COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

GRAND CHAMBER

CASE OF SAADI v. THE UNITED KINGDOM

(Application no. 13229/03)

JUDGMENT

STRASBOURG

29 January 2008

This judgment is final but may be subject to editorial revision.

In the case of Saadi v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Jean-Paul Costa, *President*,
Christos Rozakis,
Nicolas Bratza,
Boštjan M. Zupančič,
Peer Lorenzen,
Françoise Tulkens,
Nina Vajić,
Margarita Tsatsa-Nikolovska,
Snejana Botoucharova,
Anatoly Kovler,
Elisabeth Steiner,
Lech Garlicki,
Khanlar Hajiyev,
Dean Spielmann,
Ineta Ziemele,
Isabelle Berro-Lefèvre,
Päivi Hirvelä, *judges*,
and Michael O'Boyle, *Deputy Registrar*.

Having deliberated in private on 16 May and 5 December 2007,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 13229/03) against the United Kingdom of Great Britain and Northern Ireland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Iraqi national, Mr Shayan Baram Saadi ("the applicant"), on 18 April 2003.

2. The applicant was represented by Messrs Wilson & Co., solicitors practising in London. The United Kingdom Government ("the Government") were represented by their Agent, Mr J. Grainger, Foreign and Commonwealth Office.

3. The applicant alleged that he had been detained in breach of Articles 5 § 1 and 14 of the Convention, and that he had not been given adequate reasons for the detention, contrary to Article 5 § 2.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 27 September 2005 it was declared admissible by a Chamber of that Section composed of the following judges:

Mr J. Casadevall, Sir Nicolas Bratza, Mr M. Pellonpää, Mr R. Maruste, Mr K. Traja, Ms L. Mijović, Mr J. Šikuta and also of Ms F. Elens-Passos, Deputy Section Registrar. On 11 July 2006 a Chamber composed of the same judges, together with Mr T.L. Early, Section Registrar, delivered a judgment in which it held, by four votes to three, that there had been no violation of Article 5 § 1 and, unanimously, that there had been a violation of Article 5 § 2. The Chamber further held, unanimously, that it was not necessary to consider Article 14 separately, that the finding of a violation of Article 5 § 2 was sufficient just satisfaction for non-pecuniary damage, and that the respondent State should pay the applicant EUR 1,500, plus any tax that might be chargeable, for costs and expenses.

5. On 11 December 2006, pursuant to a request by the applicant, the Panel of the Grand Chamber decided to refer the case to the Grand Chamber in accordance with Article 43 of the Convention.

6. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court.

7. The applicant and the Government each filed written observations on the merits. In addition, third-party comments were received jointly from the Centre for Advice on Individual Rights in Europe ("AIRE Centre"), the European Council on Refugees and Exiles ("ECRE") and Liberty and from the United Nations High Commissioner for Refugees ("UNHCR"), which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 16 May 2007 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr J. GRAINGER,	*Agent*,
Mr D. PANNICK QC,	*Counsel*,
Mr M. FORDHAM QC,	*Counsel*,
Ms N. SAMUEL,	
Mr S. BARRETT,	*Advisers.*

(b) *for the applicant*

Mr R. SCANNELL,	
Mr D. SEDDON,	*Counsel*,
Mr M. HANLEY,	
Ms S. GHELANI,	*Advisers*.

The Court heard addresses by Mr Scannell and Mr Pannick, as well as their answers to questions put by Judges Costa and Spielmann.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, an Iraqi Kurd, was born in 1976 and now lives and works as a doctor in London.

A. The applicant's temporary admission to the United Kingdom

10. In December 2000 the applicant fled the Kurdish Autonomous Region of Iraq when, in the course of his duties as a hospital doctor, he treated and facilitated the escape of three fellow members of the Iraqi Workers' Communist Party who had been injured in an attack. He arrived at Heathrow airport on 30 December 2000 and immediately claimed asylum.

11. The immigration officer contacted the Oakington Reception Centre ("Oakington": see paragraphs 23-25 below), but there was no immediate room there, so the applicant was granted "temporary admission" (see paragraphs 20-21 below) to stay at the hotel of his choice and return to the airport the following morning. On 31 December 2000 he reported as required and was again granted temporary admission until the following day. When the applicant again reported as required he was, for the third time, granted temporary admission, until the following day, 2 January 2001 at 10.00 a.m.

B. Detention at Oakington and the asylum proceedings

12. On this last occasion, when the applicant reported as required, he was detained and transferred to Oakington.

13. When being taken into detention, the applicant was handed a standard form, "Reasons for Detention and Bail Rights", indicating that detention was used only where there was no reasonable alternative, and setting out a list of reasons such as risk of absconding, with boxes to be ticked by the immigration officer where appropriate. The form did not include an option indicating the possibility of detention for fast-track processing at Oakington.

14. On 4 January 2001 the applicant met at Oakington with a lawyer from the Refugee Legal Centre, who contacted the Home Office to enquire why the applicant was being detained and to request his release. On 5 January 2001, when the applicant had been detained for 76 hours, the lawyer was informed over the telephone by an immigration officer that the applicant was being detained because he was an Iraqi who fulfilled the Oakington criteria. The lawyer then wrote to the Home Office requesting the applicant's release on the ground that it was unlawful. When refused, the

applicant applied for judicial review of the decision to detain him, claiming it was contrary to domestic law and Article 5 §§ 1 and 2 of the Convention.

15. The applicant's asylum claim was initially refused on 8 January. The following day he was released from Oakington and again granted temporary admission pending the determination of his appeal. On 14 January 2003 his appeal was allowed and he was granted asylum.

C. The judicial review proceedings

16. In the proceedings for judicial review of the decision to detain the applicant, Collins J on 7 September 2001 (*R. (on the application of Saadi and others) v. Secretary of State for the Home Department* [2001] EWHC Admin 670) found that the Secretary of State had such a power to detain under the Immigration Act 1971 (see paragraph 19 below). However, relying on the Court's judgment in *Amuur v. France*, (judgment of 25 June 1996, *Reports of Judgments and Decisions* 1996-III, § 43), and what he considered to be a "sensible reading" of Article 5 § 1(f), he found that it was not permissible under the Convention to detain, solely for purposes of administrative efficiency, an asylum seeker who had followed the proper procedures and presented no risk of absconding. Even if the detention did fall within Article 5 § 1(f), it was disproportionate to detain asylum seekers for the purpose of quickly processing their claims, since it had not been demonstrated that stringent conditions of residence, falling short of 24-hour detention, might not suffice. He also found (as did the Court of Appeal and House of Lords) that the applicant had not been given adequate reasons for his detention.

17. On 19 October 2001 the Court of Appeal unanimously overturned this judgment ([2001] EWCA Civ 1512). Lord Phillips of Worth Matravers MR, who gave the lead judgment, first considered whether the policy of detaining asylum seekers for fast-track processing at Oakington was irrational, such as to render it unlawful under domestic law. He observed that over recent years applications for asylum to the United Kingdom and other countries had been escalating. In the United Kingdom the average monthly number of applications from July to September 1999 was nearly 7,000; 60% higher than the previous year. Coping with huge numbers of asylum seekers posed heavy administrative problems, and it was in the interests of all asylum seekers to have their status determined as quickly as possible. He continued:

> "We share the doubts expressed by Collins J as to whether detention is really necessary to ensure effective and speedy processing of asylum applications. But in expressing these doubts we ... are indulging in assumption and speculation. It is not in doubt that, if asylum applications are to be processed within the space of seven days, the applicants are necessarily going to have to be subjected to severe restraints on their liberty. In one way or another they will be required to be present in a centre at all times when they may be needed for interviews, which it is impossible to schedule to a

pre-determined timetable. Would applicants voluntarily submit to such a regime, if not detained? Many no doubt would, but it is impossible to condemn as irrational the policy of subjecting those asylum seekers whose applications appear susceptible to rapid resolution to a short period of detention designed to ensure that the regime operates without dislocation.

This is not a conclusion that we have reached easily. Asylum seekers are detained at Oakington only if it seems likely that their applications can be resolved within a week. But they must also be persons who are not expected to attempt to abscond or otherwise misbehave. At first blush it seems extreme to detain those who are unlikely to run away simply to make it easier to process their claims. But the statistics that we have set out at the start of our judgment cannot be ignored. As [the Home Office minister] observed in debate in the House of Lords on 2 November 1999, faced with applications for asylum at the rate of nearly 7,000 per month, 'no responsible government can simply shrug their shoulders and do nothing' ... . A short period of detention is not an unreasonable price to pay in order to ensure the speedy resolution of the claims of a substantial proportion of this influx. In the circumstances such detention can properly be described as a measure of last resort. ...”

The Court of Appeal next considered whether the detention fell within the first limb of Article 5 § 1(f), and held that the right to liberty in Article 5 § 1(f) was intended to preserve the sovereign power of Member States to decide whether to allow aliens to enter their territories on any terms whatsoever and that detention of an alien would be covered by the sub-paragraph unless and until entry was authorised, subject to the proviso, derived from *Chahal v. the United Kingdom* (judgment of 15 November 1996, *Reports* 1996-V) that the asylum or deportation procedure should not be prolonged unreasonably.

18. On 31 October 2002 the House of Lords unanimously dismissed the applicant's appeal ([2002] UKHL 41). Having taken note of evidence that the applications of approximately 13,000 asylum seekers a year were processed at Oakington, which entailed scheduling up to 150 interviews a day, Lord Slynn of Hadley, with whom the other Law Lords agreed, held as follows:

“In international law the principle has long been established that sovereign states can regulate the entry of aliens into their territory. ...

This principle still applies subject to any treaty obligation of a state or rule of the state's domestic law which may apply to the exercise of that control. The starting point is thus in my view that the United Kingdom has the right to control the entry and continued presence of aliens in its territory. Article 5 § 1(f) seems to be based on that assumption. The question is therefore whether the provisions of para. 1(f) so control the exercise of that right that detention for the reasons and in the manner provided for in relation to Oakington is in contravention of the Article so as to make the detention unlawful.

In my view it is clear that detention to achieve a quick process of decision-making for asylum seekers is not of itself necessarily and in all cases unlawful. What is said however is that detention to achieve speedy process 'for administrative convenience' is not within para. 1(f). There must be some other factor which justifies the exercise of

the power to detain such as the likelihood of the applicant absconding, committing a crime or acting in ways not conducive to the public good. ...

It is ... to be remembered that the power to detain is to 'prevent' unauthorised entry. In my opinion until the State has 'authorised' entry the entry is unauthorised. The State has power to detain without violating Article 5 until the application has been considered and the entry 'authorised'. ...

There remains the issue whether, even if detention to achieve speedy asylum decision-making does fall within Article 5 § 1(f), 'detention was unlawful on grounds of being a disproportionate response to the reasonable requirements of immigration control'. ...

The need for highly structured and tightly managed arrangements, which would be disrupted by late[ness] or non-attendance of the applicant for interview is apparent. On the other side applicants not living at Oakington, but living where they chose, would inevitably suffer considerable inconvenience if they had to be available at short notice and continuously in order to answer questions.

It is regrettable that anyone should be deprived of his liberty other than pursuant to the order of a court but there are situations where such a course is justified. In a situation like the present with huge numbers and difficult decisions involved, with the risk of long delays to applicants seeking to come, a balancing exercise has to be performed. Getting a speedy decision is in the interests not only of the applicants but of those increasingly in the queue. Accepting as I do that the arrangements made at Oakington provide reasonable conditions, both for individuals and families and that the period taken is not in any sense excessive, I consider that the balance is in favour of recognising that detention under the Oakington procedure is proportionate and reasonable. Far from being arbitrary, it seems to me that the Secretary of State has done all that he could be expected to do to palliate the deprivation of liberty of the many applicants for asylum here."

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Immigration Act 1971

1. Detention

19. The Immigration Act 1971 ("the 1971 Act"), Schedule 2, paragraph 2, entitles an immigration officer to examine any person arriving in the United Kingdom to determine whether he or she should be given leave to enter. Paragraph 16(1) provides:

"A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter."

Paragraphs 8, 9 and 10 enable an immigration officer to remove those refused leave to enter or illegal entrants and paragraph 16(2) (as substituted by the Immigration and Asylum Act 1999: "the 1999 Act") provides:

> "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 10 ... 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."

2. Temporary admission

20. Paragraph 21(1) of Schedule 2 to the 1971 Act enables an immigration officer to grant temporary admission to the United Kingdom to any person liable to be detained. Paragraph 21(2) (as amended by the 1999 Act) provides:

> "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."

Sub-paragraphs 2(A) to 2(E) give powers to the Secretary of State to make regulations placing residence restrictions on persons granted temporary admission.

21. Section 11 of the 1971 Act provides as follows:

> "A person arriving in the United Kingdom by ship or aircraft shall for purposes of this Act be deemed not to enter the United Kingdom unless and until he disembarks, and on disembarkation at a port shall further be deemed not to enter the United Kingdom so long as he remains in such area (if any) at the port as may be approved for this purpose by an immigration officer; and a person who has not otherwise entered the United Kingdom shall be deemed not to do so as long as he is detained, or temporarily admitted or released while liable to detention ..."

In *Szoma (FC) v. Secretary of State for the Department of Work and Pensions* [2005] UKHL 64, the House of Lords held that the purpose of section 11 of the 1971 Act was to exclude a person temporarily admitted from the rights available to those granted leave to enter, in particular the right to seek an extension of leave to remain, but that an alien granted temporary admission was nonetheless "lawfully present" in the United Kingdom for the purposes of social security entitlement.

B. Pre-Oakington policy on detention and temporary admission

22. Before March 2000, when the opening of Oakington was announced (see paragraph 23 below), the Home Office policy on the use of detention was set out in a White Paper (policy paper) published in 1998 entitled "Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum" (Cm 4018) in these terms (paragraph 12.3):

"The Government has decided that, whilst there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances:

• where there is a reasonable belief that the individual will fail to keep the terms of temporary admission or temporary release;

• initially, to clarify a person's identity and the basis of their claim;

• where removal is imminent. In particular, where there is a systematic attempt to breach the immigration control, detention is justified wherever one or more of those criteria is satisfied."

In paragraph 12.11 of the White Paper it was made clear that detention should be used for the shortest possible time and paragraph 12.7 required written reasons to be given at the time of detention.

C. The Oakington Reception Centre

23. On 16 March 2000 the Minister, Barbara Roche MP, announced a change of the above policy in a written answer to a Parliamentary question, as follows:

"Oakington Reception Centre will strengthen our ability to deal quickly with asylum applications, many of which prove to be unfounded. In addition to the existing detention criteria, applicants will be detained at Oakington where it appears that their applications can be decided quickly, including those which may be certified as manifestly unfounded. Oakington will consider applications from adults and families with children, for whom separate accommodation is being provided, but not from unaccompanied minors. Detention will initially be for a period of about seven days to enable applicants to be interviewed and an initial decision to be made. Legal advice will be available on site. If the claim cannot be decided in that period, the applicant will be granted temporary admission or, if necessary in line with existing criteria, moved to another place of detention. If the claim is refused, a decision about further detention will similarly be made in accordance with existing criteria. Thus, detention in this latter category of cases will normally be to effect removal or where it has become apparent that the person will fail to keep in contact with the Immigration Service."

24. The decision whether an asylum claim is suitable for decision at Oakington is primarily based on the claimant's nationality. According to the Home "Operational Enforcement Manual", detention at Oakington should not be used for *inter alia* "any case which does not appear to be one in which a quick decision can be reached"; minors; disabled applicants; torture victims; "any person who gives reason to believe that they might not be suitable for the relaxed Oakington regime, including those who are considered likely to abscond".

25. The detention centre is situated in former army barracks near Oakington, Cambridgeshire. It has high perimeter fences, locked gates and twenty-four-hour security guards. The site is large, with space for outdoor

recreation and general association and on-site legal advice is available. There is a canteen, a library, a medical centre, a social visits room and a religious observance room. Applicants and their dependents are generally free to move about the site, but must eat and return to their rooms at fixed times. Male applicants are accommodated separately from women and children and cannot stay with their families overnight. Detainees must open their correspondence in front of the security guards and produce identification if requested, comply with roll-calls and other orders.

III. RELEVANT INTERNATIONAL LAW DOCUMENTS

A. International treaties, declarations, conclusions, guidelines and reports

1. Vienna Convention on the Law of Treaties (1969)

26. The Vienna Convention on the Law of Treaties, which entered into force on 27 January 1980, provides in Article 31:

> "*General rule of interpretation*
>
> 1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
>
> 2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
>
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
>
> 3. There shall be taken into account, together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
>
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
>
> (c) any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended."

27. Article 32 provides:

Supplementary means of interpretation

"Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

(a) leaves the meaning ambiguous or obscure; or

(b) leads to a result which is manifestly absurd or unreasonable."

28. Article 33 provides:

Interpretation of treaties authenticated in two or more languages

"1. When a treaty has been authenticated in two or more languages, the text is equally authoritative in each language, unless the treaty provides or the parties agree that, in case of divergence, a particular text shall prevail.

...

3. The terms of the treaty are presumed to have the same meaning in each authentic text.

4. Except where a particular text prevails in accordance with paragraph 1, when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the texts, having regard to the object and purpose of the treaty, shall be adopted."

2. Universal Declaration of Human Rights ("UDHR")

29. The UDHR provides in Article 3 for the right to life, liberty and security; in Article 9 for the right not to be arbitrarily arrested, detained or exiled; and in Article 13 for the right to freedom of movement and residence.

30. In Article 14(1) it declares that "everyone" has the fundamental right "to seek and to enjoy in other countries asylum from persecution".

3. International Covenant on Civil and Political Rights ("ICCPR")

31. Article 9(1) of the ICCPR provides:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

In its case-law on this Article, the UN Human Rights Committee ("HCR") has held, *inter alia*, that the failure by the immigration authorities

to consider factors particular to the individual, such as the likelihood of absconding or lack of co-operation with the immigration authorities, and to examine the availability of other, less intrusive means of achieving the same ends, might render the detention of an asylum seeker arbitrary (*A. v. Australia*, no. 560/1993, *CCPR/C/59/D/560/1993*; *C. v. Australia*, no. 900/1999, *CCPR/C/76/D/900/1999*). In *A. v. Australia* the HCR observed that:

> "the notion of 'arbitrariness' must not be equated with 'against the law' but be interpreted more broadly to include such elements as inappropriateness and injustice. Furthermore, remand in custody could be considered arbitrary if it is not necessary in all the circumstances of the case, for example to prevent flight or interference with evidence: the element of proportionality becomes relevant in this context."

32. Article 12 of the ICCPR protects the right of freedom of movement to those "lawfully within the territory". Under the case-law of the HCR, a person who has duly presented an application for asylum is considered to be "lawfully within the territory" (*Celepi v. Sweden, CCPR/C/51/D/456/1991).*

4. Convention relating to the Status of Refugees (Geneva, 1951: "Refugee Convention")

33. The Refugee Convention, which entered into force on 22 April 1954, together with its 1967 Protocol, generally prohibits Contracting States from expelling or returning a person with a well-founded fear of persecution to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Articles 1 and 33). Under Article 31:

> "*Refugees unlawfully in the country of refuge*
>
> 1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom in was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.
>
> 2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country."

34. On 13 October 1986, the Executive Committee of the United Nations High Commissioner for Refugees' Programme adopted the following Conclusion relating to the detention of asylum seekers (No. 44 (XXXVII) – 1986). The Conclusion was expressly approved by the General Assembly on 4 December 1986 (Resolution 41/124) and reads as follows:

> "The Executive Committee,
>
> Recalling Article 31 of the 1951 Convention relating to the Status of Refugees.

Recalling further its Conclusion No. 22 (XXXII) on the treatment of asylum-seekers in situations of large-scale influx, as well as Conclusion No. 7 (XXVIII), paragraph (e), on the question of custody or detention in relation to the expulsion of refugees lawfully in a country, and Conclusion No. 8(XXVIII), paragraph (e), on the determination of refugee status.

Noting that the term 'refugee' in the present Conclusions has the same meaning as that in the 1951 Convention and the 1967 Protocol relating to the Status of Refugees, and is without prejudice to wider definitions applicable in different regions.

(a) Noted with deep concern that large numbers of refugees and asylum-seekers in different areas of the world are currently the subject of detention or similar restrictive measures by reason of their illegal entry or presence in search of asylum, pending resolution of their situation;

(b) Expressed the opinion that in view of the hardship which it involves, detention should normally be avoided. If necessary, detention may be resorted to only on grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum; or to protect national security or public order;

(c) Recognized the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum-seekers from unjustified or unduly prolonged detention;

(d) Stressed the importance for national legislation and/or administrative practice to make the necessary distinction between the situation of refugees and asylum-seekers, and that of other aliens;

(e) Recommended that detention measures taken in respect of refugees and asylum-seekers should be subject to judicial or administrative review;

(f) Stressed that conditions of detention of refugees and asylum seekers must be humane. In particular, refugees and asylum-seekers shall, whenever possible, not be accommodated with persons detained as common criminals, and shall not be located in areas where their physical safety is endangered;

(g) Recommended that refugees and asylum-seekers who are detained be provided with the opportunity to contact the Office of the United Nations High Commissioner for Refugees or, in the absence of such office, available national refugee assistance agencies;

(h) Reaffirmed that refugees and asylum-seekers have duties to the country in which they find themselves, which require in particular that they conform to its laws and regulations as well as to measures taken for the maintenance of public order;

(i) Reaffirmed the fundamental importance of the observance of the principle of non-refoulement and in this context recalled the relevance of Conclusion No. 6 (XXVIII).”

35. To give effect to the above Conclusion, UNHCR published Guidelines in 1995, which it revised and reissued on 10 February 1999. The Guidelines made it clear that the detention of asylum seekers was "inherently undesirable". Guideline 3 provides that such detention:

> "may exceptionally be resorted to for the reasons set out below ... as long as this is ... in conformity with general norms and principles of international human rights law (including Article 9 ICCPR) ... Where there are monitoring mechanisms which can be employed as viable alternatives to detention, (such as reporting obligations or guarantor requirements) ... these should be applied first unless there is evidence to suggest that such an alternative will not be effective in the individual case. Detention should therefore only take place after a full consideration of all possible alternatives, or when monitoring mechanisms have been demonstrated not to have achieved the lawful and legitimate purpose."

The Guideline continued:

> "... detention of asylum-seekers may only be resorted to, if necessary: (i) to verify identity. This relates to those cases where identity may be undetermined or in dispute; (ii) to determine the elements on which the claim for refugee status or asylum is based. This statement means that the asylum-seeker may be detained exclusively for the purpose of a preliminary interview to identify the basis of the asylum claim. This would involve obtaining the essential facts from the asylum-seeker as to why asylum is being sought and would not extend to a determination of the merits or otherwise of the claim. This exception to the general principle cannot be used to justify detention for the entire status determination procedure, or for an unlimited period of time; (iii) in cases where asylum-seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the State in which they intend to claim asylum. What must be established is the absence of good faith on the part of the applicant to comply with the verification of identity process. ... Asylum-seekers who arrive without documentation because they are unable to obtain any in their country of origin should not be detained solely for that reason ..."

36. On 18 December 1999 the UN Working Group on Arbitrary Detention, reporting on its visit to the United Kingdom (E/CN.4/1999/63/Add.3) recommended that the Government should:

> "ensure that detention of asylum seekers is resorted to only for reasons recognised as legitimate under international standards and only when other measures will not suffice ...
>
> Alternative and non-custodial measures, such as reporting requirements, should *always* be considered before resorting to detention.
>
> The detaining authorities must assess a compelling need to detain that is based on the personal history of each asylum seeker ..."

B. Council of Europe texts

37. In 2003 the Committee of Ministers of the Council of Europe adopted a Recommendation (Rec (2003) 5) that stated, *inter alia*:

> "The aim of detention is not to punish asylum seekers. Measures of detention ... may be resorted to only in the following situations: (a) when their identity, including nationality, has in case of doubt to be verified, in particular when asylum seekers have destroyed their travel or identity documents or used fraudulent documents in order to mislead the authorities of the host state; (b) when elements on which the asylum claim is based have to be determined which, in the absence of detention, could not be obtained; (c) when a decision needs to be taken on their right to enter the territory of the state concerned; or (d) when protection of national security and public order so requires. ... Measures of detention of asylum seekers should be applied only after a careful examination of their necessity in each individual case. Those measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international instruments and by the case-law of the European Court of Human Rights. ... Alternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention. ..."

38. On 8 June 2005, the Council of Europe Commissioner for Human Rights, in his report on his visit to the United Kingdom (CommDH(2005)6), noted that:

> "I would like to raise a number of points regarding [asylum] proceedings. The first concerns the frequent resort to detention for asylum seekers at the very outset of proceedings. Whilst detention is not automatic in such proceedings, there would appear to be a strong presumption in its favour; mooted plans to increase the asylum detention estate in precisely this area suggest that this is the direction in which the UK is headed. The UK authorities have indicated to me that the UK courts have approved detention for the sole purpose of processing asylum applications. I do not exclude the possibility of detention being appropriate in certain circumstances, but I do not believe that this would be an appropriate rule. Open processing centres providing on-site accommodation and proceedings are, I believe, a more appropriate solution for the vast majority of applicants whose requests are capable of being determined rapidly."

C. European Union instruments

39. The EU Charter of Fundamental Rights (2000) proclaims in Article 18: "the right to asylum shall be guaranteed with due respect to the rules of the [Refugee Convention]".

40. Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ L 326), which must be transposed into member States' national law by 1 December 2008) provides in Article 7:

> "Applicants shall be allowed to remain in the Member State, for the sole purpose of the procedure, until such time as the determining authority has made a decision in accordance with the procedures at first instance set out in Chapter III. This right to remain shall not constitute an entitlement to a residence permit."

The Directive further provides in Article 18:

> "1. Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum.

2. Where an applicant for asylum is held in detention, Member States shall ensure that there is a possibility of speedy judicial review."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

41. The applicant alleged that he had been detained at Oakington in breach of Article 5 § 1 of the Convention, which provides:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) 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."

A. Whether the applicant was deprived of his liberty

42. It is not disputed by the Government that the applicant's detention at Oakington amounted to a deprivation of liberty within the meaning of Article 5 § 1. The Grand Chamber considers it clear that, given the degree of confinement at Oakington, Mr Saadi was deprived of his liberty within the meaning of Article 5 § 1 during the seven days he was held there (see, for example, *Engel and Others v. the Netherlands*, judgment of 8 June 1976, Series A no. 22, §§ 60-66).

43. Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds of deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III). In the present case the Government's principal contention is that the detention was justified under the first limb of Article 5 § 1(f); although they argue in the alternative that it might also have been justified under the second limb of that sub-paragraph. The Court must accordingly first ascertain whether the applicant was lawfully detained "to prevent his effecting an unauthorised entry into the country".

B. Whether the deprivation of liberty was permissible under sub-paragraph (f) of Article 5 § 1

1. The Chamber judgment

44. In its judgment of 11 July 2006 the Chamber held, by four votes to three, that the detention fell within the first limb of Article 5 § 1(f). The Chamber observed that it was a normal part of States' "undeniable right to control aliens' entry into and residence in their country" that States were permitted to detain would-be immigrants who had applied for permission to enter, whether by way of asylum or not. Until a potential immigrant had been granted leave to remain in the country, he had not effected a lawful entry, and detention could reasonably be considered to be aimed at preventing unlawful entry.

45. The Chamber continued that detention of a person was a major interference with personal liberty, and must always be subject to close scrutiny. Where individuals were lawfully at large in a country, the authorities might detain only if a "reasonable balance" was struck between the requirements of society and the individual's freedom. The position regarding potential immigrants, whether they were applying for asylum or not, was different to the extent that, until their application for immigration clearance and/or asylum had been dealt with, they were not "authorised" to be on the territory. Subject, as always, to the rule against arbitrariness, the Chamber accepted that the State had a broader discretion to decide whether to detain potential immigrants than was the case for other interferences with the right to liberty. Accordingly, there was no requirement in Article 5 § 1 (f) that the detention of a person to prevent his effecting an unauthorised entry into the country be reasonably considered necessary, for example to prevent his committing an offence or fleeing. All that was required was that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length.

46. It was plain that in the present case the applicant's detention at Oakington was a *bona fide* application of the policy on "fast-track" immigration decisions. As to the question of arbitrariness, the Chamber noted that the applicant was released once his asylum claim had been refused, leave to enter the United Kingdom had been refused, and he had submitted a notice of appeal. The detention lasted a total of seven days, which the Court found not to be excessive in the circumstances. It therefore found no violation of Article 5 § 1.

2. The parties' submissions

a) The Government

47. Before the Grand Chamber the Government emphasised several factual aspects of the case. First, the applicant had been detained for only seven days, in a relaxed regime, with access to legal advice and other facilities at the Centre. Secondly, in common with all others detained at the Centre, the applicant was seeking authorisation to enter the United Kingdom on the basis of asylum and human rights grounds, under the Refugee Convention (see paragraph 33 above) and the European Convention on Human Rights. The fact that he had earlier been granted temporary admission for a short period, as an alternative to detention, did not affect his position as a person requiring authorisation to effect entry into the country. Third, he was detained to enable speedy examination of his claim and a quick decision as to whether to give or refuse leave to enter. The domestic courts had referred to the increasingly high numbers of individuals seeking asylum in the United Kingdom at the time of the applicant's detention (see paragraphs 17 and 18 above) and had recognised that the Oakington system was central to the Government's procedure for processing such applications fairly and without undue delay.

48. The Government reasoned that the phrase "to prevent his effecting an unauthorised entry" was describing the factual situation that the person was seeking to effect an entry, but had no authorisation. Article 5 § 1(f) recognised that there might be detention in conjunction with the State's deciding whether or not to grant authorisation, in the exercise of its sovereign role to control the entry into, and presence of aliens in its territory; a role which, as the national courts had observed, had long been recognised by international law.

49. The Government relied on *Chahal v. the United Kingdom* (cited in paragraph 17 above, § 112), where the Grand Chamber had held, in connection with the second limb of Article 5 § 1(f), that "Article 5 § 1(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing ...". They argued that there was no good reason for distinguishing between the two limbs of

the sub-paragraph, so that a person who had been living within the community could be detained in conjunction with a deportation even though this was not necessary to prevent his absconding, but a person who had newly arrived could be detained in conjunction with his arrival only where this was necessary to prevent his absconding.

50. The Government further denied that the applicant's detention had been unlawful or arbitrary. It was clear, as the national courts at three instances unanimously confirmed, that the detention had complied with the substantive and procedural rules of national law (see paragraphs 16-18 above). The detention was not arbitrary, since, as the Chamber had held, it had been a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and its duration had been limited to that which was reasonably necessary for that purpose. To argue, as did the applicant, that the detention had been arbitrary because it might have been possible to achieve the same purpose by use of an "accommodation centre", with similar conditions of residence but no confinement, was misplaced, since it involved seeking to reintroduce the "necessity" requirement through the requirement of lack of arbitrariness. In any event, the House of Lords had found that, given the tight schedule of interviews, any arrangement short of detention would not have been as effective (see paragraph 18 above).

b) The applicant

51. The applicant submitted that the Convention had to be interpreted in accordance with Articles 31-33 of the Vienna Convention on the Law of Treaties (see paragraphs 26-28 above). He did not dispute the State's sovereign right to control the entry and presence of aliens on its territory, but emphasised that this right had to be exercised consistently with the State's international obligations, in particular those contained in the Convention, including Article 5. The purpose defined by Article 5 § 1(f) first limb was to prevent unlawful immigration, that is, entry and residence in a country by the circumvention of immigration control. There had to be a direct and precise causal relationship between the detention and the risk of unauthorised entry. This purpose was underlined by the words "his effecting", indicating that the focus was upon whether the particular individual, if not detained, would otherwise effect an entry that was unauthorised. It was clear from the facts of the applicant's case that, if he had not been detained, he would have been lawfully present in the United Kingdom with "temporary admission", an "authorised" status in fact and law (see, *inter alia*, the House of Lords' judgment in *Szoma*, paragraph 21 above). The interpretation he advanced would allow for initial detention for the purposes of verification and assessment of the individual risk of unauthorised entry; such procedure formed part of the ordinary process of immigration control, and was plainly detention for the purpose of

preventing the individual effecting an unauthorised entry. It was not, however, permissible under Article 5 § 1(f) to detain someone purely for administrative convenience.

52. The applicant referred to the Court's case-law under other sub-paragraphs of Article 5 § 1, requiring an objective need for the detention of the particular individual to be demonstrated, and to the case-law of the Human Rights Committee (see paragraph 31 above), and reasoned that similar principles should apply under Article 5 § 1(f). Although the Court in *Chahal v. the United Kingdom* (cited above) did not require a necessity test in respect of Mr Chahal's detention under the second part of Article 5 § 1(f), there was good reason for distinguishing between the two limbs. First, as was clear from paragraph 112 of the *Chahal* judgment, the contrast made with the other sub-paragraphs of Article 5 § 1 was based on the language of the provision under which Mr Chahal was detained, which required only that "action [was] being taken with a view to deportation", whereas the first limb of Article 5 § 1(f) stipulated that detention had to be for the purpose of preventing unauthorised entry. Secondly, on the facts of the *Chahal* case, it was evident that release on bail would have been inappropriate since it was alleged that Mr Chahal constituted a national security threat. In contrast, a necessity test should apply to those like the present applicant who "have [not] committed criminal offences but ... who, often fearing for their lives, have fled from their own country" (*Amuur,* cited above, § 43).

53. In common with all other Oakington detainees, the applicant had been assessed as presenting no risk of absconding, and the sole purpose of the deprivation of liberty was to enable a quick decision to be made on his asylum claim. This was a manifestly insufficient reason for the purposes of Article 5 § 1(f), which required that there be a risk, in the particular case, of the subject making an unauthorised entry into the country. Detention at Oakington was not proportionate, since no lesser measure (for example, an accommodation centre) had first been tried. Moreover there was evidence to suggest that the decision to opt for detention at Oakington was led by the reaction of local residents and planning committees rather than a clear need for detention to enable speedy processing of asylum applications.

3. The third parties' submissions

a) UNHCR

54. UNHCR was concerned that the Chamber judgment, which (1) assimilated the position of asylum seekers to ordinary immigrants, (2) considered that an asylum seeker effectively had no lawful or authorised status prior to the successful determination of the claim and (3) rejected the application of a necessity test to the question whether detention was arbitrary, permitted States to detain asylum seekers on grounds of

expediency in wide circumstances that were incompatible with general principles of international refugee and human rights law. Properly construed, Article 5 § 1(f) should confer robust protection against detention for asylum seekers. The sub-paragraph stipulated a purpose, the effecting of an unauthorised entry, which detention must prevent. Asylum seekers had to be distinguished from general classes of illegal entrants or those facing deportation, and in order to detain an asylum seeker under Article 5 § 1(f), there had to be something more than the mere absence of a decision on the claim; the detention had to be necessary, in the sense that less intrusive measures would not suffice, and proportionate to the aim pursued.

55. UNHCR reminded the Court that, as with the Refugee Convention, the European Convention on Human Rights had to be interpreted in harmony with other rules of international law of which it formed part, particularly where such rules were found in human rights treaties which State Parties to the Convention had ratified and were therefore willing to accept (see *Al-Adsani v. the United Kingdom*, [GC] no. 35763/97, § 55, ECHR 2001-XI). It further had to be interpreted in a manner which ensured that rights were given a broad construction and that limitations were narrowly construed, in a manner which gave practical and effective protection to human rights, and as a living instrument, in light of present day conditions and in accordance with developments in international law so as to reflect the increasingly high standard being required in the area of the protection of human rights.

56. Under international law, there was an obligation on States not to *refoule* persons who had accessed the jurisdiction or territorial frontier and claimed the fundamental right to seek and enjoy asylum. There was a further duty, except in mass influx situations, to admit such persons to fair and efficient determination procedures (see Articles 3-31 of the Refugee Convention, paragraph 33 above). Where a State admitted an asylum seeker to procedures, and the asylum seeker complied with national law, his temporary entry into and presence on the territory could not be considered as "unauthorised"; the grant of temporary admission was precisely an authorisation by the State temporarily to allow the individual to enter its territory consistent with the law. In such a situation, the asylum seeker was not seeking unauthorised entry, but rather, had been granted temporary but authorised entry for the purpose of having the asylum claim considered (see Article 31 of the Refugee Convention, paragraph 33 above; *Szoma*, paragraph 21 above; EU Council Directive 2005/85/EC, Article 7, paragraph 40 above).

57. UNHCR referred to a number of international instruments relating to the detention of asylum seekers, including Article 9 of the ICCPR as interpreted by the Human Rights Committee in cases such as *A. v. Australia*, Article 31 of the Refugee Convention, the Executive Committee's Conclusion No. 44 and the UNHCR's Guidelines on detention of asylum

seekers (see paragraphs 31 and 33-35 above). It concluded that while the process of examining those who are seeking asylum might involve necessary and incidental interference with liberty, where detention was resorted to for permitted purposes but on a fact-insensitive blanket basis, or effected purely for reasons of expediency or administrative convenience, it failed the necessity test required by international refugee and human rights law.

b) Liberty, ECRE and the AIRE Centre

58. The above three non-governmental organisations pointed out that this would be the first case in which the Court had to decide on the meaning of the first limb of Article 5 § 1(f). They asked the Grand Chamber to hold, as a matter of general principle, (1) that in the absence of evidence that an individual asylum seeker would, but for being detained, effect or attempt to effect an unauthorised entry into the country, such detention does not fall within Article 5 § 1(f); and (2) that the detention of asylum seekers under Article 5 § 1(f), like detention under the other sub-paragraphs of Article 5 § 1 and the lesser restriction imposed on their freedom of movement under Article 2 of Protocol No. 4, must be subject to the test of necessity and proportionality.

59. The Chamber's approach, based on the finding that the detention of an asylum seeker was covered by the second limb of Article 5 § 1(f) where no positive decision on his or her claim had yet been made, sat uncomfortably with the principle that asylum seekers who had duly presented a claim for international protection were *ipso facto* lawfully within the territory for the purposes of Article 2 of Protocol No. 4 and also Article 12 of the ICCPR (see paragraph 32 above). Whilst it was true, as the Chamber had held, that prolonged duration might render arbitrary a detention which was not so at the outset, the reverse was not the case; the brevity of the period could not justify unnecessary detention. Article 5 § 1(f) of the Convention should be interpreted consistently with Article 9 of the ICCPR (see paragraph 31 above), which required that any deprivation of liberty imposed in an immigration context should be lawful, necessary and proportionate. Moreover, it would be inappropriate for the Court, in the first Grand Chamber judgment on the first limb of Article 5 § 1(f), to adopt a lower level of protection than that which had already been agreed by the Member States through the Committee of Ministers (see paragraph 37 above) or than that which applied to mere restrictions on freedom of movement under Article 2 of Protocol No. 4.

60. In many States, the precise legal basis for the detention of asylum seekers was unclear, but cases were unlikely to reach the courts because of language difficulties, lack of legal representation and fear on the part of asylum seekers that complaints about detention might prejudice the outcome of their claims. The arbitrary nature of such detention would be exacerbated

if the Grand Chamber were to uphold the Chamber's view and give States complete freedom to deprive all asylum seekers of their liberty whilst their claims were being processed, without any requirement to show that the detention was necessary for the purpose specified in Article 5 § 1(f), namely to prevent the making of an unauthorised entry.

4. The Court's assessment

a) The meaning of the phrase "... to prevent his effecting an unauthorised entry into the country"

61. In the present case the Court is called upon for the first time to interpret the meaning of the words in the first limb of Article 5 § 1(f), "... lawful ... detention of a person to prevent his effecting an unauthorised entry into the country ..." (in French: "*la détention [régulière] d'une personne pour l'empêcher de pénétrer irrégulièrement dans le territoire*"). In ascertaining the Convention meaning of this phrase, it will, as always, be guided by Articles 31 to 33 of the Vienna Convention on the Law of Treaties (paragraphs 26-28 above, and see, for example, *Golder v. the United Kingdom*, judgment of 21 February 1975, Series A no. 18, § 29; *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A no. 112, § 51 *et seq.*; *Lithgow and Others v. the United Kingdom*, judgment of 8 July 1986, Series A no. 102, §§ 114 and 17; *Witold Litwa v. Poland*, cited above, §§ 57-59).

62. Under the Vienna Convention on the Law of Treaties, the Court is required to ascertain the ordinary meaning to be given to the words in their context and in the light of the object and purpose of the provision from which they are drawn (see the *Golder* judgment, § 29; the *Johnston* judgment, § 51; and Article 31 § 1 of the Vienna Convention). The Court must have regard to the fact that the context of the provision is a treaty for the effective protection of individual human rights and that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (*Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, § 48, ECHR 2005-X). The Court must also take into account any relevant rules and principles of international law applicable in relations between the Contracting Parties (see *Al-Adsani v. the United Kingdom*, cited above, § 55; *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v. Ireland* [GC], no. 45036/98, § 150, ECHR 2005-III; and Article 31 § 3(c) of the Vienna Convention). Recourse may also be had to supplementary means of interpretation, including the preparatory works to the Convention, either to confirm a meaning determined in accordance with the above steps, or to establish the meaning where it would otherwise be ambiguous, obscure or manifestly absurd or unreasonable (Article 32 of the Vienna Convention).

63. When considering the object and purpose of the provision within its context, and the international law background, the Court has regard to the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (see, *inter alia*, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, § 37 and *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, Series A no. 145-B, § 58).

64. Whilst the general rule set out in Article 5 § 1 is that everyone has the right to liberty, Article 5 § 1(f) provides an exception to that general rule, permitting States to control the liberty of aliens in an immigration context. As the Court has remarked before, subject to their obligations under the Convention, States enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory" (see the *Amuur* judgment cited above, § 41; the *Chahal* judgment cited above, § 73; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, Series A no. 94, §§ 67-68). It is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. It is evident from the tenor of the judgment in *Amuur* that the detention of potential immigrants, including asylum seekers, is capable of being compatible with Article 5 § 1(f).

65. On this point, the Grand Chamber agrees with the Court of Appeal, the House of Lords and the Chamber, that until a State has "authorised" entry to the country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be, without any distortion of language, to "prevent his effecting an unauthorised entry". It does not accept that, as soon as an asylum seeker has surrendered himself to the immigration authorities, he is seeking to effect an "authorised" entry, with the result that detention cannot be justified under the first limb of Article 5 § 1 (f). To interpret the first limb of Article 5 § 1(f) as permitting detention only of a person who is shown to be trying to evade entry restrictions would be to place too narrow a construction on the terms of the provision and on the power of the State to exercise its undeniable right of control referred to above. Such an interpretation would, moreover, be inconsistent with Conclusion No. 44 of the Executive Committee of the United Nations High Commissioner for Refugees' Programme, the UNHCR's Guidelines and the Committee of Ministers' Recommendation (see paragraphs 34-35 and 37 above), all of which envisage the detention of asylum seekers in certain circumstances, for example while identity checks are taking place or when elements on which the asylum claim is based have to be determined.

66. While holding, however, that the first limb of Article 5 § 1(f) permits the detention of an asylum seeker or other immigrant prior to the State's

grant of authorisation to enter, the Court emphasises that such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion.

The Court must now consider what is meant by "freedom from arbitrariness" in the context of the first limb of Article 5 § 1(f) and whether, in all the circumstances, the applicant's detention was compatible with that provision.

b) The notion of arbitrary detention in the context of Article 5

67. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a)-(f), be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above § 37; *Amuur*, cited above, § 50; *Chahal*, cited above, § 118, and *Witold Litwa*, cited above, § 78). It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.

68. While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see further below).

69. One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, *Bozano v. France*, judgment of 18 December 1986, Series A no. 111; *Čonka v. Belgium*, no. 51564/99, ECHR 2002-I). The condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (*Winterwerp*, cited above, § 39; *Bouamar v. Belgium*, judgment of 29 February 1988, Series A no. 129, § 50; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X). There must in addition be

some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention (see the above-mentioned *Bouamar* judgment, § 50; *Aerts v. Belgium*, judgment of 30 July 1998, *Reports* 1998-V, § 46; *Enhorn v. Sweden*, no. 56529/00, § 42, ECHR 2005-I).

70. The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort 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 (see *Witold Litwa*, cited above, § 78; *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 51, 8 June 2004; *Enhorn v. Sweden*, cited above, § 44). The principle of proportionality further dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck 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 (see *Vasileva v. Denmark*, no. 52792/99, § 37, 25 September 2003). The duration of the detention is a relevant factor in striking such a balance (ibid., and see also *McVeigh and Others v. the United Kingdom*, applications nos. 8022/77, 8025/77, 8027/77, Commission decision of 18 March 1981, DR 25, pp. 37-38 and 42).

71. The Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Article 5 § 1(a), where, in the absence of bad faith or one of the other grounds set out in paragraph 69 above, as long as the detention follows and has a sufficient causal connection with a lawful conviction, the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5 § 1 (see *T. v. the United Kingdom* [GC], no. 24724/94, § 103, ECHR 2000-I ; and also *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV).

72. Similarly, where a person has been detained under Article 5 § 1(f), the Grand Chamber, interpreting the second limb of this sub-paragraph, held that, as long as a person was being detained "with a view to deportation", that is, as long as "action [was] being taken with a view to deportation", there was no requirement that the detention be reasonably considered necessary, for example to prevent the person concerned from committing an offence or fleeing (*Chahal*, cited above, § 112). The Grand Chamber further held in *Chahal* that the principle of proportionality applied to detention under Article 5 § 1(f) only to the extent that the detention should not continue for an unreasonable length of time; thus, it held (§ 113) that "any deprivation of liberty under Article 5 § 1(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible ..."

(and see also *Gebremedhin [Gaberamadine] v. France*, no. 25389/05, § 74, ECHR 2007-...).

73. With regard to the foregoing, the Court considers that the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1(f) in the same manner as it applies to detention under the second limb. Since States enjoy the right to control equally an alien's entry into and residence in their country (see the cases cited in paragraph 63 above), it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country.

74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see *Amuur*, § 43); and the length of the detention should not exceed that reasonably required for the purpose pursued.

c) Was the applicant's detention arbitrary?

75. Before examining whether the applicant's detention at Oakington was arbitrary in the sense outlined above, the Court observes that the national courts at three levels found that it had a basis in national law, and the applicant does not contend that this conclusion was incorrect.

76. In examining whether the applicant's detention was compatible with the criteria set out in paragraph 74 above, the Court further recalls the following findings of the Court of Appeal and House of Lords (see paragraphs 17-18 above), which it accepts. The national courts found that the purpose of the Oakington detention regime was to ensure the speedy resolution of some 13,000 of the approximately 84,000 asylum applications made in the United Kingdom per year at that time. In order to achieve this objective it was necessary to schedule up to 150 interviews a day and even small delays might disrupt the entire programme. The applicant was selected for detention on the basis that his case was suited for fast track processing.

77. In these circumstances, the Court finds that the national authorities acted in good faith in detaining the applicant. Indeed the policy behind the creation of the Oakington regime was generally to benefit asylum seekers; as Lord Slynn put it, "getting a speedy decision is in the interests not only of the applicants but of those increasingly in the queue" (see paragraph 18 above). Moreover, since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant's claim to asylum, his detention was closely connected to the purpose of preventing unauthorised entry.

78. As regards the third criterion, the place and conditions of detention, the Court notes that the Oakington Centre was specifically adapted to hold asylum seekers and that various facilities, for recreation, religious observance, medical care and, importantly, legal assistance, were provided (see paragraph 25 above). While there was, undoubtedly, an interference with the applicant's liberty and comfort, he makes no complaint regarding the conditions in which he was held and the Court holds that the detention was free from arbitrariness under this head.

79. Finally, as regards the length of the detention, the Court recalls that the applicant was held for seven days at Oakington, and released the day after his claim to asylum had been refused at first instance. This period of detention cannot be said to have exceeded that reasonably required for the purpose pursued.

80. In conclusion, therefore, the Court finds that, given the difficult administrative problems with which the United Kingdom was confronted during the period in question, with an escalating flow of huge numbers of asylum-seekers (and see also *Amuur*, cited above, § 41), it was not incompatible with Article 5 § 1(f) of the Convention to detain the applicant for seven days in suitable conditions to enable his claim to asylum to be processed speedily. Moreover, regard must be had to the fact that the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers.

It follows that there has been no violation of Article 5 § 1 in the present case.

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 OF THE CONVENTION

81. The applicant contended that he was not informed of the genuine reason for his detention until some 76 hours after his arrest, when the information was given orally to his legal representative in response to that person's enquiry. He alleged a violation of Article 5 § 2 of the Convention, which provides as follows:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

82. The Government pointed to the general statements of intent regarding the Oakington detention regime. They accepted that the forms in use at the time of the applicant's detention were deficient, but contended that the reasons given orally to the applicant's on-site representative (who knew the general reasons) on 5 January 2001 were sufficient to enable the applicant to challenge the lawfulness of his detention under Article 5 § 4 if he wished.

83. The applicant underlined that unsolicited reasons were not given at any stage, and that solicited reasons were given orally in the afternoon of 5 January 2001, some 76 hours after the arrest and detention. Mere reference to policy announcements could not displace the requirement to provide sufficiently prompt, adequate reasons to the applicant in relation to his detention.

84. The Chamber found a violation of this provision, on the ground that the reason for detention was not given sufficiently "promptly". It found that general statements – such as the parliamentary announcements in the present case – could not replace the need under Article 5 § 2 for the individual to be informed of the reasons for his arrest or detention. The first time the applicant was told of the real reason for his detention was through his representative on 5 January 2001 (see paragraph 14 above), when the applicant had already been in detention for 76 hours. Assuming that the giving of oral reasons to a representative met the requirements of Article 5 § 2 of the Convention, the Chamber found that a delay of 76 hours in providing reasons for detention was not compatible with the requirement of the provision that such reasons should be given "promptly".

85. The Grand Chamber agrees with the Chamber's reasoning and conclusion. It follows that there has been a violation of Article 5 § 2 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

87. The Court notes that before the Chamber the applicant claimed EUR 5,000 compensation for non-pecuniary damage in respect of the seven days he spent in detention in Oakington. The Chamber, which, like the Grand Chamber, found a violation of Article 5 § 2 of the Convention but not of Article 5 § 1, held that the finding of the violation provided sufficient just satisfaction.

88. The applicant did not contest this award, neither in his request that the case be referred to the Grand Chamber nor in his written observations before the Grand Chamber.

89. In all the circumstances, the Grand Chamber decides to maintain the Chamber's decision that the finding of a violation provided sufficient just

satisfaction for the failure promptly to inform the applicant of the reasons for his detention.

B. Costs and expenses

90. The applicant claimed costs and expenses before the Grand Chamber of GBP 28,676.51 plus value-added tax ("VAT"), in addition to GBP 15,305.56 for costs incurred before the Chamber.

91. The Government endorsed the approach taken by the Chamber under Article 41. They considered the costs before the Grand Chamber to be excessive, in particular the rate of GBP 200 per hour charged by each of the two counsel and the number of hours claimed. If the Court were to find a violation of Article 5 § 1, no more than GBP 10,000 should be allowed for counsels' fees. If only a violation of Article 5 § 2 were found, only a small proportion of the costs claimed should be awarded.

92. In connection with the Chamber costs, the Grand Chamber recalls the Chamber's decision to award only EUR 1,500, since it had found a violation of only Article 5 § 2 and since the major part of the work on the case had been directed at establishing a violation of Article 5 § 1. The Grand Chamber maintains this award in respect of the costs and expenses incurred up to the delivery of the Chamber's judgment. Given that it, too, has found only a violation of Article 5 § 2, and that almost the entirety of the written and oral pleadings before it concerned Article 5 § 1, the Grand Chamber awards a further EUR 1,500 in respect of the proceedings subsequent to the Chamber's judgment of 11 July 2006, bringing the total costs and expenses awarded to EUR 3,000 plus any VAT that might be payable.

C. Default interest

93. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by eleven votes to six that there has been no violation of Article 5 § 1 of the Convention;

2. *Holds* unanimously that there has been a violation of Article 5 § 2 of the Convention;

3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;

4. *Holds* unanimously
(a) that the respondent State is to pay the applicant, within three months, EUR 3,000 (three thousand euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 January 2008.

Michael O'BOYLE	Jean-Paul COSTA
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following joint partly dissenting opinion of Judges Rozakis, Tulkens, Kovler, Hajiyev, Spielmann and Hirvelä is annexed to this judgment.

J.-P.C.
M.O'B.

JOINT PARTLY DISSENTING OPINION OF JUDGES ROZAKIS, TULKENS, KOVLER, HAJIYEV, SPIELMANN AND HIRVELÄ

(Translation)

We do not share the majority's conclusion that there has been no violation of Article 5 § 1 (f) of the Convention in the instant case, in a situation where it is not disputed that the applicant's detention for seven days in the Oakington reception centre amounted to a deprivation of liberty for the purposes of the Convention. The issues at stake in this case are important on two counts. Firstly, the case concerns asylum seekers' rights under the Convention and the increasingly worrying situation regarding their detention. Secondly, this is the first case in which the Court has been called upon to provide an interpretation of the first part of Article 5 § 1 (f), which authorises "the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country" and, in particular, of the requirement of necessity imposed by that provision.

It is generally accepted that the aim of the first limb of Article 5 § 1 (f) of the Convention is to prevent illegal immigration, that is, entry into or residence in a country based on circumvention of the immigration control procedures. In the instant case the applicant fled the Kurdish Autonomous Region of Iraq after treating members of the Iraqi Workers' Communist Party in the course of his duties as a doctor, and claimed asylum on his arrival at London Heathrow airport. The majority attach no importance to this fact, assimilating the situation of asylum seekers to that of ordinary immigrants. Paragraph 64 of the judgment is very clear in this regard and from the outset situates the exception provided for by Article 5 § 1 (f) in the overall context of immigration control. After reiterating that States enjoy "an 'undeniable sovereign right to control aliens' entry into and residence in their territory'", the majority state that "[i]t is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not".

In such a radical form, this statement sits uncomfortably with the principle that asylum seekers who have presented a claim for international protection are *ipso facto* lawfully within the territory of a State, in particular for the purposes of Article 12 of the International Covenant on Civil and Political Rights (liberty of movement) and the case-law of the Human Rights Committee, according to which a person who has duly presented an application for asylum is considered to be "lawfully within the territory" (see paragraph 32 of the judgment). The particular circumstances of this case, moreover, demonstrate this implicitly but with certainty. On his arrival at the airport on 30 December 2000 the applicant was granted temporary

admission (see paragraphs 20-21 of the judgment), under the terms of which he could spend the night in the hotel of his choice but had to return to the airport the following morning. On 31 December 2000 the applicant reported as required and was again granted temporary admission until the next day. When he again reported to the airport as agreed he was granted temporary admission for the third time until 10 a.m. the following day, 2 January 2001. It was not until 2 January, after reporting as required, that he was detained and transferred to the Oakington reception centre, where there is a prison-like atmosphere. In any event, the theoretical debate as to whether a person is unlawfully present within a country's territory until he or she has been granted leave to enter is of no real relevance in this case, given that the applicant was in fact given permission to enter for three days.

When considering the context, object and purpose of Article 5 of the Convention, the judgment rightly stresses "the importance of Article 5 in the Convention system", which "enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty" (see paragraph 63). However, the majority deem it necessary to consider what is meant by "protection against arbitrariness" in the present case, and take the view that "the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1 (f) in the same manner as it applies to detention under the second limb. Since States enjoy the right to control equally an alien's entry into and residence in their country ..., it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country" (see paragraph 73). Hence, the judgment does not hesitate to treat completely without distinction all categories of non-nationals in all situations – illegal immigrants, persons liable to be deported and those who have committed offences – including them without qualification under the general heading of immigration control, which falls within the scope of States' unlimited sovereignty.

In the context of migration, according to the judgment, the only requirement which the detention measure must satisfy to avoid being branded as arbitrary is that it must have been carried out "in good faith". It must also "be closely connected to the purpose of preventing unauthorised entry of the person to the country" (see paragraph 74). Are these requirements met in the instant case?

With regard first of all to the question of *good faith*, the Court has no hesitation in subscribing to the observations of the domestic courts, which found that the detention regime in Oakington was designed to ensure the speedy resolution "of some 13,000 of the approximately 84,000 asylum applications made in the United Kingdom per year at that time. In order to achieve this objective it was necessary to schedule up to 150 interviews a day and even small delays might disrupt the entire programme. The

applicant was selected for detention on the basis that his case was suited for fast track processing" (see paragraph 76). In these circumstances, the Court found that the national authorities acted in "good faith" in detaining the applicant. Indeed, the policy behind the creation of the Oakington regime was generally to benefit asylum seekers; detention was therefore in their best interests.

If even "small delays" were considered to disrupt the entire programme, it is difficult to discern why, on arriving at the airport and lodging his asylum claim, the applicant was first allowed to remain at liberty and was requested to go to a hotel and report of his own accord on the following days to the authorities responsible for his case (which he duly did).

More fundamentally, not just in the context of asylum but also in other situations involving deprivation of liberty, to maintain that detention is in the interests of the person concerned appears to us an exceedingly dangerous stance to adopt. Furthermore, to contend in the present case that detention is in the interests not merely of the asylum seekers themselves "but of those increasingly in the queue" is equally unacceptable. In no circumstances can the end justify the means; no person, no human being may be used as a means towards an end.

Next, as regards the *purpose of detention*, in stating that "since the purpose of the deprivation of liberty was to enable the authorities quickly and efficiently to determine the applicant's claim to asylum, his detention was closely connected to the purpose of preventing unauthorised entry" (see paragraph 77 *in fine*), the Court does not hesitate to go a step further and assimilate all asylum seekers to potential illegal immigrants.

In the interests of rigour we believe that for detention to be authorised the authorities must satisfy themselves *in concreto* that it has been ordered exclusively in pursuit of one of the aims referred to in the Convention, in this instance to prevent the person's effecting unauthorised entry into the country. This has in no sense been established in the present case, as the applicant did not enter or attempt to enter the country unlawfully. On the other hand, if the authorities had objectively verifiable grounds to believe that the applicant was liable to abscond before his claim for asylum had been determined, they could have made use of detention in accordance with Article 5 § 1 (f) of the Convention. In that case, the detention would have been aimed at preventing the asylum seeker from entering or remaining in the country for a purpose other than that for which he had been granted temporary admission. Conversely, it is not permissible to detain refugees on the sole ground that they have made a claim for asylum.

It is not disputed in the present case that the applicant's detention was aimed at ensuring the speedy resolution of his claim for asylum and hence the adoption of a decision on the subject at the earliest date possible. His detention therefore pursued a purely bureaucratic and administrative goal, unrelated to any need to prevent his unauthorised entry into the country. As

Judges Casadevall, Traja and Šikuta rightly observed in their dissenting opinion annexed to the Chamber judgment of 11 July 2006, such a situation creates great *legal uncertainty* for asylum seekers, stemming from the fact that they could be detained at any time during examination of their application without their being able to take the necessary action to avoid detention. Hence, the asylum seeker becomes an object rather than a subject of law.

Lastly, following the same line of thinking, the Court accepts in the instant case that a seven-day period of detention "cannot be said to have exceeded that *reasonably* required for the purpose pursued" (see paragraph 79). In so doing, it is accepting a period of detention which it does not generally sanction in the other cases of deprivation of liberty contemplated by Article 5 of the Convention. Granted, it is understandable that in certain situations, for example concerning extradition, the State must be allowed greater latitude than in the case of other interferences with the right to liberty. However, we can see no justification for adopting such an approach in relation to asylum seekers, with the attendant risk that the scrutiny of deprivations of liberty under the European Convention on Human Rights will be substantially weakened as a result. Moreover, if a seven-day period of detention is not considered excessive, where and how do we draw the line for what is unacceptable?

As regards detention generally, the requirements of necessity and proportionality oblige the State to furnish relevant and sufficient grounds for the measure taken and to consider other less coercive measures, and also to give reasons why those measures are deemed insufficient to safeguard the private or public interests underlying the deprivation of liberty. Mere administrative expediency or convenience will not suffice. We fail to see what value or higher interest can justify the notion that these fundamental guarantees of individual liberty in a State governed by the rule of law cannot or should not apply to the detention of asylum seekers.

Hence, to the extent that these requirements must be encompassed in the notion of arbitrariness, the question of *alternatives* to detention should have been considered by the majority. They make no mention of it until the closing paragraphs of their reasoning where, paradoxically, they recognise that "the provision of a more efficient system of determining large numbers of asylum claims rendered unnecessary recourse to a broader and more extensive use of detention powers" (see paragraph 80). It is thus clearly acknowledged that an alternative to detention might have existed enabling the problem to be dealt with at source, in other words at the level of the management of asylum applications; this further underscores the fact that detention was the wrong answer to the right question.

The European Convention on Human Rights does not apply in a vacuum, but in conjunction with the other international fundamental rights protection instruments. In that regard, with reference to the *United Nations*, Article 9

of the International Covenant on Civil and Political Rights – which prohibits arbitrary arrest or detention and applies to all cases of deprivation of liberty, including in the context of immigration controls – has been interpreted by the Human Rights Committee's case-law to mean that detention must not simply be lawful, but must also not have been imposed on grounds of administrative expediency (see *Van Alphen v. the Netherlands*, Communication No. 305/1988, UN Doc. CCPR/C/39/D/305/1988 (1990)). In addition, it must satisfy the requirements of necessity and proportionality. Lastly, the review of a detention by the courts must not be confined to assessing whether it complies with domestic law, but must also make it possible to determine, even in cases of illegal entry, whether factors particular to the individual (likelihood of absconding, lack of cooperation, and so on) justify his or her detention (see *A. v. Australia*, Communication No. 560/1993, UN Doc. CCPR/C/59/D/560/1993 (1997)). In its decision in *Bakhtiyari v. Australia*, the Committee confirms that a court review which does not allow the courts to reexamine the justification of the detention in substantive terms will not satisfy the requirements of Article 9 of the Covenant (see *Bakhtiyari v. Australia*, Communication No. 1069/2002, UN Doc. CCPR/C/79/D/1069/2002 (2003)).

With reference to the *European Union*, mention should be made of Article 18 of the European Union Charter of Fundamental Rights, which recognises the right to asylum of refugees within the meaning of the Geneva Convention. Article 18(1) of Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJEC L 326 of 13 December 2005, p. 13) provides that "Member States shall not hold a person in detention for the sole reason that he/she is an applicant for asylum". This, in our view, is the minimum guarantee, and the assertion made in this provision provides a useful adjunct to the rules set forth in Article 7 of Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJEC L 31 of 6 February 2003, p. 18). Article 23 (3) and (4) of Directive 2005/85/EC also makes provision for priority or accelerated examination procedures.

As to the *Council of Europe*, Committee of Ministers Recommendation Rec(2003)5 of 16 April 2003 on measures of detention of asylum seekers states that the persons falling within the scope of the first limb of Article 5 § 1 (f) do not include "asylum seekers on criminal charges or rejected asylum seekers detained pending their removal from the host country" (point 2). It further states that measures of detention of asylum seekers "should be applied only after a careful examination of their necessity in each individual case. These measures should be specific, temporary and non-arbitrary and should be applied for the shortest possible time. Such measures are to be implemented as prescribed by law and in conformity with standards established by the relevant international

instruments...” (point 4). Finally, “[a]lternative and non-custodial measures, feasible in the individual case, should be considered before resorting to measures of detention” (point 6).

The crux of the matter here is whether it is permissible today for the European Convention on Human Rights to provide a lower level of protection than that which is recognised and accepted in the other organisations.

Ultimately, are we now also to accept that Article 5 of the Convention, which has played a major role in ensuring controls of arbitrary detention, should afford a lower level of protection as regards asylum and immigration which, in social and human terms, are the most crucial issues facing us in the years to come? Is it a crime to be a foreigner? We do not think so.