CO/1613/2007

Neutral Citation Number: [2008] EWHC 364 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday, 6th February 2008

B e f o r e:

KENNETH PARKER QC

- -

Between:
THE QUEEN ON THE APPLICATION OF PB
Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

- -

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Mr A Goodman [Ms L Busch attending for judgment] (instructed by Lawrence Lupin) appeared on behalf of the **Claimant**
Mr S Singh (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

1. KENNETH PARKER QC: In broad terms, the claimant in this application contends: firstly, that the defendant breached her duties under the Detention Centre Rules 2001; secondly, breached her policy by failing to consider referring the claimant to the Medical Foundation for the Care of Victims of Torture; and thirdly, deprived the claimant of a fair hearing before the Immigration Judge.

Background

2. The claimant is a national of Cameroon. She arrived in the UK on 4th December 2006 and claimed asylum on the same day. On 11th December 2006 the claimant was screened by the Asylum Screening Unit. On 13th December 2006 she was transferred to Yarl's Wood Immigration Removal Centre. The claimant was not given a physical and mental examination by a medical practitioner within 24 hours of her admission to the detention centre. However, on 13th December 2006 she was asked a number of questions as part of a medical questionnaire. She is recorded as having stated that she was a victim of torture. The medical notes of 14th December record that the claimant was unable to attend an appointment with a doctor because she was being interviewed and that a further appointment was booked for the next day, that is 15th December 2006. The claimant was then interviewed at length on 15th December.

3. According to the asylum interview record, the claimant stated that she had recently been tortured by gendarmes in Cameroon. She said that she had been beaten up, kicked and had wounds on her shin bones and ankles, slapped and spat on, made to crawl on cold water in the cell and beaten in the morning and evening with electric cables.

4. On 16th December 2006 a nurse recorded on the claimant's medical records:

> "Victim of torture form signed. Advise will book for a doctor tomorrow as she has not been seen since arriving."

A form filled out by the medical centre on 16th December 2006 also states that the claimant was alleging to have been a victim of torture. The form notes that the claimant was unable to attend an appointment with the general practitioner on 14th December as she was being interviewed and that an appointment was rebooked for 17th December 2006.

5. On 18th December the defendant rejected the claimant's asylum claim. The decision refusing her claim was based on "evidence provided during your screening interview conducted on 4th December 2006, your statement of additional grounds dated 13th December 2006, and your substantive asylum interview conducted on 15th December 2006." The decision of refusal does not mention any consideration of medical records or any consideration of referring the claimant to the Medical Foundation for the Care of Victims of Torture, which I will call the "MFCVT". The defendant did not believe the claimant's account.

6. The claimant appealed against the decision of refusal and her appeal was dismissed by the AIT in a determination promulgated on 29th December 2006. The AIT dismissed the claimant's request for reconsideration on 5th January 2007, and on 25th January

2007 the claimant's application to the High Court for reconsideration of the AIT's decision was dismissed by Collins J.

7. Meanwhile, on 1st January 2007 the claimant submitted further representations to the defendant and invited the defendant to treat those representations as a fresh claim for asylum. On 10th January 2007 the defendant refused to do so. On 12th January 2007 the defendant set removal directions for 18th January. On 17th January the claimant's former solicitors submitted to the defendant an application for humanitarian protection which was refused by the defendant on 18th January. The claimant could not be removed on 18th January in accordance with the removal directions as she became disruptive. Removal directions were then reset for 1st February 2007. The claimant's former solicitors applied for an injunction preventing the claimant's removal. No grounds were filed, the injunction lapsed, and on 12th February 2007 the defendant reset directions for removal on 26th February.

8. Meanwhile, on or around 1st February the claimant came into contact with a representative from the charity Women Against Rape to whom she alleged for the first time that she had been raped twice when she was detained in Cameroon. On 20th February 2007 the claimant's present solicitors submitted further representations to the defendant, alleging that the claimant had twice been raped by a prison guard in Cameroon. On 26th February 2007 the claimant issued her claim for judicial review, challenging the defendant's alleged failure to consider her further representations of 20th February 2007 and the alleged failure to cancel the removal directions set on 12th February.

9. On 26th February Walker J ordered the defendant not to remove the claimant pending the determination of the claimant's application for permission to apply for judicial review or further order.

10. On 2nd March 2007 the defendant informed the claimant's solicitors that the further representations of 20th February had been considered and would not be treated as a fresh claim. The letter of 2nd March 2007 stated at paragraph 7:

> "Contrary to your submissions that your client has not had a fair hearing as the Detention Centre Rules were not adhered to, I draw to your attention that your client was examined mentally and physically after her entry into detention and that the representative of the Secretary of State was notified in accordance with the Detention Centre Rules that your client claimed to be a victim of torture."

The summary grounds of defence at paragraph 17(a) also state that a medical examination had been carried out within 24 hours of detention.

11. On 27th March 2007 the claimant's solicitors wrote to the defendant questioning the basis for certain of the statements set out in the summary grounds of defence. On 4th April 2007 Silber J refused permission on the papers. The claim was renewed on grounds challenging, among other things, the evidential basis for the assertions in the summary grounds of defence.

12. At about the same time, on 2nd April 2007, the claimant was examined by Dr Juliet Cohen of the MFCVT and Dr Cohen produced a report on 9th April 2007. Dr Cohen is Head of Medical Services at the MFCVT and is a GP. She has worked part-time at the MFCVT since 1997. She has, among other things, attended and spoken at twice yearly study days at the MFCVT and has engaged in in-house training and regular doctors' meetings. She has devised and delivered training for the MFCVT doctors and health assessment centre staff in the identification of victims of torture and, as part of a British Council programme on combating torture, delivered training for forensic doctors and criminal practitioners in Brazil.

13. In her summary and opinion Dr Cohen said as follows:

> "(32) She has multiple scars on both lower legs and feet attributed to the kicks causing lacerations. The appearance of these scars is highly consistent with this attribution. The areas of hyperpigmentation on the front of the left lower leg and knees are attributed to bruising and abrasions sustained in detention, and their appearance is highly consistent with this. I use the Istanbul protocol recommended terms, appended.
>
> (33) I have considered whether these findings could have arisen due to other causes. I note that she is an agronomist. She has a tertiary qualification and no history of manual labour or playing sports, which might otherwise cause such a high number of scars. In addition, while it is notoriously difficult to age scars, these scars do all appear to be of a similar maturity, indicating it is likely they were sustained at around the same time, and not one by one over a prolonged period of time as is more usual with accidental injuries.
>
> (34) I also note that the location of the scars, which while again compatible with accidental causes is also that most exposed when a person is huddled defensively. Blows to the front of the lower leg are more likely to cause scars than blows elsewhere as they are over a bony prominence -- the tibia. Thus although she gives a history of being kicked on other parts of the body, the fact that only the lower legs are scarred is compatible with this."

14. The defendant received Dr Cohen's report on 24th April 2007. On 26th April 2007 the claimant's solicitors pressed for a response to the letter of 27th March and also submitted that in all the circumstances the claimant should be released from detention and should be granted temporary admission. The claimant, however, remained in detention.

15. On 18th May 2007 the defendant treated the submission of the medical report as an application for a fresh claim and refused to accept the report as constituting in law a fresh asylum or human rights claim. At paragraph 5 of the letter it said:

> "(b) Although you have kindly drawn to our attention that Dr Cohen's report records that your client's physical scars are 'highly consistent' with

her claims of torture whilst in detention, this is considered to be very selective use of the Medical Report.

Dr Cohen has stated that 'The appearance of these scars is highly consistent with this attribution' (kicking). Closer inspection of the Istanbul protocol, from where the term 'highly consistent' is derived, records its meaning as: 'the lesion *could have been* caused by the trauma described, *and there are fewer other possible causes'* (emphasis added) (paragraph 32).

Dr Cohen also states that consideration has been given as to whether these scars could have arisen due to other causes. No findings have been made on this point save to say that these scars 'all appear' to be of a similar maturity 'indicating it is likely' that they were sustained at around the same time. There are no explanations as to why Dr Cohen thinks this, especially given her own earlier statement that 'it is notoriously difficult to age scars' (paragraph 33).

Dr Cohen notes that although your client's history of being kicked on her lower legs is compatible with the scarring, there is also the finding that the location of the scars is compatible with scarring of accidental causes.

In conclusion whilst the scarring itself is not in dispute, it is considered that Dr Cohen's findings in this respect are somewhat limited and that insufficient alternative explanations have been explored. The term 'highly consistent' cannot be used in isolation to accept in entirety your client's account of her treatment whilst in detention.

(c) Furthermore despite your client's claims that she was beaten twice daily with electrical cables, for a period of two months (AIR question 4), it is noted that her physical examination bore no scars or marks in relation to this.

Dr Cohen has kindly given an explanation that 'Physical evidence of whipping injuries . . . depends on the force used and the parts of the body hit' (paragraph 35). However, no other findings have been made in this respect, including considering whether such whippings actually took place. It is not considered that the findings (if any) are complete in this respect.

(d) In respect of the gynaecological problems which your client attributes to rape, Dr Cohen has made the following findings (in summary): that your client has an offensive vaginal discharge and heavy periods most likely as a result of a sexually transmitted disease (paragraph 36). There is no negative inference drawn from that fact that there is no physical evidence of rape (paragraph 30).

However, given that it is your client's own evidence that she suffers from

fibroids and as such has had heavy bleeding during her monthly menstrual cycle in the past (paragraph 5) and the fact that sexually transmitted diseases are not just attributed to rape but most commonly unprotected sex, these findings cannot substantiate your client's claim of rape.

(e) Dr Cohen at paragraphs 38 through to 41 of the Medical Report offers medical opinion on your client's psychological health including a possible diagnosis that your client suffers from PTSD.

The Medical Report in this respect is not accepted to be of any substantial diagnostic or clinical value given that Dr Cohen is a General Practitioner and not according to the GMC on the Specialist Register in any specific area of medicine, including psychology or psychiatry (extract from www.gmc-uk.org attached). It is noted that such an opinion/finding has been derived primarily from your client's account which has been disbelieved by both the AIT and the Home Office.

Therefore in light of the previous credibility findings by the AIT it is not believed that this report would add such weight to your client's account that would mean that there would be a realistic prospect of success."

16. In response to the letter of 18th May 2007, supplementary grounds of claim were settled. On 11th June 2007 permission to amend the claim and permission to apply for judicial review were granted. The defendant then agreed to release the claimant from custody on 12th June 2007. She had been detained for a period of six months and one day.

The Claim

17. In essence the claim raises five issues. First, was there a breach of rules 34 and 35 of the Detention Centre Rules 2001? Secondly, was there a breach of the defendant's declared policy regarding referral of persons held on the Fast Track to the MFCVT? Thirdly, as a consequence of any breach under (1) and/or (2), was the claimant held unlawfully in detention? Fourthly, was the decision of 18th May 2007, to which I have referred, unlawful? Fifthly, as a result of her being held in detention and handled under the Fast Track Procedure, were the decision of 18th December 2006 and the subsequent proceedings in respect of that decision in the AIT unlawful and of no effect?

The First Issue

18. The Detention Centre Rules 2001, SI 238/2001, are made pursuant to section 153 of the Immigration and Asylum Act 1999 and came into effect on 2nd April 2001. The relevant Rules provide as follows:

"Rule 33 -- Medical Practitioner and Health Care Team

(1) Every detention centre shall have a medical practitioner who shall be vocationally trained as a general practitioner.

(2) Every detention centre shall have a healthcare team (of which the medical practitioner will be a member), which shall be responsible for the care of the physical and mental health of the detained persons at the centre.

Rule 34 -- Medical examination upon admission and thereafter

(1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

Rule 35 -- Special illnesses and conditions (including torture claims)

(1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.

(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.

(3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care."

19. The law and published policy relating to Fast Track detention and the rationale for the above rules were fully and authoritatively described by Davies J in joined applications, **R (on the application of D) v Secretary of State for the Home Department** and **R (on the application of K) v Secretary of State for the Home Department** [2006] EWHC 980 Admin, to which I will refer to simply as "**D and K**": see in particular

paragraphs 32 to 42 and 45 to 54. Davies J summarised his conclusion in the following terms:

> "(50) In my view the combined effect of the Detention Centre Rules, the statement of Lord Filkin, the provisions of Chapter 38 of the Operation Enforcement Manual and the relevant provisions of the Detention Services Operating Standards Manual all point in one direction: which is that the medical examination required under Rule 34 of the Detention Centre Rules is a part -- an important part -- of the safeguards provided to assess whether a person, once removed to Oakington, should continue to be detained there under the fast-track procedure. Further, it seems to me to be a necessary corollary of that that any such concerns as to torture as may be identified by the medical practitioner would at least be capable of constituting "independent evidence" for the purposes of the Government's announced policy. Indeed if that were not so, it is difficult to see why so much emphasis has consistently been placed on the availability of -- indeed, requirement for -- such physical and mental examination. It is also to be noted that the structure of Rule 35 is such that the requirement under Rule 35(3) for the medical practitioners to report concerns as to torture is distinct from any requirement to report on grounds of injury to health by reason of detention (Rule 35(1)) and from any requirement to report concerns of suicide (Rule 35(2)) . . .
>
> (52) I would, however, agree with Ms Richards that there is a separate question as to the I would, however, agree with Ms Richards that there is a separate question as to the weight to be given to such evidence; and I would not agree with Mr Rabinder Singh's submissions to the extent that such submissions connoted that any expression of concern arising from medical screening (whether or not arising from a Rule 34 examination) would "inevitably" mean that the asylum application in question would then have sufficient complications to render it inappropriate for the fast-track procedure (and concomitant detention) to be maintained. Indeed I do not read Lord Filkin's statement as making so wide-ranging a concession even with regard to a report made under Rule 35(3). A concern as noted on an AOT form by, for instance, a relatively inexperienced nurse after an initial screening may be regarded as very different from a concern noted by an experienced doctor contained in a Rule 35(3) report in deciding whether to continue to detain. In any event, always relevant will be the way in which such concerns -- whether or not by way of Rule 35(3) report -- are reported and, to some extent, the strength with which such concerns are raised. In some cases the result may then be the removal forthwith of the asylum-seeker from the fast-track procedure. If so, whether the asylum-seeker should then be detained elsewhere will depend on whether there are sufficiently exceptional other circumstances to justify such detention.
>
> (53) I also here would record my view on two other matters. First, I consider that the existence of Rules 34 and 35 and the statement of Lord

> Filkin operate to displace any notion that in some way there is, as it were, an overriding burden on the detainee always himself to come up with the relevant "independent evidence". There may well be cases where an individual detainee can and should do that. But in other cases (whether for reasons of confusion, ignorance, language, lack of resources or otherwise) a detainee may be in no position to do so: at all events in the form of medical evidence. This in fact, as I see it, is precisely one of the reasons why Rules 34 and Rule 35 are framed as they are -- the obligation being on the detaining authorities in this regard to provide the medical attendance which may in turn, in some cases, lead to a report capable of being independent evidence of torture.

20. As I stated earlier, the defendant asserted in the summary grounds of defence that in this case there was no breach of rules 34 and 35 of the Detention Rules. This was the position maintained practically up to the hearing before me. The defendant filed no evidence at all on this claim. However, on the eve of the hearing I received from Mr Sarabjit Singh, counsel for the defendant, a skeleton argument, paragraphs 19 and 20 of which read as follows:

> "(19) After the claimant arrived at Yarl's Wood on 13th December 2006, a full medical review was carried out by D Houghton at 22.40 on the same date and the claimant alleged then that she was the victim of torture (p.84 of the bundle). D Houghton was not a 'medical practitioner' as defined by rule 33(1) but was a nurse. Therefore, the defendant admits that the claimant was not given the examination required under rule 34(1).
>
> (20) Rule 35(3) provides that the medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture. On 16th December 2006 the HCC Manager reported to the Centre Manager that the claimant claimed to be the victim of torture (p.116). The HCC Manager was a registered nurse and not a 'medical practitioner', and so the defendant admits that the requirements of rule 35(3) were not met."

In other words, there were admitted breaches of rules 34 and 35 of the Detention Rules. I must now explore the consequences of these admitted breaches. Article 5 of the ECHR provides, among other things:

> "No-one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law."

Under subparagraph (f) it is said:

> "The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition."

Article 5(5) provides:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Section 8 of the Human Rights Act 1998 confers a discretion on the court with regard to judicial remedies.

21. In **D and K**, Davies J also explored the application of Article 5 of the ECHR to a case where there were proven breaches of rules 34 and 35 of the Detention Rules:

> "(108) It is common ground that the fact that D and K were wrongfully denied a medical examination within 24 hours of admission contrary to Rule 34 does not of itself mean that they were wrongfully detained. It is common ground that it is for each of D and K to show that had they received (as they should) such examination within 24 hours then they would have been released at an earlier time than in fact they were. It is common ground that this issue of causation is to be assessed on the balance of probabilities: these are not 'loss of chance' cases . . .
>
> (111) . . . So the questions are: what would (and should) have happened if they had received their Rule 34 examinations within the mandated 24 hours of admission? Would Rule 35(3) reports have resulted sufficient to bring about their release? (I add that no suggestion is made that a Rule 35(1) or Rule 35(2) report would have resulted).

22. Dealing with the case of **D**, Davies J made these important observations and findings:

> "(117) There is, however, no evidence from the doctor actually involved in the case of D as to what his view or concern (if any) was or how he would have completed any AOT form in the absence of Policy No. 25. A doctor will not necessarily have concerns that there may have been torture where a detainee is alleging torture or where scars or marks are visible. In some cases there may be no scars or marks. In others the doctor may, for example, form the view that such scars or marks have no obvious relation to the torture alleged. Or, for example, it may be that the detainee is alleging only recent torture but such marks as are visible are clearly longstanding. It may be also that such marks as are noted are trivial. But in other cases -- and it is not to be overlooked that the examination is a mental examination as well as physical -- that may not be so. That is not to say, where the doctor has concerns, that he or she necessarily is positively required to express a view that there may have been torture. Really it is a matter for the doctor involved; but as it seems to me the medical practitioner is not to be precluded, if he or she has concerns, from at least expressing a view that the scars or marks or other injury noted are consistent with the detainee's claims of torture (the approach adopted, for example, by Dr Granville-Chapman in her conclusions). If a report is put in, in accordance with Rule 35(3), then that is at least capable of constituting independent evidence. It is for the IND then to assess it in

deciding, considering the case as a whole, whether to release; either on the basis that there is an allegation of torture supported by independent evidence; or on the basis that the matter has become too complex to be suitable for the Oakington fast-track procedure; or both. What that decision will be will depend on the circumstances of each case.

(118) In D's case, I have, on balance, formed the view that had a medical examination of D taken place in accordance with Rule 34, and had there been no Policy No. 25 in existence, it should and would have resulted both in a Rule 35(3) report and in her release from detention at Oakington. D made complaints of, among other things, having been beaten by the authorities with a steel wire on her back. Those scars ('multiple linear scars') are extensive and, on examination, evident. They were observed both by the nurse and by the doctor. Further, her version of events was, it may be noted, maintained in the interview at Oakington. I think also that I am entitled to bear in mind the subsequent report and conclusion of Dr Granville-Chapman, which has not been countered by a medical report to the contrary from the Defendants in these proceedings. In such circumstances, and bearing in mind also the general presumption in favour of release, I therefore conclude that a Rule 34 examination, if made, should and would have brought about D's release from Oakington."

23. In this case Mr Singh submits that it is entirely speculative what might have happened if a proper medical examination had taken place. He submits that the purpose of an examination under rule 34(1) would not have been to produce the kind of report made by Dr Cohen, but to assess the claimant's overall condition. Notes would have been made of the claimant's overall condition, and it is, he submits, mere speculation for the claimant to assert, in effect, that these notes would have constituted independent evidence of torture.

24. I do not accept this submission. The defendant maintained at the first opportunity that she was the victim of torture. Dr Cohen recorded that she had multiple scars on both legs and feet, attributed to the kicks causing lacerations, and that the appearance of these scars was highly consistent with that attribution. The scars were therefore multiple and visible. Although Dr Cohen has substantial experience and expertise in the relevant skill of assessing attribution, I see no obvious reason why a competent GP, giving the claimant a thorough physical examination against the background of allegations of torture, would not have seen the scars and would not have reached the same, or a very similar, conclusion to that reached by Dr Cohen.

25. It seems to me also, having regard to the nature of the scars and the serious mistreatment to which they may well have related, that it was more probable than not that a report would have been made under rule 35(3). Given that any such report would have been capable of constituting independent evidence of torture, I believe also that having regard to the nature of the scars and the gravity of the mistreatment to which they may well have related, the putative rule 34 examination and rule 35 report would, on a balance of probabilities, have brought about the claimant's release from detention in the absence of any exceptional circumstances justifying such detention. No such

circumstances are relied on by the defendant and I accordingly hold the detention, after a short period sufficient to have allowed a proper procedure to be followed, to be unlawful.

26. At paragraph 120 of **D and K**, Davies J proceeded on the basis that the release decision would have been taken by the end of the day following removal to detention, and that a certain number of days would have been necessary to make transport arrangements. I see no reason why a similar approach is not appropriate in this case and, on that basis, on my calculation, the release from detention should have been effected by the end of 16th December 2006.

27. It is not disputed that compensation should be awarded if the detention was unlawful. The amount of that compensation should be assessed at a later hearing, if not previously agreed in the interim, and the assessment should be reserved to myself. This conclusion also determines part of the third issue referred to earlier.

The Second Issue

28. On 8th January 2007 Lord Hylton in the House of Lords asked Her Majesty's Government:

> "How many persons who were raped or tortured abroad have been held at (a) Yarl's Wood Removal Centre, and (b) all other detention and removal centres since April 2005; and for what purpose?"

On behalf of Her Majesty's government Baroness Scotland of Asthal, Minister of State of the Home Office replied:

> "While there are allegations of torture abroad made in centres, these allegations are not centrally recorded, and could be collated only at a disproportionate cost. There is a system for reporting such allegations, and this system is laid down in the Detention Centre Rules 2001. An allegation of torture is reported to the case holder in the Immigration and Nationality Directorate, and they investigate using the detainee's medical records. Where it is judged appropriate the detainee's case is referred to the Medical Foundation for the Care of Victims of Torture."

The last two sentences are in unequivocal terms and are to the effect that the IND investigate allegations of torture made by detainees and assume responsibility for referring the case, in appropriate circumstances, to the MFCVT.

29. In the letter of 2nd March 2007 to the claimant's solicitors, the defendant appeared implicitly to accept that this indeed was the policy. The defendant stated that the IND considered a referral of the claimant to the MFCVT but that such referral was considered inappropriate. The summary grounds of defence in substance repeated this statement (see paragraphs 17(e) and (g)). It does not now seem to be contested that the IND did not consider referring the claimant to the MFCVT. Nor does it seem to be contested that if the policy was as stated by Baroness Scotland in her Parliamentary

reply, the defendant acted unlawfully by not seeking to apply the policy in the claimant's case.

30. However, the defendant now avers through counsel that the policy was not in fact that stated by Baroness Scotland. It is said that the policy was that stated on 16th April 2007 by Baroness Scotland in reply to a further question from Lord Hylton, namely:

> "What mechanism has been, or will be, put in place so that an asylum applicant who claims to have suffered torture is promptly referred to the Medical Foundation?"

The Minister of State replied:

> "It is not for the Immigration and Nationality Directorate (IND) to judge whether a referral would be in the best interests of the claimant. Legal representatives, general practitioners and other health professionals, social workers, refugee agencies and others can help with that decision. NHS services are available to all asylum seekers whose claims are under consideration. Where appropriate, the IND will advise the claimant of the existence of the Medical Foundation for the Care of Victims of Torture."

31. It is possible to reconcile these two statements of policy. The first was made in response to a specific question relating to detainees at Yarl's Wood and other detention centres who alleged that they were victims of torture. The second statement was made in response to a more general question relating to those who made allegations of torture, whether detained or not. Furthermore, the second statement of policy refers to NHS services, which are not provided in detention centres, and to social workers to which detainees would not typically have access. Finally, the second statement does not refer at all to the first statement and does not in any express way suggest that it is replacing or qualifying the first statement, as might reasonably have been expected if that had been the intention.

32. If the matter stood there I would not therefore have treated the second statement of policy as undermining or substantially detracting from the first, particularly in the light of the letter of 2nd March 2007 and the summary grounds of defence to which I have referred. However, as I have noted, the defendant through counsel now asserts that the second statement of 16th April 2006 accurately represents the policy in fact operated in December 2006 and January 2007 when the claimant's claim was being processed. However, in my view this is not a satisfactory way of putting forward such a position. No witness statement was filed on behalf of the defendant to explain how the Minister of State might have come to make -- as the defendant now says that she made -- an incorrect statement to Parliament about the relevant policy. Such statements are, in general, carefully considered and made on the basis of informed and expert official advice. Nor is any explanation offered (1) as to the general relationship between the two statements, and in particular the omission of any reference in the second statement to the first; and (2) as to why the letter of 2nd March 2007 and the summary grounds of defence proceeded on the basis that the first statement was an accurate statement of policy so far as concerned the claimant.

33. In these unusual circumstances, I believe that it would be only right to treat the first statement made by the Minister of State as accurately representing policy in respect of detainees in the position of the claimant in December 2006 and January 2007. On that footing, the defendant failed to apply its own policy to the claimant without any reasonable justification or excuse and acted unlawfully by such failure.

34. In any event, there is a further ground upon which the claimant may rely in this context. Even if the second statement did correctly represent policy at the relevant time, that statement was made only on 16th April 2007. Between 8th January 2007 (the date of the first statement) and 16th April 2007 there was no clear, unequivocal and authoritative indication that the policy was not that represented by the Minister of State on 8th January 2007. What is therefore said to be the real policy was not articulated and was not accessible to those who would be affected by it. If a policy impacts upon detention it must, under Article 5 of the ECHR be accessible (see **Nadarajah v Secretary of State for the Home Department** [2003] EWCA Civ 1768 at paragraphs 64 to 67). The policy was not accessible and cannot therefore be relied on. The only policy that can be relied upon is that which was stated in Parliament on 8th January, and the defendant did not apply that policy as was required to the present claimant.

The Fourth Issue: The Decision of 18th May 2007

35. The defendant has in substance conceded this issue. On 7th November 2007 the Treasury Solicitor wrote to the claimant's solicitors proposing that the proceedings be settled by way of agreement in the form of a consent order which was enclosed with the letter. According to the terms of the proposed consent order, the defendant agreed to treat the claimant's submissions, including Dr Cohen's report dated 9th April 2007, as a fresh claim under paragraph 353 of the Immigration Rules. The defendant waived privilege in this correspondence and the terms of the proposed consent order are therefore before the court.

36. In any event, it seems to me that the decision in the letter of 18th May 2007 is legally flawed. The material test for present purposes under paragraph 353 of the Immigration Rules was set out by Buxton LJ in **WM (DRC) v Secretary of State for the Home Department** [2006] EWCA Civ 1495. The first question is whether there is a realistic prospect of an Adjudicator, applying the rule of anxious scrutiny, thinking that the applicant will be exposed to a real risk on return. Secondly, in addressing that question both in respect of the evaluation of the facts and in respect of the legal conclusions to be drawn from those facts, the question is whether the Secretary of State satisfied the requirements of anxious scrutiny.

37. In the decision letter, the defendant said that the claimant's use of Dr Cohen's report was "very selective". It is unclear to me on what basis that comment was made. It was also said that Dr Cohen's findings were "somewhat limited" and that "insufficient alternative explanations had been explored". However, Dr Cohen fully explained in paragraph 31 of the report that the scarring that she had seen was highly consistent with the claimant's account of ill-treatment. It is difficult to see what further information she could, or should, have provided. Furthermore, at paragraphs 33 and 34 she did explore other explanations that were possible in the light of the claimant's individual

circumstances and rejected them. Again, it is difficult to see what further exploration she could, or should, have undertaken. Certainly the decision letter of 18th May 2007 makes no positive suggestions on that point.

38. In short, I find that in those respects the letter of 18th May 2007 was not properly or rationally reasoned and that this manifest defect of reasoning on such a significant issue invalidated the defendant's conclusion that there was no reasonable prospect of the claimant succeeding before an asylum Adjudicator. The decision of 18th May 2007, even putting aside the defendant's apparent concession, should therefore be set aside.

The Fifth Issue

39. The claimant submits that because the claimant was unlawfully detained and subjected to the Fast Track Procedure, the defendant's decision of 18th December 2006 refusing her claim for asylum, and the subsequent unsuccessful appeal against that decision, were unlawful and should be set aside.

40. It does not appear to me that the fact of unlawful detention, by reason of the breaches, to which I have referred, of rules 34 and 35 of the Detention Rules necessarily made unlawful the subsequent decision refusing asylum or the decision of the AIT. There was nothing that I can see in the actual conduct of the asylum and immigration proceedings, either before the defendant or in the AIT, that would render those proceedings so conspicuously unfair to the claimant that they should be quashed or declared to be of no effect. In any event, even if I were wrong on that matter, I would not exercise my discretion so as to grant the relief sought, namely a quashing of that decision and the appeal proceedings for the following reasons. First, the claimant chose to appeal the decision of refusal to the AIT. It was at least open to the claimant to draw to the attention of the AIT in the appeal the full circumstances in which an adverse decision had been reached in the claimant's case and to invite the AIT to be especially cautious in rejecting the claimant's account, having regard, in particular, to the circumstances in which it had, contrary to the Detention Rules concerning medical examination, been given (even if the claimant might have been precluded from directly challenging the procedural fairness of the decision).

41. Secondly, even if the executive decision of refusal were unlawful, the lawfulness of the appellate procedure is an entirely different matter. The jurisdiction of the AIT is established by statute, as are the appeal routes from decisions of the AIT. The AIT refused reconsideration and when application was made to the High Court the High Court refused also to order reconsideration. The other statutory avenue of appeal is of course the Court of Appeal. In my view there are no grounds upon which this court might now properly impugn either the procedure before the AIT or the substantive decision that it reached on the material before it. Furthermore, it would, in my judgment, be wrong for this court, circumventing the established channels of appeal, either to declare that the proceedings before the AIT were a nullity or to quash such proceedings.

42. Thirdly, for reasons already given, the decision in the letter of 17th May 2007 must be set aside. The defendant must then either accept the claimant's fresh asylum claim or

reject it. The medical report of Dr Cohen will be before the defendant. The defendant has also agreed that the claimant may be interviewed again before a further decision is taken. If the defendant were to reject the fresh claim, the claimant would be able to appeal to the AIT, again with the benefit of Dr Cohen's report and any additional medical evidence. In my view, these procedures more than adequately safeguard the claimant's position.

43. Fourthly, it appears that the main purpose of seeking the relevant relief may be to ensure that none of the material relating to the original decision of refusal or to the subsequent appeal from that decision, including answers given by the claimant in interview, should be taken into account by the defendant in considering any fresh asylum claim, or by an Adjudicator who might have to decide an appeal against a refusal of such a fresh claim. I am very doubtful whether the relief sought, even if granted, would indeed have such an exclusionary effect. But in any event, it seems to me that the wholesale exclusion of the material to which I have referred would be a disproportionate response to the unlawfulness found in this application, namely the unlawful detention of the claimant following the non-observance of rules 34 and 35.

44. No doubt the defendant in taking a decision on any fresh claim, and an asylum Adjudicator in hearing any appeal on a refusal of such claim, would bear in mind that for the reasons stated in this judgment the claimant was unlawfully detained in the Fast Track Procedure when the original asylum claim was made and rejected. The decision-makers will have to scrutinise the material carefully in the light of those circumstances. However, the precise weight to be given to the earlier material will be a matter for the defendant and, on any appeal, an asylum Adjudicator.

45. In conclusion, the claimant has succeeded on the first four issues and is entitled to appropriate relief in respect of those issues. As to the fifth issue, no relief is granted for the reasons that I have given.

46. MISS BUSCH: Thank you very much, my Lord. I have to explain, I am slightly professionally embarrassed. To put it in a nutshell, I am here without any instructions. What I would ask you to do -- and I hope it does not cause inconvenience -- is that if any consequential matters stem from my Lord's judgment could be dealt with preferably in writing when Mr Goodman, who represents the claimant in this case, returns from vacation.

47. KENNETH PARKER QC: Yes. No doubt you will be seeking certain declarations and a quashing order.

48. MR SINGH: My Lord, I have some submissions to make, not on declarations but simply on costs. I understand my learned friend may not be able to deal with them but perhaps I could draw them to your attention.

49. KENNETH PARKER QC: Yes. The other matter is how we deal with damages. Do you want further directions in relation to damages?

50. MR SINGH: My Lord, you reserved the assessment to yourself if not agreed. The correspondence indicates that the damages figure may well be agreed. Can I pass you this up. **(Handed)**.

51. KENNETH PARKER QC: Thank you.

52. MR SINGH: This only concerns the defendant's very recent costs. There is obviously no application for the defendant's costs until, at the very least, 20th December 2007. If you have a look at the letter of 20th December 2007, my Lord, this is sent by my instructing solicitors to the claimant's solicitors. At part 36 a suggestion is made that a hearing be vacated for the purpose of settling quantum. If you turn over the page:

> "My client is prepared to settle your client's unlawful detention claim on the following terms. My client will pay to yours a sum of £4,000 in settlement of the unlawful detention claim and pay your costs."

It is made clear that the hearing itself should be vacated for the purpose of settling. If you turn over the page, a form of consent is attached. The defence agree there to reconsider the claimant's submissions under paragraph 353. An interview was agreed and then a proposal was made to vacate the hearing, for the claimant to withdraw her claim and then judicial review of the proceedings stayed in order to settle quantum in terms of the unlawful detention claim. The defendant to pay the claimant's costs with detailed assessment.

53. If you turn over the page, you have the response of the claimant's solicitors of 8th January 2008. The offer of £4,000 is rejected as not a serious one and the point is made that the claimant may well seek summary judgment on the point that no defence had been advanced. If you turn over the page you can see the claimant's proposals:

> "With regard to settling this matter, however, we would be prepared to vacate the forthcoming hearing on the following terms, in addition to those raised in the forms of consent --
>
> • The representations be treated as a fresh claim.
>
> • The Secretary of State agrees when reconsidering the fresh claim or opposing any appeal against refusal of a fresh claim to have no regard to previous interviews, decisions and determinations on her claim . . . "

And so on as my Lord sees. What became a sticking point, my Lord, was the claimant's solicitors' insistence that all previous interview, decisions and determinations were effectively wiped off the slate. That is a point you decided against the claimant. If you turn over the page, there are two draft letters of 11th January. Unfortunately I do not have the final letters dated 14th January. They are identical to these drafts. The first letter states at the penultimate paragraph:

> "I therefore suggest that the hearing of 27th January be vacated for the purpose of settling quantum."

The claimant's solicitors are advised to respond by return. You can see from turning over the page that the amount offered in settlement was increased to £15,000. If you turn over the page, my Lord, you have the claimant's solicitors' letter of 15th January 2008. It states:

> "Thank you for your offer of settlement as set out in the two letters of 14th January 2008. Without prejudice, we consider the level of damages being offered to be acceptable provided the remaining issues can be resolved. We wish to ensure that a full settlement can be reached and request that you alert us by 4 pm today to ensure we can, in the absence of a full settlement, proceed with the preparation for the hearing next week. A form of consent is enclosed."

If your Lordship could read the next paragraph also.

54. KENNETH PARKER QC: Yes.

55. MR SINGH: If you just turn to that form of consent, my Lord, which is over the page. Again, the first point made by the claimant's solicitors is that everything has to be considered completely fresh. On all the other points we are agreed in any event. My Lord, my instructing solicitors' response to that letter came on 16th January 2008. That is the next letter. If my Lord reads the second paragraph there.

56. KENNETH PARKER QC: Yes.

57. MR SINGH: My Lord, in essence that is what you found in your judgment. It continues:

> "Notwithstanding that my client's position is that it would be sensible to vacate the hearing . . . perhaps it should be reserved solely for the court to direct whether or not in all circumstances the previous material should be disregarded."

My Lord, the claimant's response to that letter came on 21st January, and again if my Lord reads the second paragraph.

58. KENNETH PARKER QC: Yes.

59. MR SINGH: My Lord, the claimant's insistence on that fifth point was the reason why all matters were in dispute before you. What we say is that the defendant should be entitled to his costs from a reasonable period after that first offer on 20th December 2007, say 21 days, which takes us roughly to 10th January 2007, just a few days before the revised quantum. If the claimant's solicitors had accepted those proposals then the costs from that point on would have been avoided other than costs incurred in settling quantum. The most sensible proposal is that the hearing could have been vacated. We ask for just a small proportion of our costs from that date.

60. MISS BUSCH: My Lord, I can only repeat what I said before. I am not in a position to respond in the absence of instructions.

61. KENNETH PARKER QC: Do you want 14 days to put submissions in writing in reply to that?

62. MR SINGH: Yes, my Lord.

63. KENNETH PARKER QC: Seven days to reply.

64. MR SINGH: Perhaps 14.

65. KENNETH PARKER QC: Yes, 14 days for written submissions by the claimant and 14 days to reply. Your submission at the moment is that from 10th January 2007 you should have the costs?

66. MR SINGH: Yes, my Lord.

67. MISS BUSCH: I am grateful, my Lord.

68. KENNETH PARKER QC: I shall deal with that without further hearing unless someone urges me it is necessary to have it.