abscond risk and for possible temporary admission and release from detention.

(1) Period 2: Between 17 October 2008 and 19 November 2008

37. **Factual background.** The second period was covered by the Immigration Decision taken on 9 October 2008 when SA first arrived at Dover that he should be detained as a potential Dublin Regulation case. The period started with his being returned from the care of Kent County Council Social Services into detention on 17 October 2008 and ended with the service of the defendant's decision to issue a third country certificate[18] and to remove him as an illegal entrant to Greece. These decisions were taken on 19 November 2008 and were notified to him by the service on him of an IS.151A form dated 19 November 2008. SA was made the subject of a Eudorac Search on 17 October 2008 and was then provided with two screening interviews on 18 October 2008. Representations on his behalf were submitted to the defendant on 26 October 2008. A formal request was submitted to Greece to take charge of SA on 28 October 2008 and Greece's acceptance of that obligation was communicated to the defendant on 21 November 2008. In addition to the IS.151A form, SA was also served with a Notice to Detainee Reasons for Detention and Bail Rights IS.91R form that was also dated 19 November 2008. This form identified the relevant reasons for being detained as being SA's likelihood of absconding if given temporary admission or release, his imminent removal from the UK and his need to be detained whilst administrative arrangements were made for his care. Throughout this period, therefore, the defendant was making arrangements with Greece pursuant to the Dublin Regulation for Greece to take charge of SA's asylum application and was also reaching an informed decision that SA's substantive asylum application was not to be considered by the UK authorities and that his asylum application based on his fear of refoulement by Greece should be rejected.

38. **Discussion.** SA had arrived in the UK clandestinely, with no papers and with a clearly untrue story as to his journey to the UK and his age and it soon emerged that he was subject to the Dublin Regulation and to safe third country removal. The defendant was under a duty to return him as soon as Greece accepted responsibility to take charge of his asylum application. He had no resources and no abode, accommodation, family or contacts in the UK and, without resources, accommodation and the means to be monitored, he presented as clear an abscond risk as is imaginable.

39. Overriding these considerations was the defendant's decision, in accordance with the general policy outlined above, that SA was to be removed in the very near future. That policy and the decision to implement it in SA's case were reasonable and were also supported by the decisions of the Court of Appeal in both **Nasseri**[19] and **AH(Iran) and others**[20]. In consequence, the defendant had taken the reasonable decision not to suspend SA's removal to Greece unless directed to do so by a court since his removal was imminent. This remained a reasonable decision even after permission to appeal to the House of Lords had been granted in **Nasseri**.

40. It was contended on behalf of SA that the granting of permission to appeal in **Nasseri** should have led immediately to the conclusion that SA would not be returned to Greece in the reasonably near future. However, the principal issue in **Nasseri** was whether the third country certificate statutory procedure was in principle incompatible, either generally or in the case of Greece alone, with article 3 of the ECHR and section 6 of the HRA. There was no basis for contending that the grant of permission had significantly affected the Court of Appeal's assessment in **AH(Iran) and others**[21] that, factually, those such as SA had no grounds for relying on article 3. Furthermore, there were many asylum seekers who the UK was returning to Greece on Dublin Regulation grounds and there was no good reason for distinguishing SA's case from these asylum seekers, particularly as no judicial review proceedings had yet been initiated on his behalf. Indeed, it would have been a breach of the defendant's Dublin Regulation obligations to suspend SA's removal to Greece in the absence of such proceedings.

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18 A second third country certificate was issued on 9 January 2009 when the defendant realised that the first third country certificate had been issued two days prematurely because Greece's acceptance of the UK request of 24 October 2008 for Greece to take charge of SA's asylum application was dated 21 November 2008. A third country certificate should not be issued unless and until it is clear that the third country has accepted the UK's request to take charge of the asylum seeker. No point was rightly taken on behalf of SA about this technical error.

19 [2008] 3 WLR 1386, CA.

20 [2008] EWCA Civ. 985.

21 Ibid.

41. It follows that SA's detention throughout period 2 was lawful and was primarily based on the ground that SA was to be removed imminently. He was also detained because he remained an abscond risk. His detention on each ground taken separately was both lawful and reasonable.

(4) Period 3: Between 19 November 2008 and 19 December 2008

42. **Factual background.** The removal directions dated 19 November 2008 were cancelled on 21 November 2008 following contact between SA's recently instructed solicitors and the UKBA. The notice of cancellation included a statement that the defendant would still remove SA to Greece unless a Crown Office reference number was obtained for his threatened judicial review application within three working days. This reference was not obtained within that time-scale and the defendant was again served removal directions dated 26 November 2008. SA was also served with an IS.91R Notice to Detainee Reasons for Detention and Bail Rights form which provided as reasons for remaining in detention that he was likely to abscond if given temporary admission or release and that his removal from the UK was imminent. The removal directions were cancelled on 1 December 2008 following service of SA's judicial review application on 28 November 2008.

43. On 19 December 2008, during a detailed review of SA's grounds for seeking judicial review, the defendant decided to release SA from detention if he could offer an appropriate release address. The grounds put forward in support of the claim for asylum in the UK were that there were legitimate concerns as to whether the Greek authorities would process asylum claims and treat asylum seekers appropriately. In consequence, the safe third country certification procedure provided for by the 2004 Act was incompatible with SA's article 3 Convention rights. Furthermore, SA was entitled to a stay of the removal directions pending the decision of the House of Lords in **Nasseri** which raised the same issues and which, if decided in favour of the appellant asylum seeker, would also determine SA's case in his favour. The defendant's reply, dated 9 January 2009 and the grounds set out in the acknowledgement of service dated 12 January 2009, both contended that SA was subject to a safe third country certificate which the defendant was entitled to issue both in law and on the facts currently known. Moreover, SA was not entitled to a stay of his removal to Greece pending the decision in **Nasseri** since his case was indistinguishable from the Court of Appeal decision in **AH (Iran) and others** where a stay on the same grounds as those advanced by SA was refused.

44. **Discussion**. The same considerations apply in this third period as applied to the first two periods. SA remained an abscond risk, his removal remained imminent or reasonably so and, until 1 December 2008, no judicial review proceedings had been started. The period from 1 December 2008, when the proceedings that had been started on 28 November 2008 were served on the defendant, and 19 December 2008, when the decision to release SA from detention was taken, can reasonably be attributed to the need for the defendant to review SA's asylum application in the light of his recently initiated judicial review proceedings and his various claims for relief. That review took place in compliance with the defendant's general policy to undertake a detailed internal review of the grounds of any judicial review application once this had been lodged. It had to be undertaken by the TCU at a time when it was under unprecedented pressures of both time and resources as a result of the large number of Greece third country asylum applications it was processing and the more general Dublin Regulation problems that Greece was causing the UK Government. The review also took place at the time that the defendant and the defendant's legal advisers were reviewing the policy of resisting any stay of proceedings and removals in Greece safe third country cases pending the decision in **Nasseri** whilst preparing the written submissions in **Sharif** in both the permission and stay applications in that case[22]. Throughout this period, SA remained an obvious abscond risk.

45. In the circumstances, it was reasonable that the decision to conditionally release SA, taken during that review process, took eighteen days and could only first be communicated to SA's solicitors on 19 December 2008. The decision to release SA was taken two weeks and three days before the defendant, on 9 January 2009, issued his decision that SA should be removed, a fresh safe third country certificate, an unfounded claim certificate and an assurance that removal would not be effected until the decision in **Nasseri** was known. The initial decision taken in October 2008 that SA's removal was imminent was reasonable and remained reasonable until 19 December 2008, the timescale of the defendant's decision-making process relating to SA's release from detention and the suspension of his removal to Greece was reasonable and the decision to release SA from detention was taken as soon as it reasonably became apparent that SA's circumstances had been changed by the on-going review of SA's grounds for seeking judicial review that had shown that his removal was no longer imminent.

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[22] See paragraph 26 above.

46. It follows that SA's detention throughout period 3 was lawful and was, until the end of this period, primarily based on the ground that SA was to be removed imminently. He was, however, also being detained because he remained an abscond risk. His detention on each ground taken separately was both lawful and reasonable.

(5) Period 4: Between 19 December 2008 and 13 February 2009

47. **Factual background.** On the 19 December 2008, the defendant sent a letter to SA's solicitors informing them that she wished to release SA but, as she did not have an address to which he could be released, his solicitors were asked to arrange for SA to complete an application for NASS support provided under section 4 of the Immigration and Asylum Act 1999 and the Immigration and Asylum (Provision of Accommodation to Failed asylum seekers) Regulations 2005 by NASS, a Service located within the defendant's Immigration and Nationality Directorate[23]. This statutory provision permits the defendant to provide, or to arrange for the provision of, accommodation to be paid for by the defendant on terms as to reporting and other conditions. The TCU must first approve an applicant's suitability for NASS support which is done by reference to the criteria set out in the 2005 Regulations. Once NASS support is approved in principle, suitable accommodation must then be found. NASS has identified various approved third party support providers, many of whom are independent charities, who actually find and arrange for the provision of NASS-supported accommodation acting as a letting or accommodation agency for asylum seekers. NASS arranges for the provision of accommodation by sending an application to one of its approved charity support providers. These support providers are entirely independent of the defendant who has no power to direct or manage their work. They are, therefore, providing a service for an asylum seeker who must himself, or through his solicitor, apply for available accommodation to NASS once NASS support has been granted in principle. NASS then submits that application on the asylum seeker's behalf to the third party support provider with a request to attempt to find support accommodation.

48. SA's application was prepared by SA's solicitors and was signed by SA on 20 December 2008 at the detention centre where he was then being detained. SA then faxed the application back to his solicitor who, on 22 December 2008, faxed it onto the TCU. It was only received, or the relevant officials only first became aware of its receipt, on 24 December 2008. The application was processed over the Christmas period and SA was issued with NASS support by the TCU on 2 January 2009. The next step was for SA's solicitor to apply to NASS for accommodation. Due to the high level of demand for accommodation, SA's solicitors were unable to make contact with NASS and they therefore wrote to the TCU on 6 January 2009 asking it to take swift action to obtain a suitable address. The TCU responded promptly on 7 January 2009, stating that due to the backlog of applications, the TCU would itself submit SA's application for accommodation to NASS. On the same day, NASS received SA's application and immediately sent out an Accommodation and Travel Booking Form to United Property Management ("UPM"), the third party support provider chosen by NASS to locate appropriate accommodation for SA under the NASS scheme. UPM did not immediately provide an address and NASS sent UPM chasing emails on 21 January 2009 and 30 January 2009 and a further requisition form on 5 February 2009 requesting immediate action. That further form led to UPM, on 5 February 2009, providing SA's solicitors with an address in Wolverhampton with a starting or availability date of 17 February 2009. This date was brought forward at NASS's request to 13 February 2009. SA was then released on 13 February 2009, a release secured by his being provided by the defendant with an IS.96 Notification of Temporary Admission document which stated that SA had to reside at the allocated address and had to report to an immigration official every Monday at 11.00 am.

49. The evidence suggests that due to the Christmas and New Year holiday period and the excessive demand placed on the TCU's resource and on NASS-supported accommodation created by the general demand for NASS accommodation exacerbated by the flood of Greece third country asylum seekers, there were unavoidable delays in, firstly, the TCU processing the application for NASS support and granting it to SA and NASS sending out the requisition form to UPM (between 24 December 2008 and 7 January 2009), secondly, in UPM processing SA's accommodation application and then finding

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[23] Section 4 of the IAA 1999 provides:

"**4. Accommodation for those temporarily admitted or released from detention**

The Secretary of State may provide, or arrange for the provision of, facilities for the accommodation of persons—
(a) temporarily admitted to the UK under paragraph 21 of Schedule 2 to the 1971 Act;
(b) released from detention under that paragraph; or
(c) released on bail from detention under any provision of the Immigration Acts."

suitable, affordable and available accommodation (between 7 January 2009 and 5 February 2009) and, thirdly, in waiting for the accommodation that was obtained becoming available for occupation by SA (between 5 February 2009 and 13 February 2009).

50. **Discussion.** SA was detained not only because, until 19 December 2008, his removal was imminent, but also, throughout all four periods of detention, because he would be likely to abscond if given temporary admission. The principle basis for detaining him on this second ground was that he had no close ties, family or friends so that it was likely that he would abscond and unlikely that he would stay in one place. Detention is only to be used where there is no reasonable alternative available. His continued detention on this sole remaining ground for being detained after 19 December 2008 continued to be lawful because it continued to be reasonable to consider him to be an abscond risk and the final decision as to whether he was to be removed would be made within a short period of time once his judicial review and **Nasseri** had both been concluded and both decisions would be made within a reasonably short time.

51. Since SA was reasonably considered to be an abscond risk, the defendant was not prepared to release him from detention until he could provide the defendant with a suitable address where he could be accommodated and where he could be required to reside and from where he could be made subject to reporting restrictions. Since SA was without resources, any appropriate accommodation would have to be paid for out of public funds since there are no Probation Service bail hostels or approved premises where asylum seekers can be accommodated in the same way as those released on bail by the criminal courts can be accommodated. Thus, SA could only obtain his release if he had first successfully applied to the TCU for, and had then been granted, NASS support by the TCU, had then applied to NASS for NASS-supported accommodation, had then had that application passed on to a third party support provider and had then been granted that accommodation and it had then become vacant and was immediately ready to receive him.

52. Although part of the process of securing such accommodation is within the control of the TCU and NASS, a significant part of the process is outside that control and within the sole control of the independent third party support provider over whom the defendant has no direct responsibility or control. Since, as in this case, the third party support provider is an independent charity administered by volunteers, that part of the process is particularly susceptible to delays, particularly at holiday periods and at times of high demand. The evidence suggests that these delays were, in SA's case, further exacerbated by an excess of demand over supply in relation to suitable accommodation compounded by resource difficulties within the third party support provider and a shortage of NASS-supported accommodation.

53. The defendant reached the decision on 19 December 2008 that SA should be released. The period of time between the 19 and 24 December 2008 was taken up by SA's solicitors providing the TCU with SA's completed NASS application form. Clearly, that period of delay is not attributable to the defendant. Following the TCU's receipt of SA's completed and signed application, the further period of seven weeks and two days until SA was released appears at first sight to be excessive. However, this period occurred during and beyond the Christmas and New Year period and there was undoubtedly enormous pressure in that period and in the subsequent period up to 13 February 2009 on the TCU, on NASS and on UPM, the third party support provider due to the unprecedented number of accommodation seekers whose numbers were swelled by Greece third country asylum seekers.

54. The delay between 7 January 2009 and 13 February 2009 is attributable to UPM or to the shortage of available accommodation that it was looking for. The defendant is not vicariously liable for any delays caused by any culpable behaviour by UPM save and insofar as it can be shown that NASS caused avoidable delay by its own actions or omissions in relation to UPM, an independent provider over whom NASS had no control. The factual summary of what happened in the period after 7 January 2009 shows that the defendant took reasonable steps to seek to speed up UPM's apparent delay in obtaining accommodation. In any event, UPM acted as speedily as its resources and the unusually high demand for accommodation permitted.

55. It follows that since it was not irrational or unlawful for the defendant to refuse to release SA until suitable NASS-funded accommodation had been found, SA has failed to show that the defendant's limited involvement in the independent third party process of obtaining support and accommodation was irrational or unlawful. In any event, no delay has been shown to have been caused by any failure of UPM and, even if any such failure could be established, it is not a failure for which the defendant is responsible.

56. There is, therefore, no basis for the claim that SA was unlawfully or unreasonably detained in period 4. He was lawfully detained throughout the period because he remained an abscond risk until he had obtained an appropriate and immediately available release address. The defendant had no obligation to provide suitable accommodation, the only obligation was to consider any application for NASS-support, to pass onto a third party support provider a completed application for accommodation and to monitor the progress of that application. Only when the entire process was successfully completed and suitable vacant accommodation was offered to SA could the defendant reasonably be expected to release SA from detention having provided him with notification of temporary admission linked to a reasonable requirement that he must reside at the release address and be subject to regular reporting restrictions.

Conclusion

57. It follows that SA's detention throughout the four periods in question was lawful and his claim for damages must be dismissed.

HH Judge Anthony Thornton QC