IN THE HOUSE OF LORDS

ON APPEAL

FROM HER MAJESTY'S COURT OF APPEAL (ENGLAND)

Between:-

THE QUEEN
(On the applications of: SHAYAN BARAM SAADI
ZHENAR FAZI MAGED
DILSHAD HASSAN OSMAN
RIZGAN MOHAMMED

-and-

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

WRITTEN SUBMISSIONS OF THE INTERVENORS,
THE AIRE CENTRE & LIBERTY

The intervenors

Your Lordships intervenors are two non-governmental organisations with an expertise in international human rights law and particularly the European Convention on Human Rights. This document comprises their joint written submission prepared in order to assist the Court in determining this case. The intervenors are grateful to the Court for the opportunity to make written submissions on the points of concern to them. However if the Court would require assistance on any other matters, the intervenors are willing to provide further written submissions.

1. Introduction

1.1 This case is concerned with the use of detention for "administrative convenience" in the context of applications for asylum and its compatibility with the European Convention on Human Rights (the ECHR). The parties in the case have identified three issues for determination by Your Lordship's House. The intervenors propose to address the first two issues only which relate to lawfulness of detention under the ECHR, leaving aside the question relating to the requirements of domestic law as this falls outside the area of the intervenors' particular expertise. The intervenors make no submissions on the particular facts of the Oakington regime but confine submissions to providing the international human rights law framework in which the case is to be decided.

1.2 In seeking to set out the international human rights law context in which these issues are to be decided, this submission examines a number of matters of principle which arise out of the submissions by the parties and the Court of Appeal's judgment[1].

2. General methods of interpretation of the ECHR

2.1 The European Court of Human Rights approaches the interpretation of the scope and content of the rights protected by the Convention as a single complex operation, guided by the principles of interpretation laid down in Articles 31-33 of the Vienna Convention of 23 May 1969 (the Vienna Convention).

2.2 As the European Court of Human Rights pointed out in the case of **Golder v. the United Kingdom**[2] the essential principle of the Vienna Convention is that a treaty is "*interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty and in the light of its object and purpose*".

[1] The intervenors have had sight of the Statement of Facts and Issues; the Case for the Appellants and Respondent and the Appendix in preparing this submission.
[2] (1975) 1 EHRR 524, paras. 29-30

2.3 Given that the primary object and purpose of the ECHR is the protection and furtherance of individual rights from infringement by the Contracting States, the principles of interpretation laid down in Article 31(1) of the Vienna Convention require the Strasbourg organs to seek the interpretation that is most appropriate in order to realise the aim and achieve the object of safeguarding of effective individual rights, "*not that which would restrict to the greatest possible degree the obligations undertaken by the parties*"[3].

2.4 In giving effect to the object and purpose of the ECHR, the Strasbourg organs have developed a principle of effectiveness which dictates that the rights contained in the ECHR should be practical and effective, not theoretical or illusory[4]. This principle requires that rights be given their full weight. The Strasbourg organs have been inclined to look beyond appearances and formalities, and to focus on the realities of the position of the individual. The European Court of Human Rights has adopted an extensive interpretation of the scope and content of the rights and freedoms of the ECHR. This principle has been relied on for holding that an ECHR provision may contain positive obligations for the Parties even where this is not immediately apparent from the text of the ECHR[5].

2.5 As a corollary to extensive interpretation of the terms of the ECHR which define the scope of the rights and freedoms, exceptions to rights guaranteed are to be narrowly construed. The European Court of Human Rights has applied this principle in respect of the restriction clauses in Article 8 and 10[6].

2.6 In the context of the right to liberty in Article 5 the Court has held that the exceptions set out in paragraph 5(1)(a) to (f) provide an exhaustive definition of the circumstances in which a person may be deprived of his or her liberty and are to be given a narrow interpretation[7].

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[3] **Wemhoff v Germany** (1979-80) 1 EHRR 55
[4] **Marckx v Belgium** (1975) 2 EHRR 330 (para. 31)
[5] *ibid.*
[6] **Klass and others** (1978) Series A no. 28
[7] **Winterwerp v the Netherlands** (1979) 2 EHRR 387 (para. 69)

2.7 Thus in a number of cases, the European Court of Human Rights has held that the detention of person for reasons which fell outside the permitted exceptions in Article 5(1) was not lawful detention regardless of the legitimate concerns of the State involved[8].

2.8 In order to give effect to the object and purpose of the ECHR the Strasbourg organs have held that its terms must be interpreted in a dynamic or evolutive way in order to ensure that rights are effectively protected in light of societal, scientific or other changes. This means that the ECHR must be interpreted in the light of present day conditions , not those prevailing when it was drafted.

> "*The standards of the Convention are not regarded as static, but as reflective of social changes. This evolutive approach towards interpretation of the Convention implies that the Commission and the Court take into account contemporary realities and attitudes, not the situation prevailing at the time of drafting of the Convention in 1949-1950*"[9]

2.9 This is not to say that an interpreter can undertake a process of treaty revision and clearly the text of the ECHR and its Protocols set limits on any process of interpretation. As a former President of the European Court of Human Rights has said

> *"Human rights treaties must be interpreted in any objective and dynamic manner, by taking into account social conditions and developments; the ideas and conditions prevailing at the time when the treaties were drafted retain hardly any continuing validity. Nevertheless, treaty interpretation must not*

[8] **Cuilla v Italy** (1989) 13 EHRR 346 (para 41) (Authorities Volume II, tab 34) where the arrest and detention of suspect pending an order for "preventative measures" fell outside the permitted exceptions in Article 5(1) even though the Court acknowledged importance of the fight against organised crime in Italy.

[9] P van Dijk and GJH van Hoof "*Theory and Practice of the European Convention on Human Rights*" (Kluwer) 1998 at page 78

amount to treaty revision. Interpretation must therefore respect the text of the treaty concerned."[10]

2.10 In giving a dynamic interpretation to the ECHR, the European Court of Human Rights has repeatedly used other international human rights instruments from the United Nations and Council of Europe in order to decide cases demonstrating how the ECHR lives and changes to reflect the consensus of the international community. Indeed Article 53 ECHR provides that the ECHR can not be construed in such as way as to limit or derogate from any of the rights which may be ensured under other international agreements to which a Contracting State is a party.

2.11 There have been a number of examples of where the European Court has used the European Social Charter for instance as a basis for its analysis relating to social and economic rights[11].

2.12 In **Soering v United Kingdom** the European Court referred to the UN Convention against Torture as well as the International Covenant on Civil and Political Rights as demonstrating that the prohibition against torture is "*an internationally accepted standard*"[12]. It acknowledged that Article 3 of the UN Convention against Torture contains a far more detailed and specific obligation on States not to extradite a person who faces a real risk of being tortured than Article 3 ECHR.

"*The fact that a specialised treaty should spell out in detail a specific obligation attaching to the prohibition of torture does not mean that an essentially similar obligation is not already inherent in the general terms of Article 3 of the European Convention. It would hardly be compatible with the underlying values of the Convention, that "common heritage of political*

[10] R Bernhardt "*The European Dimension; Studies in Honour of Gerard J Wiarda"* (Koln, 1988) 65 at 71
[11] For instance **Gustafsson v Sweden** (1996) 22 EHRR 409; **National Union of Belgium Police v Belgium** (1979-80) 1 EHRR 578;
[12] (1989) 11 EHRR 439, para.88, Authorities Volume II, tab 35

traditions, ideals, freedom and the rule of law" to which the Preamble refers, were a Contracting State knowingly to surrender a fugitive to another State where there were substantial grounds for believing that he would be in danger of being subjected to torture"[13]

3. Interpreting Article 5(1)(f) of the ECHR

3.1 It is against this framework for interpreting the ECHR that the intervenors make some observations as regards the judgment of the Court of Appeal. The Court of Appeal correctly acknowledged that the ECHR is a living instrument[14]. However it proceeded to consider at length the rights of aliens and particularly the rights of asylum seekers in 1951 or thereabouts when the ECHR was agreed[15] whilst tacitly acknowledging that "*it is possible that the approach of the court to the position of asylum applicants has changed over the years as more states have agreed to recognise the right to asylum and the volume of asylum seekers has change*d".

3.2 The intervenors submit that this method of analysis is not one which would properly accord with the approach of the European Court of Human Rights. In examining the text of the ECHR it is necessary to give the ordinary meaning of words contained therein. The principle of effectiveness dictates that restrictions on rights must be interpreted as narrowly as possible, in order to give full effect to the rights of the individual. If this approach does not provide the interpreter with a comprehensible interpretation of the text, then it must be given a dynamic and evolutionary interpretation in accordance with current international standards, whilst avoiding treaty revision.

3.3 Examining Article 5(1)(f) more specifically, the most natural meaning of the phrases contained therein should be applied. There would appear to be two distinct circumstances in which detention may be permissible: firstly "*to prevent (a person) effecting an unauthorised entry into the country*" (first limb) and

[13] ibid, para. 88
[14] at para 36, Court of Appeal judgment
[15] paras. 36 – 40, Court of Appeal judgment

secondly "*of a person against whom action is being taken with a view to deportation or extradition*" (second limb).

3.4 Giving a natural meaning to the words contained in the first limb would dictate that detention is only permitted where it is used to stop a person from circumventing authority. This would mean that an asylum seeker could be detained but only where there is a connection between the detention and an attempt to circumvent immigration control, either at the time or the forseeable future.

3.5 As regards the second limb, detention is only justified where there is action actually being taken with a view to expelling someone or for so long as extradition proceedings are in progress. This at least implies that a decision to remove or expel is actually made. This phrase appears to have caused less controversy, and requires no further examination.

3.6 Returning to the first limb of Article 5(1)(f) whilst Mr Justice Collins in the Administrative Court appears to have found the language of Article 5(1)(f) clear[16], the Court of Appeal was not persuaded of this. It is at this point that the principle of effectiveness would dictate that the provision is given a narrow interpretation. The European Court of Human Rights has often repeated this in the context of Article 5(1) underlying the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention

> "*... Article 5(1) circumscribes the circumstances in which individuals may be lawfully deprived of their liberty, it being stressed that these circumstances must be given a narrow interpretation having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom*"[17]

[16] para 30, per Collins J. "*Once it accepted that an applicant has made a proper application for asylum and there is no risk that he will abscond or otherwise misbehave, it is impossible to see how it could reasonably be said that he needs to be detained to prevent his effecting an unauthorised entry*"
[17] **Kurt v Turkey** (1998) 27 EHRR 373 at para.122, (Authorities Bundle III, tab 45); see also **Winterwerp v the Netherlands** (1979) 2EHRR 387 at para. 37 (Authorities Bundle II, tab 29)

3.7 A restrictive interpretation of the first limb of Article 5(1)(f) would dictate that a person who is clearly doing all he can to abide by the laws of a country in order to lawfully enter is not a person who can be said to be trying to effect an unauthorised entry.

3.8 The Respondent in this case suggests that the State has the right to deprive a person of their liberty in order "*to assess whether they have a basis for lawfully entering the country*" when in fact there is nothing to suggest that the person would attempt to remain unlawfully or would not comply with any conditions imposed on them, including leaving the territory when so directed, if given temporary stay for the assessment period[18]. Only the broadest interpretation of the first limb of Article 5(1)(f) would lead to this conclusion.

3.9 The Strasbourg organs have never permitted a broad interpretation of the limitations on the right to liberty; there is nothing different about the case of asylum-seekers which would alter the principles of interpretation.

3.10 Taking the evolutive or dynamic approach to the interpretation of Article 5(1)(f), a brief survey of current international standards as regards these issues can provide assistance. The right to asylum is well established in international law. Article 14 of the Universal Declaration of Human Rights proclaimed that "everyone has the right to seek and enjoy in other countries asylum from persecution". The 1951 Convention on the Status of Refugees (the Refugee Convention) prohibits the return of a person to his country of origin until it is established that he has no well founded fear of persecution there. The 1967 Protocol to the Refugee Convention extended the scope of the Convention considerably to eliminate temporal and geographic limitations on the Refugee Convention by removing the requirement that the claim relate to a pre-1951 event in Europe that had been contained in Article 1(A) of the original Convention. More recently the 2000 European Charter on Fundamental Rights provided that

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[18] see Respondent's case at paragraph 29

European Union States recognise that "*the right to asylum shall be guaranteed with due respect for the rules of the (Refugee) Convention ...*"[19]

3.11 Despite the lack of specific reference in the ECHR to refugees, the European Court of Human Rights has consistently afforded protection against refoulement where a person faces a real risk of treatment contrary to Article 3. The Court has held that the protection afforded by Article 3 is "*wider than that provided by Article 33 of the (Refugee) Convention*"[20]. The positive obligations imposed upon the State by Article 3 read together with Article 1 and 13 mean that a person alleging that to remove him would expose him to a risk of treatment contrary to Article 3 cannot be removed whilst his claim is being assessed (unless he is to be sent to a safe third country) and he is afforded an effective remedy in respect of that claim.

3.12 Whilst the Court of Appeal placed considerable weight on the "norms" in 1951, this would have little relevance to the interpretation of the ECHR today unless it was apparent that to ignore those would be to engage in revision of the text of the ECHR. An extensive search by the intervenors of the *travaux preparatoires* to the ECHR reveals that in fact there is no relevant discussion recorded on the text of Article 5(1)(f) by the Committee of Experts charged with drafting much of the text of the ECHR.

3.13 It certainly would not entail any revision of the text of the ECHR to suggest that the ECHR offers protection to asylum seekers. Indeed a dynamic and evolutive interpretation which accords with other international human rights law would respect the right to seek asylum. The act of seeking asylum could not in this context be taken as evidence of seeking to enter without authorisation.

3.14 It is necessary in this context to make the distinction between the general rights of States to control immigration into their territory and their obligations as regards refugees. Whereas it is without doubt that States have a right in international law to control the entry of non-nationals into its territory, this is

[19] Article 18
[20] **Ahmed v Austria** (1996) 24 EHRR 278, para. 41 (Authorities Bundle III, tab 41)

subject to treaty obligations[21]. Indeed there is little in international law which interferes with that right of States save in the context of international free movement areas.[22] Conversely once a refugee has stepped foot in a country of refuge, which is a party to the Refugee Convention, he is protected by the provisions of Article 33 of that Convention against being forcibly returned to a country where he will be in danger of persecution. This distinction manifests itself in the availability of procedural safeguards that will be afforded to those claiming to be refugees but not necessarily to those seeking entry to a country for other immigration purposes.

3.15 It is manifestly wrong to translate the right of states to control entry of non-nationals, into a *prima facie* right to detain asylum seekers pending the outcome of their asylum claims when there is nothing to suggest that they are entering or will attempt to enter or remain without the permission of the State authorities.

3.16 The intervenors submit that international human rights obligations as set out in the Refugee Convention and indeed the ECHR itself require that a person claiming to be in need of international protection is permitted to remain physically present in the host country whilst their claim is assessed (or an assessment is made of whether they can be returned to a safe third country). Article 5(1) is clearly only concerned with the authorisation of detention in the very limited circumstances laid down in sub paragraphs (a) to (f). In the case of Article 5(1)(f) detention will only be authorised where the person's detention is necessary in order to prevent him or her circumventing immigration control or where there are deportation proceedings in progress. Thus the requirements of the ECHR are that an asylum seeker should be permitted to be physically present in the host country whilst his or her claim is assessed but can only be detained in circumstances where he or she is seeking to circumvent immigration control.

3.17 The proper operation of most domestic immigration systems would dictate that an asylum seeker who is not seeking to circumvent immigration control is granted some form of temporary "entry" into the territory in order for his or her claim to

[21] see **Abdulaziz v UK** (1985) 7 EHRR 471 at para 67 (Authorities Bundle II, tab 33)
[22] for example the European Union or the Common Travel Area

be assessed. In the intervenors' view this would be consistent with obligations under international law as it would ensure that those who, as a matter of international law, must be permitted to be physically present but whom the State is not permitted to detain, are given some form of immigration status detailing their rights and obligations during their temporary stay and if necessary attaching conditions to that stay.

3.18 The foregoing may lead to an over preoccupation with the question of whether physical presence is "entry" within the meaning of Article 5(1)(f). But how such presence (at liberty) is characterised is not the essential question raised by Article 5(1)(f). The obligation focuses on questions of liberty as opposed to some overly mechanistic question of immigration control or status.

3.19 Whether the corollary of not being able to detain an asylum seeker is that the person must be granted formal "entry" into a State will be a matter for the State authorities in their choice of system for admission and whether within their own legal framework this constitutes "entry" for the purposes of immigration controls or not.

3.20 Indeed recently in the context of the European Court of Justice's decision in the case of **R v Secretary of State for the Home Department ex parte Barkoci and Malik**[23], it has been accepted, as the United Kingdom Government contended, that "temporary admission" as an asylum-seeker in the United Kingdom system does not constitute actual entry

> "*It must be noted in this regard that, ..., temporary physical admission of that person, where he does not have entry clearance for the territory of that State, is in no way equivalent to actual leave to enter that State*"[24].

3.21 Thus a proper interpretation of the first limb of Article 5(1)(f) would be that detention of persons who exercise their right to seek asylum is only permissible where there is a rational connection between the detention and preventing the

[23] C-257/99, 20 September 2001, European Court of Justice
[24] *ibid*, at para. 77

person from effecting an unauthorised entry. However where a person makes a claim for asylum in compliance with national procedures, he or she cannot be regarded as seeking "unauthorised entry" *per se* and the ECHR does not permit his or her detention.

4. The Lawfulness of Detention: Pursuant to a legitimate purpose

4.1 Fundamental to Article 5(1) is the requirement that the deprivation of liberty is lawful. Lawfulness in the context of Article 5(1) means in accordance with national law and procedure but also confers protection against arbitrariness. A detention will only be lawful within the meaning of Article 5(1) if:-

i) the detention pursues a legitimate purpose permitted by one of the exceptions to the right to liberty laid down in Article 5(1):
ii) the law is of sufficient quality and the detention is not arbitrary; and
iii) the detention is proportionate and not unduly prolonged

4.2 The case law on the other permissible categories for detention indicates that there must be a precise and clear connection between the permissible purpose and the detention. Thus detention for educational purposes must promote a specific regime promoting education[25] and mental patients must have a sufficient severity of disorder to warrant detention or any necessary treatment[26]. Where a detention is motivated by a reason other than that put forward by the authorities the European Court of Human Rights will carefully scrutinise the lawfulness of that detention[27].

4.3 The question of whether a detention falls within the ambit of any of the permissible grounds for detention under Article 5(1) is essentially a question of fact and the Strasbourg organs will examine whether, in light of the facts of the case, the person was detained for the declared legitimate purpose[28].

[25] see **Bouamar v Belgium** (1987) 11 EHRR 1
[26] **Winterwerp v the Netherlands** (1979) 2 EHRR 387 (Authorities Bundle II, tab 29)
[27] **Bozano v France** (1986) 9 EHRR 297, paragraphs. 55 – 60

4.4 The permissible grounds for detention under Article 5(1)(f) have already been discussed at length above and the intervenors submit that detention of asylum seekers does not fall within the permissible grounds for detention *per se*, if Article 5(1)(f) is to be given its proper interpretation.

4.5 The Court of Appeal acknowledged the Respondent's difficulties in dealing with large numbers of asylum seekers which pose heavy administrative problems[29] and the laudable aim of the Respondent in determining asylum claims quickly[30]. However these factors are irrelevant to the question of whether an asylum applicant's detention is for a legitimate purpose and can not alter the specific circumstances in which detention is permissible under Article 5(1).

4.6 The European Court of Human Rights in examining a detention in the context of a State's fight against the Mafia applied this aspect of the lawfulness test under Article 5(1) equally strictly

> "*the Court does not underestimate the importance of Italy's struggle against organised crime, but it observes that the exhaustive list of permissible exceptions in paragraph 1 of Article 5 of the Convention must be interpreted strictly*."[31]

4.7 In light of the foregoing the intervenors submit that the detention of asylum seekers solely for the administrative reason of determining asylum claims swiftly does not fall within the permissible grounds for detention under Article 5(1).

5. Arbitrariness and proportionality of detention

5.1 It is clear from the consistent case law that the essence of the protection provided by Article 5(1) is the prevention of detention that is arbitrary. Arbitrariness has a number of aspects. Firstly the power to detain must be clearly granted in national

[28] ibid, at para.58; **Cuilla v Italy** (1989) 13 EHRR 346
[29] Court of Appeal at para. 4
[30] Court of Appeal at para. 67

law. It is further clear that the term "prescribed by law" refers not only to compliance with national law but also to the "quality of law"[32], requiring that the law is "sufficiently precise and ascertainable" so as to enable the individual to acquaint himself with the legal rules applicable to him and to regulate his conduct in accordance with the rules.

5.2 Furthermore, the European Court has found that a deprivation of liberty will be prohibited by Article 5 where it is arbitrary in its motivation or effect[33]. Motivation in this sense means the reasons given as justification for the detention. Even if the detention is properly motivated detention may be arbitrary if it is disproportionate to the attainment of its purpose[34].

5.3 It is noted that Oakington detentions are founded upon guidance criteria that the person is of a certain nationality or ethnic group with an appearance that a decision can be made quickly on his or her asylum claim. The motivation of such detention may not necessarily be arbitrary although there may be circumstances where the use of a list in this way could raise issues as to arbitrariness. However there will be issues in terms of the arbitrariness of the effect in that a preliminary assessment of an asylum claim is very unlikely to be able to determine the true complexity of a claim and whether it can be decided quickly. In reality any decision can be made quickly if it is seen as politically expedient to do so.

5.4 The proportionality principle, which implies the need to strike a proper balance between the various competing interests, permeates the whole interpretation of the ECHR. The proportionality principle naturally extends to the application of Article 5(1), particularly given its fundamental importance in a democratic society. A detention which falls within the permissible exceptions under Article 5(1) and is therefore for a legitimate purpose, may nonetheless be disproportionate to the aim pursued. Further the connection between the detention

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[31] **Cuilla v Italy** (1989) 13 EHRR 346 at para 41, (Authorities Bundle II; tab 34)
[32] see **Amuur v France** (1996) 22 EHRR 533 at para. 50 (Authorities Bundle II, tab 37)
[33] see **Winterwerp v the Netherlands** (1979) 2 EHRR 387, paras 37-39, (Authorities Bundle II, tab 29)
[34] ibid, at para. 39

and the legitimate purpose permitted by Article 5(1) should not be tangential or theoretical but substantial and proportionate.

5.5 In this context the necessity of a detention will be relevant. In relation to Article 5(1)(e) the detention of a person of unsound mind is permitted for the protection of society or self-protection but only extreme disorders will justify detention. The needs and wishes of society are balanced against the preservation of liberty[35].

5.6 In relation to Article 5(1)(e) and the detention of alcoholics the European Court has considered that a detention was unlawful because the individual did not appear to have posed a threat to himself or the public.

> *"The Court reiterates that a necessary element of the lawfulness of the detention within the meaning of Article 5 (1)(e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. That means that it does not suffice that the deprivation of liberty is executed in conformity with national law but it must also be necessary in the circumstances."*[36]

5.7 In the context of Article 5(1)(b) and the obligation of persons to submit to examination in a criminal context the Commission has held that

> "*It is necessary to consider whether its fulfilment is a matter of immediate necessity and whether the circumstances are such that no other means of securing fulfilment are reasonable practicable. A balance must be drawn between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty*"[37]

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[35] **Winterwerp v the Netherlands**, (1979) 2 EHRR 387
[36] **Witold Litwa v Poland**, Judgment of 4 April 2000

5.8 The intervenors submit that a detention which is not justified as necessary in the context of the first limb of Article 5(1)(f) will be arbitrary and disproportionate. Whilst the Respondent observes that the word "necessary" is absent from the text of Article 5(1)(f), the same might be observed for Articles 5(1)(b), (d) and (e) where the Strasbourg organs have clearly applied a necessity text nonetheless.

5.9 The principle of proportionality as it is applied to Article 5(1) will also take into account other factors. Clearly where the State can make out an allegation that a person poses a national security risk for instance this will weigh heavily against the applicant[38].

5.10 Where no such risks exist the European Court will otherwise take into account factors such as past behaviour[39], risk of absconding, whether less severe measures than detention have been considered and found to be insufficient[40] and the effectiveness of detention[41].

5.11 It is in this context that the intervenors observe that both the Court of Appeal and Collins J doubt whether detention is really necessary to ensure the effective and speedy processing of asylum applications. The Court of Appeal did not find that the detention was disproportionate however although it applied a test of proportionality which examined the length of detention only.

5.12 The intervenors submit that such a test is too narrow in the context of the first limb of Article 5(1)(f) and that if there is a rational connection to be made between the detention and the prevention of a person effecting an unauthorised entry, the proportionality of the detention will be affected by whether the detention is necessary for reasons such as anticipated lack of co-operation or absconding.

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[37] **McVeigh, O'Neill and Evans v the United Kingdom** (1981) 5 EHRR 71 at para 191 (Authorities Bundle II, tab 31)
[38] **Chahal v the United Kingdom** (1997) 23 EHRR 413
[39] **Cesky v the Czech Republic**, Judgment of 6 June 2000
[40] **Litwa v Poland**, 4 April 2000 para. 98; **Tomasi v France** (1992) 15 EHRR 1

6. Conclusion

6.1 The lawfulness of a detention is determined by a number of factors; whether it falls within the permissible grounds for detention set out in Article 5(1), whether it is arbitrary and whether it is proportionate to the permitted aim.

6.2 In order for a detention to fall within the permissible grounds set out in Article 5(1)(f) there must be a rational connection between the detention and the enumerated limbs under that provision. If the proper rules of interpreting the ECHR are followed, Article 5(1)(f) must be interpreted as meaning that detention will only be permissible where it is in order to prevent a person evading immigration control or if deportation proceedings are in progress.

6.3 The lawfulness of a detention, even if it falls within the permissible grounds set out in Article 5(1)(f), may be called into question by a lack of necessity for the detention and arbitrariness. This is essentially a factual question but it is clear that detention must proportionately pursue the permitted aim taking into account the availability of alternatives to detention and the conduct of the individual in question.

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[41] **Bouamar v Belgium**, (1987) 11 EHRR 1