Neutral Citation Number: [2009] EWHC 1044 (Admin)

Case No. CO/5985/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Wednesday, 18th March 2009

**B e f o r e:**

**MR JUSTICE CRANSTON**

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**Between:**
**THE QUEEN ON THE APPLICATION OF RABAH, WOLDEMICHAEL & SAADAH**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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**Mr M Supperstone QC, Mr D Bazini & Ms G Brown** (instructed by ) appeared on behalf of the **Claimants**
**Mr J Beer** (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

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J U D G M E N T

1. MR JUSTICE CRANSTON:

Introduction

2. In Seamus Heaney's well-known poem "Limbo", he speaks of limbo as being "a cold glitter of souls". The claimants in this judicial review, two Palestinians and one claimant of Eritrean and Ethiopian ancestry, contend that by the decision of the Secretary of State for the Home Department ("the Secretary of State"), they are effectively in limbo. One aspect is their limited entitlement to social and housing benefits. Their position results because of a decision by the Secretary of State to grant them temporary admission. Their claim is that that is unlawful and that I should make a declaration to that effect and also order that they be granted leave to enter. I am told that there are a number of other cases involving Palestinian and Ethiopian/Eritrean claimants whose cases have been stayed pending the determination of this case.

The Background

3. (a) The first claimant, Ahmmad Ali Rabah

4. The first claimant is a Palestinian from the West Bank of the Palestinian territories. He was born on 18th March 1979, so he is now 30 years old. He arrived in this country and claimed asylum. That was refused by the Secretary of State in April 2004. He appeals against that decision and the matter was heard by an Adjudicator in July 2004.

5. In his evidence before the Adjudicator the claimant said that he had left the West Bank in January 2004 posing as a tourist. He said that his twin brother had been in the al-Aqsa Brigade and had disappeared. His brother's membership of the al-Aqsa Brigade had led to problems with the Israelis, which led him to leave. His mother is still alive but blind and deaf. She was living with distant relatives. He could not contact her because she could not hear or speak. He did not have the telephone number to contact the relatives. He said that his relatives were still living in his village. His father had died of a heart attack in December 2003.

6. In his findings the Adjudicator said that he did not accept that the claimant's brother was a member of the al-Aqsa Brigade. Neither did the Adjudicator accept the appellant's evidence that he had been detained by the Israeli authorities. At paragraph 52 the Adjudicator said this:

> "I find that it was opportunistic of the appellant to come to the United Kingdom for economic betterment, and there are no reasons why he should not return to Palestine."

The first claimant was placed on temporary admission on 13th March 2004 and that has continued to the present.

7. On the Adjudicator's account, when he arrived in this country he had no documents. He has said that in 2006 he managed to contact one Abu Ali, a person who used to help his family with their financial affairs. Abu Ali was able to obtain a birth certificate for

him. That birth certificate, which is before the court, includes an ID number. For the purposes of his case the claimant accepts that the birth certificate is genuine.

8. The claimant was advised by his legal representatives that he should attempt to return to the West Bank in the light of the Adjudicator's decision. On 14th March 2007 he went to the offices of the Palestinian General Delegation in London. He took his birth certificate. The deputy head of the mission informed him that, since he had not been issued previously with a Palestinian Travel Authority document, they could not issue him with such a document. Subsequently, on 26th April 2007, the deputy head of mission wrote to his solicitors, saying:

> "I would like to inform you that in accordance with the Oslo Agreement signed between the PL0 and Israel, all Palestinian passports are only issued in either West Bank or Gaza for those Palestinians who hold an ID number.
>
> As for the Palestinian General Delegation to the United Kingdom we only certify powers of attorney for people who wish to renew their passports. And they have to follow the procedures themselves."

There was a subsequent letter from the Palestinian General Delegation, dated 6th August 2007:

> "In the absence of relevant documentation presented by the respective person the Palestinian General Delegation in the UK does not have the capacity to prove the nationality of any Palestinian. It is up to the individual himself to present types and forms of documentation which can help us identify him."

9. The claimant's representatives sent letters before claim in the first part of 2007 requesting leave to remain. The application for judicial review was lodged in June 2007. In November 2007 the Secretary of State refused the application, asserting that the claimant was in possession of a Palestinian birth certificate which had an ID number. That was the number that would have been of his Palestinian identity card which he would have been issued at birth. He was required to find someone in Palestine to act as his representative. He must know someone to act for him.

10. In a witness statement to the court, the claimant has said that he has never had a genuine passport, travel document, Palestinian Authority Identity Card, driving licence, political party membership card or medical card. In respect of obtaining assistance from someone in the West Bank, he did not believe that he could take the matter further. He did not know whether his mother or twin brother was alive or dead and he had now lost contact with Abu Ali. He did not have the financial resources to instruct an attorney on the West Bank to act for him.

11. Dr Tobias Kelly is a lecturer in social anthropology at the University of Edinburgh, with extensive experience of the Palestinian territories. In three expert reports prepared for the claimant's solicitors, he explains how the Palestinian National Authority issues

travel documents. He also explains the checkpoints established by the Israelis into the West Bank. He reflects in his reports what the Palestinian General Delegation said in the letters I have referred to, namely, the need for a relative or someone with a power of attorney to go to the Ministry of Interior in Ramallah on his behalf to obtain a West Bank identity card and Palestinian travel document.

12. In his second report Dr Kelly opines that without a contactable relative the chance of the claimant obtaining the necessary documents are 10 per cent. In his third report, Dr Kelly clarifies what he meant to say, that is, that the chance was 10 per cent if he could find someone to help him in the West Bank. Without that help the chance would be zero.

(b) <u>The second claimant, Fikrete Woldenmichael</u>.

13. The next claimant is of mixed Eritrean/Ethiopian heritage. She was born on 29th January 1987 in Ethiopia. She arrived with her sister in the United Kingdom and claimed asylum. The Secretary of State refused the application and the matter went to an Adjudicator. The Adjudicator dismissed the claim on asylum and human rights grounds.

14. There is no need to canvass the details of the Adjudicator's findings. Essentially he found that she and her sister were vague and evasive as to the alleged arrest of their father and there were various other aspects of their claim which could not be regarded as credible. But the Adjudicator did accept that their father was Eritrean, although he appeared to have lived most of his life in Ethiopia. The Adjudicator accepted that the claimant had never lived in Eritrea and had no relatives there.

15. There have been contacts with both the Eritrean and Ethiopian Embassies in London about the claimant. An earlier contact with the Eritreans, through the Refugee Action Choice Team in 2005, produced this report from one of the latter's workers:

> "I was informed that the Eritrean Authority would not be able to issue travel documents for individuals born in Ethiopia."

16. Ms Sheona York, the solicitor who has done an enormous amount of dedicated work for the three claimants in this case, has written on numerous occasions to the Eritrean Embassy asking for appointments or for the Embassy to process applications, both in relation to this claimant and others in a similar situation. In addition, she says that in another similar case, the Secretary of State set out what it was considered an individual must do to establish that a person has made a satisfactory effort to obtain documentation:

> "It is recommended that your client submit a formal application a for passport, allowing sufficient time for the Embassy to respond. If your client receives no response to this application within a number of weeks, it is recommended that he writes to the Embassy (or Embassies) to enquire about his application by recorded delivery at least once. If he continues to receive no response, and provides evidence of the

> correspondence (for example the recorded delivery slips and copies of the letters) IND is likely to accept this as a sustained effort to obtain a national passport."

In Miss York's evidence it would appear that no individual in a similarly placed situation as the claimant has received a passport from the Eritrean Embassy and that no person has been removed to Eritrea.

17. There is a statement from the Eritrean Embassy, included from the Eritrea Ambassador to London, setting out "Our general criteria for citizenship." This provides:

> "A person who is with an Eritrean father/mother WOULD BE ELIGIBLE for Eritrean nationality as long as the person provides three Eritrean witnesses."

18. Clive Wools, who is an inspector with the Secretary of State in the Returns Liaison Unit, has given evidence to the court about the return of persons to Eritrea. Essentially he says the difficulty is that an Eritrean must prove nationality. He describes the substantial effort, including at ministerial level, to facilitate the return of Eritreans to Eritrea. The fruits of that is that the Eritrean Embassy has now agreed to interview anyone who needs to be redocumented for removal. This includes those who have no evidence of nationality and identity.

19. As for contacts with the Ethiopian Embassy, it will be recalled that the relevance of this in relation to the claimant is that she spent her whole life in Ethiopia before coming to this country. It is of note that on several occasions the Secretary of State has recorded the claimant as being Ethiopian. Current removal directions for the claimant are to Eritrea, but the Secretary of State has said that they may be reset for Ethiopia. That would involve considering any potential fresh claim, under section 353 of the Immigration Rules. A right of appeal might then be triggered.

20. In May 2007 the claimant went with her social worker to the Ethiopian Embassy to obtain a passport. She had been advised by her solicitor to seek proof that she would <u>not</u> be able to obtain documentation from the Ethiopians. She was refused a passport. Then, on 6th November 2007, the Secretary of State wrote to the claimant, informing her that an interview had been arranged for her at the Ethiopian Embassy a week later for the purposes of confirming her nationality and identity. She attended that interview. Eventually the claimant's solicitor, by way of a subject-access request, learned that the Secretary of State's case notes indicated that the Ethiopian Embassy refused to grant the claimant a travel document, since it was believed she was Eritrean.

21. The report "Detention and Removal of Illegal Aliens" by the US Department of Homeland Security reads says Ethiopia will only issue travel documents to persons who prove their parents were born in Ethiopia, who provide proof of birth in Ethiopia, who are able to speak the language and who prove that they have families residing in Ethiopia today.

22. In January 2009 Dr June Rock prepared a report for the claimant's solicitor on documentation procedures and practices of UK and non UK based Ethiopian and Eritrea Embassies in relation to persons of mixed Ethiopian and Eritrean decent. Dr Rock explains that the war between Ethiopia and Eritrea is the background to the difficulties which those, like the claimant, now face. Ethiopia deprived persons of Ethiopian nationality who were suspected of having Eritrean origins. Dr Rock refers to the Ethiopian laws of 2003 and 2004, which may be seen as offering those of wholly or partly Eritrean origin a greater chance of return. She points out, however, that there have been very few returns within Ethiopia. That is because the embassy requires proof of parentage, the passport, an ID card, a birth certificate or a skill certificate.

23. The Ethiopian Embassy has written to Mr Clive Wools, the inspector in the Returns Liaison Unit I have mentioned. The letter in February 2009 is from the head of legal and consular affairs. After referring to various provisions of Ethiopian law the letter reads:

> "Accordingly, a person who was born to both or one of Ethiopian parents is Ethiopian and entitled to have Ethiopian travel documents. If a person is a minor the consent of his/her parents is mandatory. It is noteworthy that no dual nationality is allowed under Ethiopian law. The person would not be entitled to obtain Ethiopian travel documents if he/she voluntarily acquires foreign nationality even though he/she was born to both or one Ethiopian parents. Any Ethiopian who voluntarily acquires another nationality shall be deemed voluntarily to have renounced his Ethiopian nationality."

24. In a statement to the court, Christopher Fernandez- Packham, a senior case worker in the Case Resolution Directorate, opines that that letter supersedes the claimant's previous dealings with the Ethiopian Embassy. Mr Packham says that the case is now live within the Case Resolution Directorate and it will now be "worked actively to a conclusion".

(c) <u>The third claimant, Mazen Saadah</u>

25. The third claimant was born on 21st February 1980. He is of Palestinian origin but has lived in Saudi Arabia all his life. He had has never been to Palestine. He claimed here and claimed asylum. His claim was refused by the Secretary of State in 2003. The matter then went before an Adjudicator. He told the Adjudicator that he had family in Saudi Arabia, although his brother was in this country. He said that he had first arrived in the United Kingdom in 2000 and had claimed asylum as a Somali national. That, of course, was untrue. He then returned to Saudi Arabia in March 2002 but came again to the United Kingdom in April 2002. He sought leave to enter as a student and used false documents in connection with that application. As I have said, he then claimed asylum and was refused.

26. Before the Adjudicator he explained that he was able to return to Saudi Arabia in 2002 because he had overcome a dispute he had with his sponsor there. The Adjudicator said that the claimant's immigration history demonstrated a total disregard for the laws in

this country relating to immigration. It had been bad enough that he claimed to be a Somali in 2000, but his claim to stay here as a student was a reckless disregard for the truth. His credibility was seriously damaged in respect of every element of his claim.

27. The official website for Saudi Arabia says in respect of those seeking a visa that they need a national passport, a valid resident visa and a reference letter from an employer. In a statement to this court the claimant has said that he does not believe that his sister or his family, who were there, could sponsor him. The Secretary of State has said that it appears that the claimant's sister, who was a Saudi Arabian national, has sponsored her parents so that they may also reside in Saudi Arabia.

28. The claimant has Egyptian travel documents. Again, I am indebted to Miss York. In one of her statements she explains that the many Arab States, including Egypt, provided documents to Palestinian refugees. Apparently since this claimant's parents were from Gaza, Egypt issued them travel documents and the claimant was in turn provided with similar documentation.

29. In a letter dated 20th April 2006 to the claimant's previous solicitors the Egyptian Embassy in London wrote:

> "Regarding the above mentioned Palestinian, who was granted an Egyptian Travel Document. Kindly note that according to Egyptian Regulations, 'Palestinian refugees holders of Egyptian Travel Documents have no right to reside on a permanent basis in Egypt, nor to be granted an entry visa (unless being granted a residence visa in another country) and can only be issued after the approved Competent Authorities in Egypt.'"

On its face that seems to me to mean that someone like this claimant is not removable to Egypt. There have been discussions between the Secretary of State and the Egyptian Embassy about Palestinians with Egyptian travel documents and it appears that there is a possibility of the Egyptians issuing them a visa. Those discussions are at this stage inconclusive. The Secretary of State is awaiting a reply from the Egyptian Embassy regarding the issue of emergency travel documents for the claimant. She has repeated earlier requests to the Embassy in December 2008 and January 2009.

The Legal Framework

30. Paragraph 21 of Schedule 2 to the Immigration Act 1971 ("the 1971 Act") provides for temporary admission:

> "(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, as to his

employment or occupation and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer."

As for paragraph 16 of Schedule 2 of the 1971 Act, it reads:

"If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending—

(a) a decision whether or not to give such directions;

(b) his removal in pursuance of such directions.

The reference to directions under paragraphs 8 to 10A and 12 to 14 is a reference to removal directions.

31. In terms of relevant statutory provisions, I should also set out section 67 of the Nationality and Immigration Asylum Act 2002 ("the 2002 Act"):

"**Construction of reference to person liable to detention**

(1) This section applies to the construction of a provision which—

(a) does not confer power to detain a person, but.

(b) refers (in any terms) to a person who is liable to detention under a provision of the Immigration Acts.

(2) The reference shall be taken to include a person if the only reason why he cannot be detained under the provision is that—

(a) he cannot presently be removed from the United Kingdom, because of a legal impediment connected with the United Kingdom's obligations under an international agreement.

(b) practical difficulties are impeding or delaying the making of arrangements for his removal from the United Kingdom, or.

(c) practical difficulties, or demands on administrative resources, are impeding or delaying the taking of a decision in respect of him.

(3) This section shall be treated as always having had effect."

32. There are three preliminary points to make in relation to these statutory provisions. The first is to spell out the implications of "temporary admission". Paragraph 21 of Schedule 2 of the 1971 Act provides that a person granted temporary admission will be subject to restrictions as to residence, employment and occupation and may need to report to the authorities. There is also provision in that paragraph for the making of

regulations. Under section 4 of the Immigration and Asylum Act 1999 ("the 1999 Act"), persons granted temporary admission have no choice of accommodation but are provided accommodation in dispersal sites on either full board with no vouchers, or half board with vouchers of £35 a week. There is no entitlement to cash payments by virtue of section 43(7) of the Immigration Asylum and Nationality Act 2006.

33. In addition, those granted temporary admission are not entitled to mainstream benefits or public sector housing (Immigration and Asylum Act 1999, section 115). Persons who receive section 4 support under the 1999 Act are not entitled to work or to undertake any form of business. Although those granted temporary admission are entitled to primary health care, there are limits on the extent to which they can access the National Health Service. There is also no entitlement to social services assistance and although they may study free of charge in schools and colleges, few universities will accept them and then only if they pay foreign student fees. For the sake of completeness, I should note that under section 95 of the Immigration and Asylum Act 1999 many of these restrictions also apply in the case of asylum seekers and others subject to immigration control.

34. The second preliminary point relates to the exercise of the power of detention under paragraph 16(2). That, of course, is not relevant for these claimants who are not detained. However, the power to detain in the legislation does not set out a maximum period beyond which a person's detention becomes unlawful. In the seminal case of R v The Governor of Durham Prison ex parte Hardial Singh [1984] 1 WLR 704, Woolf J (as he then was) held that for detention to be lawful it had to be purpose stated. A person could only be detained for a period that was reasonable in all the circumstances of the particular case. Where a person is detained under paragraph 16(2) pending a decision whether to give directions for their removal, or where such directions have been given, pending their removal, they can only be detained for as long as the event can reasonably be described as 'pending'. Once that point has been passed, the detention is no longer lawful.

35. The third preliminary point relates to section 67 of the 2002 Act. That section was introduced as a result of a judgment of Crane J in R (On the application of Khadir) v Secretary of State for the Home Department [2002] EWHC 1597 (Administrative Court). There Crane J had held that the phrase "liable to detention" in paragraph 21 of Schedule 2 of the 1971 Act did not relate to the categories of persons subject to immigration control who could at some point be detained, but rather was limited to those cases where the individual concerned could lawfully be detained at that precise moment. Once that point was reached, where the power to detain no longer existed, temporary release subject to conditions was no longer available.

36. The explanatory memorandum for section 67 reads as follows:

> "189. The purpose of this section is to avoid a situation where people subject to immigration control, who do not have leave to be here, but who cannot lawfully be detained, are left at large without there being any way of keeping track of them. The power to impose reporting and residence conditions on asylum seekers and others while their claims to remain in

> the United Kingdom are being considered is for contact management purposes, and this power is dependant on there being a power to grant temporary admission or release.
>
> 190. As subsection (1)(a) makes clear, this section does not affect the scope of the current powers to detain. It only applies to provisions which do not actually confer a power to detain. What it does is define what a reference in immigration legislation to being 'liable to detention' means, making it clear that the term includes cases where the only reason the person cannot be detained at the precise moment is one of those specified in subsection (2).
>
> 191. The effect of this is that the people concerned can be given temporary admission or release (under Schedule 2 to the 1971 Act) or released on conditions (unde3r Schedule 3) even where they may not lawfully be detained under the detention powers in respectively, Schedule 2 and Schedule 3 to the 1971 Act.
>
> 192. Subsection (3) gives the section retrospective effect, thus avoiding the need to reassess the cases of persons on temporary admission on an individual basis. Because the provision will always have applied, it has the effect of validating the authorisation of temporary admission and restrictions imposed."

37. Let me return to Khadir. Crane J's judgment was appealed both to the Court of Appeal and the House of Lords. The facts, in brief, were these. Mr Khadir was an Iraqi Kurd who arrived in the United Kingdom in February 2000. He was granted temporary admission at that point. Following the refusal of his claim for asylum, and the dismissal of his appeal, he argued that there had been a long-term failure to find a safe means of return for him to the Kurdish Autonomous Area. He applied for exceptional leave to enter. The Secretary of State refused that application on 3rd May 2002 and instead periodically extended his temporary admission. As I have said, Crane J held that as at 3rd May 2002 the grant of temporary admission had not been lawful. Section 67 then came into force. The Court of Appeal allowed the Secretary of State's appeal and held that although Crane J had been right to hold on the basis of the legislation then in force that by 3rd May there was no longer a power to continue Mr Khadir's temporary admission, that section operated retrospectively to deem there to have been such a power and accordingly to deny him the benefit of Crane J's judgment.

38. Mr Khadir appealed to the House of Lords: [2005] UKHL 39; [2006] 1 AC 207. For the appellant Mr Blake QC (now Blake J) contended, inter alia, that although section 67 had retrospective effect, it could not deny Mr Khadir the benefit of the first instance judgment in his favour. On the other hand the Secretary of State contended that Crane J's decision was in any event wrong. The main speech was given by Lord Brown. Lords Bingham Hope and Rodger, and Baroness Hale, agreed. Lord Brown held, first, that given the enactment of section 67 the case before them would affect Mr Khadir and no one else. The position with regard to others similarly placed was now plain beyond

argument. They could all be granted temporary admission on a long-term basis (paragraphs 9 and 12). Lord Brown then addressed section 67 and said:

> "[20] It will readily be seen that paragraph (b) of section 67(2) was enacted to deal precisely with the present type of case... As section 67(1) makes plain, it does not affect provisions like paragraph 16(2) of Schedule 2 (the detention power), but rather provisions like paragraph 21 which give power to temporarily admit those "liable to detention." In short, the section recognises that it is one thing to detain a person during what may be a long delayed process of removal, quite another to provide for his temporary admission during such delays**."**

Towards the end of this judgment Lord Brown said this about section 67:

> "[35] Nor should the fact that the appellant has now been here for a further five years occasion any particular optimism for the future: by section 67 Parliament has manifested its clear intention that even those awaiting removal on a long-term basis should ordinarily do so under the temporary admission regime**."**

After considering the actual detention cases such as Hardial Singh, Lord Brown said this of the meaning of "pending" in paragraph 16 of Schedule 2 of the 1991 Act:

> "[32] The true position in my judgment is this. 'Pending' in paragraph 16 means no more than 'until'. The word is being used as a preposition, not as an adjective. Paragraph 16 does not say that the removal must be 'pending', still less that it must be 'impending'. So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile. Plainly it may become unreasonable actually to detain the person pending a long delayed removal (ie throughout the whole period until removal is finally achieved). But that does not mean that the power has lapsed. He remains 'liable to detention' and the ameliorating possibility of his temporary admission in lieu of detention arises under para 21**."**

Legal submissions

39. Let me now turn to the legal implications of the statutory provisions and of the House of Lords' decision in Khadir. At the outset, it is appropriate that I state my conclusion. In my judgment, the power to grant temporary admission contained in paragraph 21 of Schedule 2 of the 1971 Act is to be interpreted by reference to section 67 alone. Paragraph 21 does not itself confer a power to detain but refers to a person "liable to detention". Thus section 67 applies. The relevant issue is simply whether there are practical difficulties impeding or delaying the making of arrangements for removal from the United Kingdom. There is no need for any enquiry into whether the prerequisites of paragraph 16 (2) apply. In my judgment, this conclusion follows from the plain words of the statutory language, coupled with the legislative intention

reflected in the Explanatory Memorandum. Paragraph 16(2) is a provision which confers a power of detention. Section 67 has no application to it.

40. In his careful and considered submissions for the claimants Mr Supperstone QC sought to avoid this conclusion by referring to the meaning of "practical difficulties" in section 67(2)(b). In his submission those words excluded situations where the difficulties were legal. He drew support for this contention from the phrase "legal impediment" in section 67(2)(a). Thus, in his submission, if there are legal difficulties impeding or delaying removal, not covered by the very specific situation mentioned in paragraph (a), the position would fall outside section 67 completely. Thus in his submission one construes paragraph 21 on its own terms. To anticipate his submissions, I should explain that he contends that, at least in the case of the second and third claimants, there are legal difficulties in their own countries which prevent their removal from this country.

41. In my view, even if cases involving legal difficulties fall outside the terms of section 67(2)(b), they would have to be legal difficulties arising from the law of one of the jurisdictions of the United Kingdom. Legal difficulties could not be constituted by the law of a foreign country. Quite apart from anything else, that is because of the forensic difficulties which would occur from the need to obtain expert evidence about the law of a foreign country. Expert evidence would be needed because as a matter of English law foreign law is a question of fact. But even if I am wrong in this and legal difficulties include legal difficulties constituted by foreign law, in my view there is no reason that those legal difficulties can not be at the same time practical difficulties within section 67(2)(b). It must surely often be the case that practical difficulties derive from legal difficulties. In my view the reference in section 67(2)(a) to the legal impediment constituted in the very specific way identified there does not detract from that conclusion.

42. The result is that, if I am satisfied that there are practical difficulties impeding or delaying the making of arrangements for the removal of these claimants from the United Kingdom, they are to be taken to be liable to detention by virtue of paragraph 16(2) of Schedule 2 of the 1971 Act. In other words, the grant to the claimants of temporary admission, and the detriments attached to it, would be lawful.

43. Assume, however, that this is not correct and that it is necessary to apply paragraph 16(2) of Schedule 2. In other words, the power to grant temporary admission is contingent on the Secretary of State satisfying me that each claimant's removal is "pending". It is pending in the terms Lord Brown's speech in Khadir if the Secretary of State intends to remove each claimant and there is "some prospect" of that claimant's removal.

44. In his submissions Mr Supperstone QC contends that the phrase used by Lord Brown, "some prospect", means that there must be a realistic prospect of removal. As I understand him, his contention is that Lord Brown was not using the phrase "some prospect" with any great deliberateness. The focus of the argument in Khadir was on the meaning of "pending". It could not be thought that Lord Brown had intended to establish a different test for prospects in this context from the reasonable or realistic test

applying in the case of actual detention. The same test should apply both for those liable to detention and those actually detained.

45. In support of his interpretation of the phrase "some prospect", Mr Supperstone QC invoked the judgment of Mance LJ (as he then was) in the Court of Appeal in Khadir [2003] EWCH Civ 475. At paragraph 76 Lord Mance said:

> "Whether someone can be regarded as temporarily admitted depends on whether there is a realistic possibility of operating the machinery for removal within what I would prefer, for clarity, to describe as a tolerable, rather than a reasonable period. That period must depend on the particular circumstances, including in my view whether the person is or is not in detention, but also taking into account as a factor that temporary admission is itself an unprivileged status. That this status (which the respondent has had since 27th November 2000) may be consistent with human rights, as Miss Carss-Frisk submitted, is not the issue. Its limitations are a relevant factor when considering the period for which a person could be expected to continue in it pending removal."

In addition, Mr Supperstone QC referred to MacDonald's Immigration Law and Practice in the United Kingdom (7th edition 2008) paragraph 342 where it is said:

> "But there is a certain practicality in the decision Khadir because the House also recognises that if there comes a point where there is no realistic prospect of removal, then leave should be given."

Mr Supperstone QC also submitted that I might obtain some support from the provision in CPR 24.2, which contains the grounds for summary judgment. It refers to a real prospect of success. In all Mr Supperstone QC submitted that if "some prospect" did not mean "realistic prospect", the result would be to keep persons such as these claimants in limbo on temporary removal, indefinitely.

46. In my view, it is impossible to conclude that when Lord Brown referred to "some prospect" of removal he did not mean it. In his speech Lord Brown analysed four of the actual detention cases, including Hardial Singh, when Lord Woolf referred to the power of detention being given in order to enable the machinery of removal to be carried out and it being implied that that power was limited to a period reasonably necessary for the purpose. So the concepts of reasonable or realistic in relation to the power of removal would have been well in Lord Brown's mind. I cannot conclude that by using the phrase "some prospect" Lord Brown meant anything other than that.

47. Indeed, in my view, Mr Supperstone QC's submissions are directly contrary to the finding in Khadir. Crane J and the Court of Appeal had held there was no realistic prospect of removing the claimant in that case to the Kurdish Autonomous Area. That being the case, the House of Lords was concerned only with his specific circumstances since he had the benefit of the judgment of Crane J. If Mr Supperstone QC is correct, the claimant there should have succeeded in the House of Lords if "some prospect" meant "realistic prospect". The point is underlined because Lord Brown rejected a

submission of Mr Blake QC, on behalf of the claimant, that "removal" cannot be said to be pending unless it will be possible to effect it within a reasonable time (paragraph 26(2)) of Lord Brown's speech). Khadir would have been decided differently if Lord Brown had meant "realistic prospect" when interpreting paragraph 16.

48. Moreover, in my view, the submission confuses the exercise of the power as to whether detention is lawful with the existence of the power. In his judgment in the Court of Appeal, Mance LJ drew that distinction but in the passage I quoted earlier seems, with respect, later to have elided it. There may come a point where it is unlawful to exercise the power of detention. That does not mean, however, that it does not exist so that a person ceases to be liable to detention and hence subject to temporary admission. MacDonald's Immigration Law and Practice is, in my view, wrong in its interpretation of Khadir. As for the CPR, it has nothing to do with this case.

The Prospects of Removal

49. For the reasons given, in my judgment, there is no need for me to consider this issue. However, for the sake of completeness, let me set out how the case on behalf of each claimant was put together with my response.

50. The first claimant's case was advanced on the basis that he had to have a person available on the West Bank to obtain the necessary travel documents. It was clear that he could only obtain these in Ramallah and that he needed someone to do that, either a relative, friend or other person acting under a Power of Attorney. In Mr Supperstone QC's submissions the mother was not capable of acting, even if the claimant could contact her and there was no evidence that the distant relatives, if there were such, could act. Dr Kelly's expert report was that without assistance the chances of getting the travel documents were zero. There was the genuine birth certificate, but the claimant had lost contact with Mr Abu Ali, so that he could not serve as an avenue to obtain the documents. In sum there was no evidence that the claimant had anyone who could assist him.

51. In my view, there is some prospect in the claimant's case of removal. He was able to obtain the birth certificate as recently as 2007. I draw the inference that if he was able to do that, he could have obtained the necessary travel documents as well, or at least he could have initiated the process. He did not do so. There is the evidence before the Adjudicator that he has relatives in his village. The Adjudicator did not accept his evidence about his brother having joined the al-Aqsa Brigade. The brothers may be available. Most importantly, in my view, is that this claimant has lived on the West Bank for 25 years. He only left 5 years ago. Notwithstanding all the civil disruption which must exist in that society, I am not at all persuaded that he cannot obtain assistance from one or more persons who he knew over those 25 years. It beggars belief that he has no one. In my view, there is some prospect of his being able to obtain the travel documents.

52. Let me turn to the second claimant. The case was advanced on the basis that she faced legal difficulties. The fact is that for Eritrea she would need three witnesses to obtain the necessary documents but has never been there. In relation to Ethiopia, it was said

that the hopes which the Secretary of State had recently expressed were a delusion, that Ethiopian law had not changed since she was rebuffed by the Embassy here earlier. In addition there was the very clear evidence from Dr Rock's report about the difficulties she faced. She did not have family in Ethiopia or other relatives. She did not have any passport.

53. It seems to me that the chances of this claimant being returned to Eritrea are at the borderline of being fanciful. I accept that the Eritrean Embassy has now told the Secretary of State that the Embassy is prepared to conduct an interview but that does not seem to take the matter very far. However, the Ethiopian Embassy has been much clearer in what it has recently said. In my view, there is some prospect that progress can be made in her case as regards Ethiopia. In any event in this claimant's case there is the undertaking the Secretary of State has given the court that a decision whether or not to give removal directions will be made, and I take that to mean, will be made soon. In other words, it may become irrelevant as to whether or not this claimant can be removed to Ethiopia were that decision to go one way rather than the other.

54. I turn to the third claimant. It is said on his behalf that there is a legal difficulty: that he has no valid documents with which to travel to Saudi Arabia and no country will admit him even in transit. The evidence from the Saudi Arabian website says that he needs a passport, a residential visa and a letter from his employer. In the submissions on his behalf, there was no evidence that the Saudi immigration law would allow either his sister or his mother to sponsor him to enter or remain in Saudi Arabia. To obtain the Egyptian travel document it would seem on one interpretation of the embassy letter he has to have a residence visa in another country. On the facts Mr Supperstone QC said on his behalf that there was no prospect at all that he could be removed to Saudi Arabia.

55. In my view, one of the telling features of this claimant's case is that he was able to return to Saudi Arabia in 2002. The evidence before the Adjudicator was that he was able to overcome the dispute he had with his sponsor at the time. It seems to me that the evidence about sponsorship is confused. But, in my judgment, there is some prospect that he can be removed to Saudi Arabia in that his sister may act as his sponsor. The recent evidence from the Secretary of State is hopeful as to his case. I cannot say that the prospects are fanciful or at zero. As far as the website is concerned, that takes the matter nowhere because it does not address the specific case of displaced Palestinians with Egyptian travel documents, albeit those whose travel documents have expired. The work which the Secretary of State has undertaken with the Egyptian Embassy may address that point.

Remedy

56. The claimants submitted that I should make a declaration that temporary admission in relation to these three defendants is unlawful and also order that they be given leave to remain. For the sake of completeness, let me briefly address the submissions I have received in that regard. Mr Supperstone QC, for the claimants, said that these claimants should be on temporary admission, or given leave to enter; they should not be left in limbo. In opening the case he referred to R (On the application of S v Secretary of

State for the Home Department [2006] EWHC 1111 (Admin), where Sullivan J had granted a mandatory order that the claimants there be given 6 months' discretionary leave to enter the United Kingdom. The Secretary of State appealed that decision but not as regards the mandatory order: [2006] EWCA Civ 1157. That case, as Mr Supperstone QC seemed to concede in his closing submissions, is not directly helpful in this case. There the claimants had been granted Article 3 rights as a result of the tribunal decision. There was also a policy, which the Secretary of State had attempted to change providing that, in those circumstances, a person should be granted 6 months' leave to enter. Mr Supperstone QC said that nonetheless, in the appropriate case, a mandatory order could be made. It was not legally possible to allow the claimants to remain in an undefined status given the disadvantageous consequences I outlined earlier.

57. In my view, however, there is simply no basis for granting a mandatory order. There is no immigration rule having any purchase in this case. Neither is there an immigration policy, as there was in S, which would justify a mandatory order. The fact that these claimants have not been removed does not give rise to any substantive rights in their favour. Although they may be in limbo I cannot see any legal basis for a mandatory order in their favour.

Conclusion

58. Temporary admission is a harsh regime. Although it may not be Seamus Heaney's "cold glitter of souls", the claimants have been subject to a deprivation of rights as a result of their temporary admission. That has continued for a considerable period. However, that is the legislative regime. As a matter of law, I cannot find that temporary admission, in the circumstances of these claimants, is unlawful. I take some comfort from the fact that at least in relation to the second claimant the Secretary of State informs me that she is giving special attention to the case and that she is working towards an imminent decision.

59. MR BEER: Before my friend makes any applications that he has, could I set out the order that I would ask for consequent on my Lord's decision. In relation to each claim it is as follows, three paragraphs:

(i) claim dismissed, and this arises because each claimant is in receipt of community legal service funding.

(ii) The claimant to pay the defendant's costs of the claim, such costs to be assessed, if not agreed. The assessment of the claimant's liability to pay such costs pursuant to section 11 of the Administration of Justice Act 1999 be adjourned.

(iii) The costs of the claimants to be subject of a detailed community legal service funding assessment.

60. MR JUSTICE CRANSTON: Yes.

61. MR BEER: I am grateful.

62. MR SUPPERSTONE: Would my Lord permit me one moment. If your Associate did not get all that I am happy to assist afterwards, if that is the order that the court makes **(Pause)**.

63. My Lord, I am very grateful. I just want to be clear as to the costs position and also I do have an application to make with regard to permission to appeal. With regard to the costs order, my Lord my understanding is that the order that my friend seeks is the correct order in these circumstances. However, in the case of Woldenmichael, Mitting J gave costs to the claimant in any event up to and including permission, and therefore one proceeds on the basis in the Woldenmichael case that at the costs order, now your Lordship is being invited to make would not affect that order.

64. MR JUSTICE CRANSTON: Exactly so.

65. MR SUPPERSTONE: My Lord, I do not need to say any more about costs.

66. My Lord, we do apply for permission to appeal. As your Lordship knows, plainly the issues before your Lordships involve not just these three claimants but many others.

67. MR JUSTICE CRANSTON: Let me hear Mr Beer on this. Mr Beer is this a test case?

68. MR BEER: I made a noise as I stood up.

69. MR JUSTICE CRANSTON: Is this a test case?

70. MR BEER: It depends what one means by that. What I would say as to permission is this, three short points. Firstly, my Lord's involved the application of the existing and binding authority, namely Khadir to this point. In any event, any application would be defeated by my Lord's findings in the third part of your judgment, namely as whether on the facts there was some prospect. There is not any real prospect of the claimants overturning. If the claimants are proceeding on the basis that there is not a real prospect but some other compelling reason to grant permission to appeal, we say that is best left for the Court of Appeal to determine and not this court.

71. MR JUSTICE CRANSTON: Thank you very much, that is very concise. What about that third point, that it is really up to the Court of Appeal?

72. MR SUPPERSTONE: My Lord, we do with respect say that this is a matter that my Lord can properly deal with and not to be left to the Court of Appeal. If I can deal with the three points and I hopefully will cover that point as well.

73. My Lord, as to the first point, the critical ruling of my Lord was as to the proper construction of paragraph 21 of Schedule 2 to the 1971 Act and section 67 of the 2002 Act. My Lord ruled that properly construed Lord Brown's "some prospect" test does not apply to circumstances covered by section 67. That is essentially the first issue.

74. My Lord, we respectfully submit that that is an issue in itself which is worthy of consideration by the Court of Appeal. Certainly the judges granting permission in two of these cases and the third case, that of Saadah went by way of consent but in granting

permission in Rabah and Woldenmichael the judges appeared to have proceeded on the basis that "some prospect" test did apply. Can I just invite my Lord to take up the Saadah file and turn to page 92, paragraph 3. In the case of Rabah, Mr Burnett said (as he then was):

> "I am going to grant permission. The issues are of some practical importance with application not just to Palestinians but to potential removals to other parts of the world. SSHD believes he can obtain national documents. C says this is impossible. If SSHD cannot assist him, where does that leave SSHD in relation to whether there is some prospect of removal?"

Then over to paragraph 11, in the case of Woldenmichael, which starts at paragraph 10, then Mitting J in paragraph 11 dealing with the Woldenmichael application. He said:

> "I am granting permission in this case because I am granting permission I will just give very short reasons. The test whether someone can be kept on temporary admission is not in doubt. It is agreed the Secretary of State intends to remove this person, the Secretary of State asserts that there is a prospect in the medium to long term of removing this person to Eritrea."

So certainly, those two judges in granting the permission appear to have proceeded on that basis.

75. My Lord, as for realistic prospect of success, the submission that I am now making and the application I now make does not revive that submission that I made to my Lord and my Lord has rejected. So proceeding on the basis of Lord Brown's "some prospect of success", as I say it appears certainly that, and I appreciate it was only at the permission stage and before full argument had been heard, that appeared to be initial reaction and impression of those two judges.

76. My Lord, I also appreciate -- I forget now whether it was the second or third point -- on the basis of the findings that my Lord has made as to some prospect that my Lord may feel that there is some difficulty certainly with the first and third claimants. As far as the second claimant, Miss Woldenmichael, is concerned, what my Lord said in relation to the second claimant was that the chances of her being returned to Eritrea were on the borderline of being fanciful. The only directions there are at present in relation to the second claimant is return to Eritrea. The issue of whether there should be return to Ethiopia was one which was raised at an earlier point in time, was then rejected and in the last few days has been revived in the skeleton argument of my friend and reference has been made to it in the statements again in the last few days. At the present time, there are no removal directions to Ethiopia. My Lord, therefore, certainly the case of the second claimant, even on the basis of my Lord's findings, we would submit does provide a proper case to go forward for the purpose of testing this important point which -- and again I can just and I will not labour it, can I just tell my Lord that it is not just these three claimants. There are many others. There are 14 other claimants where similar judicial review applications have been issued, seven of which have been formally stayed and seven already in the pipeline. In addition, I am instructed there are

substantial numbers of persons -- I am told in the hundreds -- in a similar position, from Eritrea and Ethiopia who are amongst the biggest number of asylum seekers of whom those removed none, or virtually none have been removed. There are potentially in the several hundreds from Ethiopia and Eritrea. As to Palestinians in a similar position, there are, I am instructed, around a hundred at least in London and those figures I put before my Lord are the conservative figures from Miss York's own experience. My Lord, it is on the basis of those matters that we invite my Lord to grant permission.

77. I should, for the sake of completeness, I should say this. Of course, in relation to relief, because it may be said we cannot get relief at the end of the day or certainly the relief we are seeking, there does not appear to be any authority directly relating to the issue of the mandatory relief that we are seeking. Therefore we would submit certainly whilst my Lord has rejected our submission, it is a matter that could be properly argued in the circumstances.

78. MR JUSTICE CRANSTON: Do you want to say anything more, Mr Beer?

79. MR BEER: Firstly the main point my learned friend took was that the two of three permission judges did not consider the main argument that I advanced as to paragraph 21 and section 67 standing alone and excluding consideration, pending and some prospect, that was because it was not in any of the summary grounds. The fact they proceeded on the basis that some prospect was the relevant test is simply a function of the fact that the point had not been taken in front of them. That does not advance the case in any way.

80. MR JUSTICE CRANSTON: Because of the weight of numbers of people in this situation, it seems to me that the matter ought to go to the Court of Appeal. I grant permission. Is there anything else?

81. MR SUPPERSTONE: My Lord no. Thank you.