Neutral Citation Number: [2007] EWHC 1654 (Admin)

Case No: CO/9745/2005

IN THE HIGH COURT OF JUSTICE
ADMINISTRATIVE

Royal Courts of Justice
Strand, London, WC2A 2LL

18/07/2007

Before:

THE HONOURABLE MR JUSTICE WYN WILLIAMS

- -

Between:

1) S **Claimants**
2) C (by her litigation friend S)
3) D (by his litigation friend S)

- and -

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT **Defendant**

- -
- -

Mr Edward Fitzgerald QC and Laura Dubinsky
(instructed by Scott-Moncrieff, Harbour & Sinclair Solicitors) for the **Claimants**
Ms Jenni Richards
(instructed by the Treasury Solicitors) for the **Defendant**

Hearing dates: 18th and 19th April 2007

- -

Judgment Approved by the court for handing down

……

The Honourable Mr Justice Wyn Williams

Mr Justice Wyn Williams:

Introduction

1. The First Claimant is Jamaican. On the 29th October 2002 she came to the United Kingdom with her daughter, the Second Claimant (hereinafter referred to as "C"). At that time the First Claimant was 18 years old and C was 1½ years old. The First Claimant was granted temporary admission but she was required to return to the airport to leave the United Kingdom on 6th November 2002. She failed to do so and, thereafter, she was treated as an absconder. She remained illegally in the United Kingdom.

2. On 29th July 2005 the First Claimant came to the attention of the Immigration Authorities after she had been arrested in respect an allegation of shoplifting at a supermarket. Between November 2002 and 29th July 2005 she made no attempt to contact the Immigration Authorities or regularise her immigration position. In a witness statement filed in these proceedings, however, she has given, in summary form, an account of what she did and how she lived in that period.

3. After entering the United Kingdom the First Claimant went to her cousin's home in Harlesden, London. She remained living at that home for approximately 10 months. Her cousin's home was the address which the First Claimant had given to the Immigration Authorities when she was given temporary admission. In the summer of 2003 the cousin moved to Catford and the First Claimant moved with her. It was whilst she was living in Catford that she became pregnant with the Third Claimant ("D"). D was born on 24 October 2004. By the date of his birth the First Claimant had moved from the home of her cousin to a friend in Lewisham. She remained with her friend until approximately four months after D's birth and then returned to Catford to live with another friend.

4. Shortly before the birth of D, C had started in nursery school. As from January 2005 C attended school from 9.00am to 3.15pm. In the summer term of 2005 the First Claimant applied for C to attend Athelney Primary School in Catford and, as I understand it, C was due to begin at that school in September 2005.

5. D's father is a Jamaican national. He has played no role in D's upbringing. The First Claimant and the two children have always lived together as a family unit.

6. Following her arrest at the supermarket, as I have said, the First Claimant came to the attention of the Immigration Authorities. She was taken to the Yarl's Wood Immigration Centre and on 31 July 2005 an Immigration Officer interviewed her. During a discussion with the Immigration Officer the prospect of claiming asylum was raised and on that date the First Claimant claimed asylum.

7. On 31 July 2005 the First Claimant was released but with a requirement that she report to Gatwick Airport on the 2 August together with C and D. On the 31 July also the First Claimant was told that on the 2 August she would be taken, together with her children,

from Gatwick Airport to Oakington Detention Centre. She was also told that she would be kept there for about 14 days.

8. On 2 August 2005 the First Claimant and her children presented themselves at Gatwick Airport and they were then taken to Oakington. Her claim for asylum was assessed as being suitable for the "*fast-track*" procedure. A detention review was conducted on 3 August 2005 as the detention involved two children and detention was authorised. On 8 August 2005 the First Claimant was interviewed in relation to her asylum claim. On 10 August 2005 the Claimants' detention was again reviewed and authorised. On 12 August 2005 the asylum claim was refused and certified as clearly unfounded. The written decision to that effect was served on the First Claimant on 15 August 2005.

9. The First Claimant and her children were not released from detention following the conclusion of the "*fast-track*" procedure. Rather on 15 August the detention of the Claimants was reviewed and further authorised. It was authorised, in summary, because a decision to deport the Claimants to Jamaica had been taken and it was considered that the First Claimant would abscond with C and D if granted temporary admission or release.

10. The Claimants have not been deported. They remained in detention until 1st December 2005 and then released.

11. The Claim Form in these proceedings was issued two days before their release. In the Claim Form the Claimants seek a number of remedies. It suffices for the purpose of this introduction that I record that they seek declarations that their detention for part or all of the period from 2 August 2005 was unlawful.

The Principal Issues in these Proceedings

12. It seems to me that they are as follows: -

i) As of August 2005, was the Defendant's policy in relation to the detention of families with children lawful or unlawful?

ii) Was the Claimants' detention between 2nd August 2005 and 1st December 2005 unlawful either in respect of the whole or part of that period?

iii) Does D have a claim against the Defendant in respect of a breach of his rights under Article 8 European Convention on Human Rights?

13. I will deal with each of these issues in turn. I deal with issue (i) with a degree of diffidence since, as will become apparent, the lawfulness or otherwise of the Defendant's policy in August 2005 is not critical to my findings upon whether or not the detention of the Claimants was lawful. Since, however, the lawfulness of the policy was the subject of detailed submissions it would be remiss of me to make no finding on the point.

Policy

14. It is common ground that before October 2001 the Defendant's policy was that families with children could only be detained in exceptional circumstances and for a few days under Immigration Act powers. That policy was set out in the White Paper of July 1998 entitled "***Firmer, Faster, Fairer***". The Policy was encapsulated in the following quotation: -

> *"The detention of families and children is particularly regrettable, but is also sometimes necessary to effect the removal of those who have no authority to remain in the UK, and who refuse to leave voluntarily. Such detention should be planned to be effected as close to removal as possible so as to ensure that families are not normally detained for more than a few days."*

15. In February 2002 the White Paper entitled "***Secure Borders, Safe Haven"*** was published. It is also common ground that this White Paper signalled a shift in policy. In paragraph 4.77 of the Paper the following appeared:

> *"Families can in some instances give rise to the same problem of non-compliance and thus the need to detain as can be encountered with single adults. Naturally there are particular concerns about detaining families and it is not a step to be taken lightly. Although true of all decisions to detain, it is especially important in the case of families that detention should be used only when necessary and should not be for an excessive period. It was previously the case that families would, other than as part of the fast-track process at Oackington Reception Centre, normally be detained only in order to effect removal. Such detention would be planned to take place as close to removal as possible so as to ensure that families were not normally detained for more than a few days. Whilst this covered most circumstances where detention of a family might be necessary, it did not allow for those occasions when it is justifiable to detain families at other times or for longer than just a few days. Accordingly, families may, where necessary, now be detained at other times and for longer periods than just immediately prior to removal. This could be whilst their identities and basis of claim are established, or because there is a reasonable belief that they would abscond. Where families are detained they are held in*

dedicated family accommodation based on family rooms in Removal Centres. No family is detained simply because suitable accommodation is available."

16. Government Policy on the detention of families with children was the subject of debate in the House of Commons on 8th May 2003. During the course of that debate the then Minister for Citizenship and Immigration, Beverley Hughes MP, summarised Home Office Policy in relation to the detention of minors. She said:

"I welcome the opportunity to put on record the Government's policy and practice on the issues [concerning the detention of asylum seeking families and children]……..

My Hon. Friend is right to say that, prior to October 2001, families with children were detained under those powers [the Immigration Act 1971] but, as a matter of policy rather than law using qualified detention criteria that meant that families would be detained only to go through the Oakington fast-track asylum process or for one or two days immediately prior to removal. He is also right to say that in October 2001, it was decided to remove this qualification and to allow for the detention of families under the same detention criteria as others. That was done in recognition of the fact that families – or the adults in families, anyway – can give rise to the same concerns as single adults, in terms of absconding or frustrating removal.

……..

I entirely reject my Hon. Friend's assertion that families are targeted for detention or that they are detained except in the most exceptional circumstances or for the shortest periods of time……..

I am deeply sympathetic to the concerns about the detention of children. It is not something we do easily or gladly and it is certainly not our intention – or our practice – that children should be in detention for prolonged periods…… ...."

17. In a debate in the House of Lords on 18th May 2004 Lord Bassam of Brighton also summarised "*general government policy with regards to children*". He said: -

"However, as we have made plain on many occasions, it is a regrettable fact that some families with children can give rise to the same immigration and asylum concerns as single adults, particularly in terms of failing to leave the UK voluntarily when they have no lawful basis of stay here. The detention of some families may therefore sometimes be necessary as part of maintaining an effective immigration control and asylum system. We cannot exclude families with children from those controls.

Having said that, I must stress that overall very few families are detained and that most of those who are detained are held very briefly just prior to their removal from the UK. There is a presumption in all cases in favour of granting temporary admission or release, and each case will always be considered on its merits."

18. The Defendant publishes a document entitled "***The Operational Enforcement Manual***" which provides guidance for officers of the Immigration and Nationality Directorate in relation to many facets of their work. Chapter 38 of the Manual which was in force in August 2005 deals with the topic "***Detention and Temporary Release***". Under the heading "Use of Detention" the following sentence appears:-

"In all cases detention must be used sparingly, and for the shortest period necessary."

Paragraph 38.3 is concerned with:-

"Factors influencing a decision to detain (excluding pre-decision fast-track)

The following general principles are then listed:-

"1 There is a presumption in favour of temporary admission or temporary release.

2 There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for the detention to be justified.

3 All reasonable alternatives to detention must be considered before detention is authorised.

4 Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

5 Each case must be considered on its individual merits.

6 The following factors must be taken into account when considering the need for initial or continued detention.

For detention:

- *what is the likelihood of the person being removed and, if so, after what time scale?*

- *is there any evidence of previous absconding?*

- *is there any evidence of a previous failure to comply with conditions on temporary release or bail?*

- *has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry?)*

- *is there a previous history complying with the requirement of immigration control? (e.g. by applying for a visa, further leave, etc)*

- *what are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? Does the person have a settled address/employment?*

- *what are the individual's expectations about the outcomes of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?*

Against Detention:

- *is the subject under 18?;*

- *has the subject a history of torture?;*

- *has the subject a history of physical or mental ill health?"*

Paragraph 38.9.4 deals exclusively with families. It provides: -

"*The decision to detain an entire family should always be taken with due regard to Article 8 of the ECHR. Families, including those with children, can be detained on the same footing as all other persons liable to detention. This means that families may be detained in line with general detention criteria (see 38.3)……..*

Detention of an entire family must be justified in all circumstances and, as in

any case, there will continue to be a presumption in favour of granting temporary release. Detention must be authorised by an inspector at whatever age stage of the process it is considered necessary and although it should last only for as long is necessary, it is not subject to a particular time limit."

19. So far, I have dealt with policy "in general" as it relates to detention. However there are specific policy statements relating to the initial authorisation and review of detention and the "*fast-track procedure*" which also fall to be considered.

20. I deal firstly with the authorisation and review. It suffices that I refer to the Operational Enforcement Manual. That requires that initial detention for any category of detainee must be authorised by a chief immigration officer or an inspector. It further requires that detention must be reviewed after 24 hours by an inspector. Paragraph 38.8 under the heading *"Detention Reviews"* contains particular guidance in relation to children. I quote: -

"Cases involving children are reviewed on a regular basis to ensure that the decision to detain is based on the current circumstances of the case and detention remains appropriate. Managers in MODCU formally review cases where children are detained after 7 days in detention (by HEO) 10 days (SEO) and 14 and each subsequent 7 days (AD). A system of Ministerial authorisation for the detention of children beyond 28 days was announced in December 2003."

21. As I understand it the first policy statement in relation to detention under the "fast-track" procedure was made in a news release (No 059/00) of March 1999 when the Home Office announced that thousands of asylum seekers will have their case decided *"in about seven days at a new fast-track facility opening Monday 20th March in Cambridgeshire."* At or about the same time the then Immigration Minister, Barbara Roche MP, explained *"Applicants will be kept for a period of about seven days while their claim is considered."*

22. In the House of Commons the Minister gave a written answer on 16 March 2000 stating that if claims could not be decided in a period of about seven days *"the applicant will be granted temporary admission or, if necessary in line with existing criteria, moved to another place of detention".*

23. The Operational Enforcement Manual relevant to these proceedings makes it clear that asylum applicants may be detained where it is considered that their claims are capable of being decided quickly. No attempt is made to further define what is meant by that word. However, specific reference is made to a Written Ministerial Statement of 16 September 2004 which is said to constitute an updating of policy.

24. That Ministerial Statement includes that following passages:

"When we began the fast track process we said that it was our intention to detain asylum claimants suitable for a quick decision for a period of about seven to 10 days. If we could not decide the claim within that time scale, the claimant would be released or moved to another place of detention with the facilities to support people for longer periods. In the vast majority of cases, we have been able to do exactly that. However, the need to ensure a really sharp focus on quality decision making, including for example in non-suspensive appeal (NSA) cases the need for a second pair of eyes, means we cannot always make decisions on claimants within the original seven to 10 target time scale. While we are able to do this in over 95 per cent of non-NSA Oakington claims, our experience has shown us that NSA claims take slightly longer, with the majority of decisions being made and served within 14 days. The purpose of this announcement is to set out our revised fast track process detention policy.

The fast track process has scheduled days set aside for specific activities (interviewing, serving the decision etc.) but we intend this to be a guide as to how the process will generally operate……We would not generally release people from detention…simply because the timetable cannot be adhered to, if the indications are that we can make and serve a decision within a reasonable time-scale. However, the period of detention for making a quick decision will not be allowed to continue for longer than is reasonable in all the circumstances. We will aim to make decisions within 10 to 14 days…… However, we will continue to detain for the purpose of deciding the claim quickly, even beyond the 10 to 14 day time scale, unless the length of time before a decision can be made looks like it will be longer than is reasonable in the circumstances….."

25. No difficulty arises in understanding the Defendant's policy in relation to detention at Oakington under fast track procedures as it applied in August 2005. Essentially, the policy is that provided the applicants in question are regarded as suitable for a quick determination the target for reaching a decision is 10 to 14 days. That, of course, carries with it the understanding that the applicants (including any children of applicants) will be detained for that period. Further, in appropriate circumstances, a longer period of detention is not prohibited.

26. I also consider that although the Defendant's policy upon detention "generally" has to be viewed in the light of a number of sources its ambit is clear. In my judgment it consists of the following key elements. I deal, firstly, with those elements which relate to all categories of persons for whom detention is contemplated. Detention must be used sparingly, and for the shortest period necessary. A presumption in favour of temporary admission or temporary release exists and there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified. All reasonable alternatives to detention must be considered before detention is authorised. Once detention is authorised it must be kept under close review to ensure that it continues to be justified.

27. These same key elements apply when the detention of families with children is contemplated. However, upon the basis of the statements of Ministers to which I have referred I accept that it is envisaged that when dealing with families with children the key elements identified above should be applied with a degree of rigour that may be absent when adults alone are being considered.

Is the Defendant's policy in relation to detention lawful?

28. I deal, firstly, with his policy in relation to detention at Oakington under the fast-track procedure. In **R (Saadi) & others v The Secretary of State for the Home Department [2002] 1 WLR 3131** the House of Lords considered a direct challenge to the lawfulness of detention at Oakington under the fast-track procedure. Lord Slynn delivered the only reasoned speech and all other members of the House agreed with him.

29. Having identified that the justification relied upon for the detention of the Claimants was that their cases fell within the category of those capable of a speedy decision Lord Slynn said: -

> *"The position under domestic law shorn of Human Rights Act considerations… …is clear. Paragraph 16 of Schedule 2 [Immigration Act 197] gives power to detain "pending" examination and a decision; that in my view means for the period up to the time when the examination is concluded and a decision taken. There is no qualification that the Secretary of State must show that it is necessary to detain for the purposes of examination in that the examination could not otherwise be carried out since applicants would run away. Nor is it limited to those who cannot for whatever reasons appropriately be granted temporary admission. The period of detention in order to arrive at a decision must however be reasonable in all the circumstances."*

Lord Slynn then concluded that the policy then in force under the fast track procedure was not unlawful in domestic law.

30. Lord Slynn next analysed whether any period of detention under the fast track procedure involved a breach of Article 5(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). It suffices that I say that in relation to the period of detention actually endured by the Claimants Lord Slynn held that no breach had occurred. In that context he said this: -

> *"It is regrettable that anyone should be deprived of his liberty other than pursuant to the Order of the 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 of not only the applicants but of those increasingly in the queue. Accepting as I do that 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 had done all that he could be expected to do to palliate the deprivation of liberty of the many applicants for asylum here."

31. Dr Saadi's case was also considered by the Grand Chamber of the European Courts of Human Rights (see **Saadi v United Kingdom** (Application number .13229/2003)). It suffices in this judgment to record that the European Court adopted the same approach to the alleged breach of Article 5(1) as did the House of Lords. One paragraph from the majority judgment suffices: -

"It is 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 Court notes 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 for a total of 7 days, which the Court finds not to be excessive in the circumstances. The Court is not required to set a maximum period on permitted detention, although it notes that the present form of detention is ordered on administrative authority only."

32. In **D and others v Home Office (Bail for Immigration Detainees and another intervening) [2006] 1WLR 1003** the claimants, D, her husband and two children, arrived in London by train on 6 February 2002. D claimed asylum and the claims of the other members of her family to asylum depended upon hers. The authorities detained D's husband over night while D and her children were granted temporary admission. The following day the whole family was transported to Oakington. On 12 February 2002 the claims for asylum were refused and on 13 February D was refused permission to enter. On 14 February the family was moved to Yarl's Wood where a fire occurred. They were moved again to Harmondsworth Detention Centre where they remained until released on 19 February. Subsequently the claimants brought proceedings in the county court claiming that their detention was unlawful and that they were entitled to damages. The District Judge refused an application by the Defendant to strike out the claim but, on appeal, the Circuit Judge acceded to that application. In the Court of Appeal the order of the Circuit Judge was varied. In summary the Court entered summary judgment for the Defendant in respect of the time which the claimants had spent in Oakington but ordered that the claim in respect of the remaining period of detention should proceed.

33. In his judgment, Brook LJ said this about the decision of the House of Lords in **Saadi**:

"The effect of paragraph 22 to 26 of his speech [Lord Slynn of Hadley] can be summarised in this way: (1) the power to detain pending examination and decision is not subject to any qualification to the effect that the Secretary of State must show that the detention is necessary because the applicant will run away if not detained; (ii) nor is it limited to those who cannot appropriately be

granted temporary admission, for whatever reason; (iii) the period of such detention must be reasonable in all the circumstances; (iv) the immigration officer must act reasonably in fixing the time for examination and for arriving at a decision in the light of the objective promoting speedy decision – making." see paragraph 25

Later he said:

"……the Home Office is entitled to summary judgment in all the claims relating to the detention of members of the family up to the end of their stay at Oakington, where they were being detained for examination. Although it is true that in ***Saadi's case [2002] 1 WLR 3131*** *the House of Lords did not expressly determine any claim that the detention of family with children under the Oakington process infringe the children's rights under the UN Convention on the Rights of the Child, I consider that, following the decision in* ***Saadi's*** *case, the claims that the detention of the family for a short period within that process was unlawful have no real prospect of success.*" see paragraph 122

34. In the light of the decision in **Saadi** in House of Lords and the European Court and **D** in the Court of Appeal, Mr Fitzgerald QC concedes that the Defendant's policy of detaining applicants for asylum under the fast-track procedures cannot be categorised as unlawful certainly in so far as it limits the period of detention to 7 days or thereabouts. However Mr Fitzgerald QC does not concede that the policy which permits of detention for up to 14 days is lawful. Essentially, he submits that such a policy is unlawful for the same reasons as he advances for asserting that the Defendant's general policy in relation to detention is unlawful.

35. Accordingly I turn to the general policy in relation to detention and the reasons why it is submitted that policy is unlawful. The Claimants submit that the Defendant's policy on the detention of families with children is unlawful because it is incompatible with Article 5(1) ECHR read in the light of Articles 3 and 37(b) of the United Nations Convention on the Rights of the Child (UNCRC).

36. Article 5(1) of the ECHR prohibits detention that is not in accordance with a procedure prescribed by law or is otherwise arbitrary.

37. Article 3 of the UNCRC provides: -

"1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for

him or her, and, to this end, shall take all appropriate legislative and administrative measures.

3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, and in the number and suitability of their staff, as well as competence supervision."

Article 37(b) of the UNCRC provides: -

"No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time."

38. The UK is a party to UNCRC but it has entered a reservation. The reservation reads: -

"The United Kingdom reserves the right to apply such legislation in so far as it relates to the entry into, stay in and departure from the United Kingdom on those who do not have the right under the law of the United Kingdom to enter and remain in the United Kingdom, and to the acquisition and possession of citizenship, as it may deem necessary from time to time."

39. The core submission made by Counsel for the Claimants is that the Defendant's policy on detention of families with children conflicts with Article 3 UNCRC under which the best interests of the child must be a primary consideration when taking any action concerning a child, and with Article 37 (b) UNCRC, under which children must only be detained as a last resort.

40. Counsel further submits that Article 5 ECHR must be read in the light of Articles 3 and 37(b) UNCRC. If that is so submits Counsel the Defendant's policy is incompatible with Article 5 ECHR because (a) it permits the detention of accompanied children under Immigration Act powers other than in exceptional circumstances; (b) permits the detention of accompanied children under Immigration Act powers for more than a few days; and (c) does not clearly accord to accompanied children a special protected status.

41. I am prepared to accept for the purposes of this judgment that Article 5 ECHR should be read in the light of Articles 3 and 37(b) UNCRC. It seems to me that accords with the body of authority quoted in paragraph 4.8 to 4.13 of the Claimants' Counsels' Skeleton Argument. I refer in particular to **Loizidou v Turkey (19950 20 EHRR 99**, **Mitunga v Belgium (Application 13178 12/10/2006** and **R(SR) v Nottingham Magistrates Court [2001] EWHC Admin 802**.

42. Viewed in that light, I ask myself first whether the Defendants' policy which existed in

2005 for detaining applicants and their children at Oakington under the fast track procedure is unlawful.

43. In my judgment, it is not. It seems to me that the considerations which led to the decisions in **Saadi** and **D** apply with similar force to a policy which contemplates detention for period of 14 days as opposed to 7 days or thereabouts. The passage from the speech of Lord Slynn in **Saadi** quoted at paragraph 30 above is, in my judgment, equally applicable when one is considering a 14 days detention period. Although Mr. Fitzgerald QC did not concede as much, he was unable to advance any good reason why that reasoning should not apply. The evidence adduced by the Defendant demonstrates that a period of about 14 days is necessary in order to process applicants under the fast-track procedure and I have no basis for rejecting that. Accordingly, I can find no basis for saying that detention for that same period is arbitrary or unreasonably long.

44. In my judgment, it is open to significantly greater debate whether the Defendant's policy in 2005 on detention generally as it applied to families with children is unlawful. On balance, however, I have reached the conclusion that it is not. As I have indicated above the policy consists of a number of key elements. Although these key elements are not phrased in an identical manner to the phraseology of the relevant articles of UNCRC, in my judgment the Defendant's policy is compatible with the general thrust of the Articles of UNCRC. In this field, it is not appropriate, in my judgment, to seek out linguistic niceties when comparing an international convention with a domestic policy so as to make an assessment of whether the policy conforms with the international convention. Rather, in my judgment, the Court should consider whether the two are compatible when they are compared fairly and objectively and in the round. Viewed in that light, there is no material difference between Article 37 (b) which prohibits the deprivation of liberty of a child in an arbitrary fashion and specifies that detention shall be used a measure of last resort and for the shortest appropriate period of time and a policy which demands that detention must be used only where all reasonable alternatives are discounted and for the shortest period necessary. Further, the fact that the interests of the child must be a primary consideration when taking action in respect of a child cannot preclude detention in all circumstances. Obviously, on occasions, other factors must be taken into account in deciding upon the proposed course of action.

45. Accordingly, I have reached the conclusion that the Claimants' challenge based upon the contention that the Defendant's detention policy as of August 2005 is unlawful should fail.

46. In the light of that finding it is unnecessary, strictly, for me to deal with the proper interpretation of the United Kingdom reservation to the UNCRC. For completeness, however, I express my conclusion shortly.

47. The interpretation of the reservation is by no means straight forward. It is a reservation which permits the United Kingdom to apply the legislation specified in the reservation as "*it may be necessary from time to time.*" In the context of the present case the legislation specified is that which relates to the entry into, staying and departure from the United Kingdom of those who do not have the right under the law of the United Kingdom to enter and remain. In one sense this wording is very wide. It is not

obviously apparent to me, however, why it should be taken to relate to legislation which authorises administrative detention as well as legislation which deals with the principles upon which a person may enter stay and depart from the United Kingdom who does not have the right to enter and remain in the United Kingdom.

48. It is generally taken to be an acceptable tenet of interpretation that clear and unambiguous words are necessary to restrict the rights which would otherwise be afforded by a convention such as the UNCRC. It certainly cannot be said, in my judgment, that the reservation in the instant case is so framed.

49. In my judgment the reservation entered by the UK to UNCRC is not and was not intended to permit the UK government to enact legislation or apply legislation so as to remove or alter the provisions of the convention which proscribe the circumstances in which it is permissible to detain children.

The Lawfulness of the detention in the instant case.

50. There is a good deal of common ground about the appropriate principles to be applied. Firstly it is common ground that detention contrary to published policy is unlawful and in breach of Article 5 ECHR. That proposition is established by the decision in **Nadarajah & Amirthanathan v SSHD [2003] EWCA Civ 1768.** Independently of the issue of policy, detention is lawful only if the principles enunciated by the Court of Appeal in **R (I) v The SSHD [2002] EWCA Civ 888** are followed and applied. The principles are those which are set out in paragraph 46 of the judgment of Dyson LJ. In that paragraph he said that four principles emerged from the cases and he enunciated them as follows:-

> *i. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;*
>
> *ii. The deportee may only be detained for a period that is reasonable in all circumstances;*
>
> *iii. If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State were not be able to affect deportation within that reasonable period, he should not seek to exercise the power of detention;*
>
> *iv. The Secretary of State should act with the reasonable diligence and expedition to effect to removal.*

In paragraph 47 of the judgment Dyson LJ explained: -

"Principles 2 and 3 are conceptually distinct. Principle 2 is that the Secretary of State must not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle 3 applies. Thus, once it becomes apparent that the Secretary of State will not able to affect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."

51. As I have said, the principles set out above are uncontroversial as between the parties. The Claimants also rely, however, upon a decision of Field J in **Hanil El Sayed Sabaei Youssef v Home Office [2004] EWHC 1184** to the effect that the Court should judge the question of whether or not detention is lawful as a primary decision maker and not simply review the decision taken by the actual decision maker upon ***Wednesbury*** principles. At paragraph 62 and 63 of his judgment Field J expressed himself in this way:-

*"62. Whilst it is a necessary condition to the lawfulness for Mr Youssef's detention that the Home Secretary should have been reasonably of view of a real prospect of being able to remove him to Egypt……. I do not agree that the standards by which the reasonableness of that was to be judged is the **Wednesbury** standard. I say this because I can find nothing in the judgment of Woolf J in **Hardial Singh** the points to this being standard and because where the liberty of the subject is concerned the Court ought the primary decision maker as to the reasonableness of the Executive's actions unless there are compelling reasons to the contrary, which I do not think there are. Accordingly, I hold that the reasonableness of the Home Secretary's view that there was a real prospect of being able to remove Mr Youssef to Egypt in compliance with Article 3 ECHR is to be judged by the Court as the primary decision maker, just as it will be the Court as primary decision maker that will judge the reasonableness of the length of the detention bearing in mind the obligation to exercise all reasonable expedition to ensure that the steps necessary to affect a lawful return are taken in a reasonable time.*

*63. It follows that I respectfully disagree with the approach taken by Sullivan J and apparently also by Andrew Collins J; and I do so in the realisation that if the challenge is not unlawfulness of the detention but that the decision to remove or deport it will be by judicial review and the reasonableness of the Home Secretary's view will indeed be assessed on **Wednesbury's** principles. In most false imprisonment and habeas corpus proceedings the difference between the two approaches is likely to be more apparent than real because when applying the approach I hold to be the correct one, the Court ought in my opinion to have regard to all the circumstances and in doing so should make allowance of the way that government functions and the slow to second guess the Executive assessment of diplomatic negotiations. However there may be cases, all be it a few in number, where the liberty of the subject will depend on which approach is applied."*

52. Ms Richards, on behalf of the Defendant, whilst not accepting that the decision of Field J was necessarily binding upon me, nonetheless accepted that I would be bound to treat his reasoning and decision as highly persuasive. Understandably, she reserved her position on whether the approach of Field J was correct so as to enable her to preserve her rights of appeal in this case. I take the view, however, that Field J was correct for the reasons he gave and I propose to adopt the same approach.

53. With the principles set out above firmly in mind I turn consider the lawfulness of the detention in this case. I start with an investigation of whether the detention was in conformity with the Defendant's published policy.

54. There can be no doubt but that the Claimants' detention at Oakington under the fast-track procedure between 2nd August and 15th August 2005 was in accordance with the relevant policy. Counsel for the Claimants do not contend to the contrary. I have found that the policy itself is lawful. Is there, nonetheless, any scope for arguing successfully that any period of the detention at Oakington under the fast-track procedure was unlawful? I do no think so. The initial detention was in accordance with policy; it was then believed that the fast-track procedure would be completed in up to 14 days and in my judgment a period of detention for that duration in the context of the fast track procedure cannot be regarded as unreasonable. Consequently, I reject the Claimants' claims in so far as they relate to their period of detention between 2 August and 15 August 2005.

55. On 15 August 2005 a decision was taken to continue to detain the Claimants notwithstanding that the fast track procedures had been completed. The reason why the Claimants were detained was that they were likely to abscond if given temporary admission or release. That conclusion was reached because (1) the Claimants did not have enough close ties to make it likely that they would stay in one place; (2) they had previously failed to comply with conditions of entry; (3) they had previously absconded; (4) they had used or attempted to use deception in a way that lead to the conclusion that they might continue to deceive; (5) they had failed to give satisfactory or reliable answers to an immigration officer's enquiries and (6) they had previously failed or refused to leave the UK when required to do so.

56. At the beginning of this judgment I set out the First Claimant's movements (firstly with the C and thereafter with D) between the time of her entry into the United Kingdom and her arrest in 2005. There can be no doubt that she remained illegally in the United Kingdom. However it seems to me that there is much force in the submission made orally by Mr. Fitzgerald QC to the effect that there is nothing about the history of the First Claimant's movements within the UK thereafter which distinguishes her from very many people who remain illegally in this country. The address to which she first went was the address which she provided to the Immigration Authorities. She remained at that address for approximately 10 months and, so far as I am aware, the Authorities did nothing to ascertain whether or not the First Claimant was living at that address. The First Claimant was living with her cousin and when her cousin moved the First Claimant moved with her. It was only after she had been in this country for something of the order of 18 months that she ceased to live with her cousin and moved to live with a friend.

57. Following her arrest on 31 July 2005 the Claimant was released prior to being taken to Oakington. She presented herself with the other Claimants to be taken to Oakington at the time and place specified to her even though she knew that she faced up to 14 days in detention with her young family.

58. By July 2005 C was registered to begin primary school. C had been at nursery school from sometime in 2004 and all the indications are that she had regularly attended nursery school.

59. When one weighs on the one hand the fact that the First Claimant had failed to leave the United Kingdom when directed in 2002 but, instead, had remained living with her cousin, against the history of events after 2002 it seems to me to be very difficult to conclude that there was a likelihood of the First Claimant absconding with C and D in August 2005. One of the reasons why the conclusion was reached that the Claimant was likely to abscond was that she did not have such close ties to make it likely that she would stay in one place. I find that conclusion very surprising in the context of the undisputed history as given to me of the Claimant's movements. She had lived either with her cousin or friends throughout a period of very nearly three years. She had made proper and sensible arrangements for C to attend a local primary school and I have no reason to believe that the First Claimant would have thought it appropriate to remove herself from the area in which C was to attend school. The evidence before me suggests very strongly that the First Claimant had always paid proper and sensible regard to C's schooling.

60. Another reason put forward for the conclusion that the First Claimant was likely to abscond is that she failed to give satisfactory or reliable answers to an immigration officer's enquiries. In the evidence adduced on behalf of the Defendant there is no explanation of this reason for reaching the conclusion that the First Claimant was likely to abscond. It is true, of course, that her asylum claim had by then been rejected and certified as clearly unfounded. It does not seem to me, however, to follow necessarily that answers given by the First Claimant in relation to her asylum application impact upon whether or not she is likely to abscond.

61. The Defendant's policy requires that there must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified. All reasonable alternatives to detention must be considered before detention is authorised. Since the detention of young children was inherent in any decision to detain the First Claimant those aspects of the Defendant's policy had to be applied with rigour.

62. In my judgment that was not done in this case. I do not consider that strong grounds existed for believing that the First Claimant would not comply with conditions of temporary admissions or temporary release and I do not consider that all reasonable alternatives to detention were properly considered. Certainly, no evidence has been adduced by the Defendant which convinces me of that.

63. In my judgment, therefore, the Defendant failed to comply with his own policy upon

detention when the decision was taken to detain the Claimants on the 15th August 2005. That means that the decision to detain was unlawful and the detention itself was unlawful and an infringement of Article 5 ECHR.

64. I should make it clear that I have reached this decision as if the primary decision maker. As Field J predicted in **Youssef** however it will not often be the case that a different view will prevail if a test under **Wednesbury** is applied. In this case I would also have found the decision to detain and the detention unreasonable in the **Wednesbury** sense.

65. I also take the view that the detention was unlawful on another basis. Earlier in this judgment I set out the principles set out by Dyson LJ in **R(I) V SSHD**. The second principle formulated by the Learned Judge was that a deportee may only be detained for a period that is reasonable in all the circumstances.

66. In my judgment, that obligation carries with it an obligation to consider when detention is first being authorised the likely length of that detention. If, upon proper consideration, it becomes clear that detention will be for a period which is reasonable in all the circumstances, any detention will be lawful. If, however, it is apparent that the length of detention will be unreasonable in all the circumstances the detention will be unlawful. The evidence of Ms Alison Hardie, put in on behalf of the Defendant, says, correctly, that on 15 August 2005 the Claimants' detention was reviewed and it was considered that the Claimants were likely to abscond if given temporary admission or release. It goes on to say that the First Claimant and C both had Jamaican passports but that D was born in the UK and was undocumented. It was apparent that emergency travel documentation would be required for all three Claimants to effect their removal. Ms Hardie says that on 19 August 2005 Lambeth Town Registry Office was contacted in order to obtain D's birth certificate. Nowhere, in the Statement of Ms Hardie, is there any evidence which sets out what consideration, if any, was given to the likely length of time which might elapse between 15 August 2005 and the removal of the Claimants.

67. On 27 August 2005 the management of the Claimants' detention was transferred to Management of Detained Cases Unit (MDCU). The Assistant Director of that unit, Miss Jackie Gallop, also provided a witness statement but that statement throws no light upon whether or not proper consideration was given was to the likely length of detention as at 15 August and, further, her statement throws no light upon whether or not consideration was given to the length of detention when MDCU took over management. In paragraph 6 of her statement she describes the initials steps taken by the Unit to obtain necessary documentation and between paragraph 6 and paragraph 21 of her statement she outlines the events which led up to the date when it was first arranged that the Claimants be deported. That date was 13 October 2005.

68. I need not detail that evidence. The submission made to me by Miss Richards, which I accept, was that the Defendant was taking such steps as were necessary in the period in question in order to affect the Claimants' removal. Inherent in that submission, however, must be an acknowledgement that anyone seeking to predict on or about 15 August 2005 how long it would be before the Claimants were deported would have concluded that it was likely to be of the order of two months.

69. In my judgment a period of detention of two months, more or less, for these Claimants was unreasonable and would have been recognised as being unreasonable by a decision maker who turned his or her mind to such a period of detention. The detention period, after all, was coming immediately after a period of 13 days in detention when the fast-track procedures were operated. The detainees were a young woman and two very young children. It is not for this Court to lay down to what may have been a reasonable period of detention but, in my judgment, such a period was bound to be far less than approximately two months.

70. If, contrary to my view, the initial decision to detain was not unlawful and if a period of detention was not unlawful did the detention of the Claimants, nonetheless, become unlawful?

71. In my judgment it did so, at the latest, by 14 September 2005. On that date the Claimants were transferred from Oakington to Yarl's Wood. They had, by then, been in detention for one and half months, or thereabouts, and as of 14 September no removal directions had been set. Nonetheless, as I have said, they were transferred from one place of detention to another. It does not seem to me that detention beyond 14 September could possibly have been justified. That amounted to detention beyond a reasonable period of time and any decision maker considering whether or not detention should continue shortly before that date would have known that some weeks in detention were still inevitable given that no removal directions had been set.

72. In this context, too, it is not insignificant that by 10 September 2005 the First Claimant was reporting to the medical staff at Oakington that she was considering suicide. At that time the First Claimant was obviously unhappy about her failed asylum application and she was actively considering placing C for adoption rather than attempting to care for her in Jamaica. It is clear that the threat of suicide was taken seriously since she was being watched carefully. In my judgment this was an additional reason why continued detention was unreasonable.

73. After 14 September 2005 there were two failed attempts to remove the Claimants. That the attempts failed was in no sense the fault of the Claimants. The first date set to remove the Claimants was 13 October 2005. By that date the period of continuous detention was 73 days. If my conclusions about the lawfulness of detention thus far are all erroneous it strikes me that at the very latest the detention became unreasonable in its length from this date onwards and, therefore, unlawful.

74. In reaching the conclusions set out at paragraphs 65 to 71 above I am mindful that detention in this case was specifically authorised by the Minister after a period of 28 days had elapsed and, thereafter, periodically. The Minister, however, as one would expect, received a comparatively short briefing note before making a decision. He was told explicitly that there were no welfare concerns in relation to C and D and, as will become apparent, in D's case that was not an accurate statement of the true state of affairs. In my judgment, therefore, the fact of ministerial authorisation of detention does not persuade me that the detention was lawful.

The Claim under Article 8 ECHR

75. This Claim was not advanced in the Claim Form and D, through his Counsel, sought permission to argue this claim. Ms Richards did not seek to argue that I should not consider the claim. Rather she opposed it on its merits.

76. In summary form D claims that his right to physical integrity under Article 8 ECHR was infringed because during the period of his detention he developed anaemia and rickets. In the Skeleton presented on behalf of all the Claimants it is submitted that the fact that D suffered those illnesses was both foreseeable and readily avoidable. Accordingly, to repeat, there was a breach of D's right to respect for his physical integrity.

77. The starting point, of course, is whether or not it is established that D suffered the illnesses I have identified. On that issue there is no dispute. D adduced in evidence a medical report from Dr Colin Michie, a consultant paediatrician. Dr Michie's Report is dated 29th June 2006 and, as I understand it, the Defendant accepts its conclusions about the illnesses suffered by D. Dr Michie examined D on the 9th December 2005. On the basis of that examination and on the basis of such medical records as were provided to Dr Michie he concluded, unequivocally, that he had suffered from rickets and anaemia. Since there is no dispute, to repeat, I need not set out in detail the basis for Dr Michie's conclusion.

78. Dr Michie also formed an unequivocal opinion that the medical records for the period of D's detention showed significant gaps in his care. Further, there appeared to him to be a failure of communication and co-ordinated action between professionals. He reached that conclusion on the basis of the records provided to him and on the basis that the First Claimant's requests for assistance in respect of D appeared to have been ignored. Dr. Michie also considered that throughout the period of detention a proper assessment of D's nutritional state was lacking. It is the view of Dr Michie that D's care fell short of that to be expected of a primary childcare service. Indeed, as I understand Dr Michie's report the level of care afforded to D was completely inadequate.

79. Dr Michie also expressed the view that the rickets and anaemia suffered by D could and should have been prevented. His reasons for that view are encapsulated in the following paragraph from his report:

> *"These conditions are predictable: children of this age should take some solid foods, and those under a year should receive daily vitamins and iron supplements. Children over a year of age who continue to breast feed are particular vulnerable and are likely to develop rickets unless they receive a good, mixed diet and vitamin D supplement. Rickets are more common in dark skinned people in the United Kingdom, and more common during winter when available sun light is limited. Rickets can develop in a few months over winter in rapidly growing infants. It should have been evident to any trained health visitor or doctor in the detention centre that D required appropriate preventative measures in order to prevent rickets developing."*

80. This evidence was not challenged.

81. Ms Richards does not and could not, on the available evidence, suggest that the development of rickets and anaemia was not avoidable. Nonetheless, she submits that the medical records show that the medical professionals involved with D's care did as much as is reasonably to be expected of them given the information provided to them by the First Claimant. Alternatively, she submits that the Defendant engaged reputable healthcare providers at the Oakington and Yarl's Woods Detention Centres. Further he engaged them pursuant to contracts which obliged the healthcare professionals to provide proper and adequate medical treatment and care. In those circumstances, she submits, the Defendant should not be held responsible for any failures on the part of the healthcare providers.

82. I do not accept this latter submission. Ms Richards advanced no authority to support it. She did not advance the proposition in her Skeleton Argument (or if she did the reference was elliptical - see paragraph 73). The question for my consideration is whether the D's right to physical integrity was infringed when he was detained at the behest of the Defendant. If it was, the Defendant, as the public authority responsible for the detention and compliance with Article 8, must be responsible in law for the infringement.

83. The crucial issue, in my judgment, is whether there was an infringement. I turn to the evidence adduced on behalf of the Defendant. This consisted of medical and social service records. He also relied upon a statement by Mr. Alan Hollett.

84. In summary, Mr. Hollett says that during the time that D was detained at Oakington an organisation known as Primecare Forensic Medical Services provided all health care services. He then goes on to detail, in effect, what the medical notes show as to the course of events in Oakington. On 3 August 2005 the First Claimant made a request that D be seen by a health care professional but also said that this need not be done urgently. On 4 August D was seen by a general nurse who was told that D *"cried and was clingy"*.

85. On 13 August 2005 D was seen by a GP. The notes record that D "*looked very well, healthy"* and was "*eating very well"*.

86. The next record which relates, specifically, to D is the record of a welfare assessment undertaken by Cambridgeshire Social Services on 12 September 2005. In respect of D a recommendation was made that a doctor should review him to check the frequency of his stools.

87. As I have indicated on 14 September 2005 the Claimants were transferred to Yarl's Wood. Mr Hollett says that on 14 September (the day of the transfer) a full medical review was conducted on all Claimants. He does not specify by whom this review was undertaken. Significantly, in my judgment, the notes of the review in respect of D include the following:

"*Mother concerned not eating properly. Still breast feeding"*

88. An appointment had been made, at some stage, for all the Claimants to see a doctor on 15 September 2005. They did not attend. D was not seen by a healthcare professional, as I understand it, until 13 October 2005. Again, I not clear about the status of the person who examined D.

89. In the light of Dr Michie's opinion a report to healthcare professionals to the effect that D was not eating properly and still breastfeeding should have raised concerns. At the date of that report (14 September 2005) D was aged about one year and, as I have said, Dr Michie has expressed a clear view that infants of about that age who are still breastfeeding are prone to develop rickets. Yet, so far as I can see, D was not examined from 14 September until the day of his intended departure on 13 October 2005. Without wishing to be unduly sceptical I would be surprised if an examination on the proposed day of departure was anything other than a check to see that he was fit for travel. Certainly the medical notes do not suggest anything more extensive.

90. I appreciate that the First Claimant failed to take D for an appointment on 15 September. It was, of course, her responsibility to ensure attendance at that appointment. Nonetheless, in my judgment, the Defendant also has a responsibility to ensure the welfare of detainees. He was here dealing with a young mother and two very young children. Only days before 15 September 2005 there had been genuine concerns about the First Claimant's potential for suicide. In those circumstances, in my judgment, it was incumbent upon the Defendant to take positive steps to ensure the welfare of D and it was not sufficient for the Defendant simply to wait and react to any reports or complaints made by the First Claimant.

91. So far as I can judge from the medical records, no meaningful investigation of D's health took place at all whilst he was at Yarl's Wood. In reaching that conclusion I appreciate that there are notes for dates in November 2005. One of the notes for a date in November which is difficult to decipher again makes reference to D having an upset tummy (my words) and to his taking fluids. To repeat, however, it does not seem that any real attempt was made to investigate.

92. I have reached the conclusion that Dr Michie is correct in his conclusion that D's development of rickets and anaemia was foreseeable and avoidable. I need not go further and express a view upon whether his trenchant criticism of the standard of care provided to D is correct. That is not to duck the issue. However, it seems to me to be extremely difficult to form a firm conclusion upon such an issue without first hearing oral evidence. That is unnecessary in this case since, in my view, all that D needs to establish to prove an infringement of his right to physical integrity is that the development of the illnesses in question was foreseeable and avoidable. In this case he has done that. In my judgment, therefore, he has established an infringement of his right to physical integrity under Article 8 ECHR.

Conclusion and Remedies

93. The detention of each Claimant from 15 August 2005 to the date of their release was unlawful and in breach of their rights under Article 5 ECHR. They are entitled to declarations to that effect. D is entitled to a declaration that his right to physical integrity under Article 8 ECHR was infringed. As I understand it, both parties are content that the issue of damages which flows from these findings should be adjourned and determined at a later date. The Claimants' claim for a declaration that the Defendant's policy on the detention of family with children under Immigration Act powers is unlawful is dismissed. Their claim for a declaration that the Children Act 1989 is applicable to children under Immigration Act powers is wholly unnecessary since the Defendant has acknowledged the same throughout these proceedings and before.

94. In the context of this case, in my judgment, no further relief is necessary at this stage. I see no purpose in granting specific relief relating to systems which no longer exist or no longer exist in their current form.