Neutral Citation Number: [2009] EWHC 1208 (Admin)

Case No: CO/7885/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/06/2009

Before :

THE HONOURABLE MR JUSTICE WYN WILLIAMS

- -

Between :

THE QUEEN on the application of SHAYANTH — **Claimant**

- and -

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

- -
- -

Ms S Jegarajah (instructed by Messrs Ravi Solicitors) for the **Claimant**
Mr. M Barnes (instructed by The Treasury Solicitors) for the **Defendant**

Hearing dates: 12 May 2009

- -

Judgment

Mr Justice Wyn Williams :

1. The Claimant was born 31 May 1981 in Jaffna, North Sri Lanka. He is a Sri Lankan national of Tamil ethnicity.

2. On 20 February 2007 the Claimant arrived in the United Kingdom. He claims that he left Sri Lanka on 5 February 2007 and travelled to the United Kingdom via Qatar and another unspecified country. On 22 February 2007 the Claimant claimed asylum. On the same day a screening interview took place. In answer to a specific question at the screening interview the Claimant asserted that he had not previously travelled outside his country of origin.

3. The Claimant's fingerprints were taken. They were submitted to the Eurodac automated fingerprint database. They matched the fingerprints of a person who had made a claim for asylum in France on 23 June 2003.

4. On 6 March 2007 the Claimant's solicitors made representations to the Defendant that removal to Sri Lanka would breach the Claimant's rights under Articles 2, 3, 8 and 14 of the European Convention on Human Rights. The next day a request was made on behalf of the Defendant to the relevant authorities in France that they accept

responsibility for the Claimant's asylum claim. The request was made pursuant to Article 16 (1)(c) of EC Council Regulation No. 343/2003 (hereinafter referred to as "Dublin II") and was in a standard form in accordance with the Regulation. In the request made to France the following comments were included.

> *"The applicant claims to have left Sri Lanka on 5/2/2007 and travelled to Qatar with the help of an agent. The Applicant claims to have stayed in Qatar until 19/2/2007. He further claims to have travelled by plane to an unknown country and then arrived in the United Kingdom on 20/2/2007.*
> *However, the United Kingdom have no proof to substantiate this claim and in the light of the applicant's failure to disclose his previous application in France, this cannot be relied upon as credible."*

5. The Claimant was notified by letter dated 15 March 2007 that the Defendant was considering whether the provisions of Dublin II should be invoked and a request made to France that the authorities in that country should consider and determine the Claimant's claim for asylum. The Claimant was not informed that a request had actually been made of the authorities in France.

6. On 20 March 2007 the French authorities replied to the Defendant. The substance of the reply was to the effect that there was nothing to show that the Claimant had not left the territories of the European Union for more than three months following his arrival in France in 2003 and accordingly France was entitled to rely upon Article 16(3) of Dublin II and refuse to assume responsibility for the claim for asylum.

7. On 29 March 2007 further representations were sent to the French authorities. A number of detailed points were made. In summary, however, the nub of the representations was an assertion that the Claimant's account of leaving Sri Lanka on 5 February 2007 was unreliable. The response further asserted that it was for the Claimant to prove his account of his movements and that in the view of the Defendant, there was no reliable evidence to suggest that the Claimant had left the territory of the EU member states at all.

8. On or about 26 April 2007 the French authorities asked the Defendant to assume responsibility for the Claimant's claim on different grounds, namely, that his father and sister were British citizens; that they and other members of the Claimant's family were resident in the UK and that, therefore, the Defendant should consider the application for asylum under Article 3.2 of Dublin II.

9. On 1 May 2007 the Claimant's then solicitors sought an update as to what was happening. On 10 May 2007 an officer of the Border and Immigration Agency wrote to those solicitors confirming that a formal request had been made to France to take responsibility for the Claimant's asylum claim. The letter continued:-

> *"The French authorities have since replied requesting further information about your Client's whereabouts and family status in the United Kingdom. The query has been answered and we await a further response from the French authorities."*

Self-evidently that was not an accurate description of what had transpired between the French and British authorities.

10. Meanwhile, on the same date, the Agency wrote to the French authorities in response to its letter of 26 April 2007. It pointed out that the Defendant was not obliged to consider the Claimant's asylum claim. It asserted, as was the case, that the Claimant was a single independent adult who had lived independently of his family since 2002; that there were no family members within the UK who were also "family members" as defined within Dublin II and that "*there were not enough compelling grounds to apply Article 3.2 in this case.*"

11. On 14 June 2007 the French Authorities composed a letter in which they accepted responsibility to determine the Claimant's claim for asylum. For reasons which are unclear this communication did not reach the Defendant until mid August.

12. On 17 August 2007 a letter was prepared on behalf of the Defendant which informed the Claimant that he was to be removed to France. The letter notified the Claimant that the French authorities had accepted that France was the state responsible for examining his application for asylum. Although the letter was prepared on 17 August 2007 it was not served upon the Claimant or his solicitors either that day or in the days immediately following. As I understand it, it was served on 3 September 2007 when the Claimant was detained pending removal to France. On that same date (3 September) the Defendant set removal directions for 7 September 2007.

13. On 3 September 2007 the Claimant's solicitors wrote to the Border and Immigration Agency. The solicitors queried why they had not been told that the French authorities had refused to accept responsibility for the Claimant's asylum claim on two separate occasions before they apparently accepted responsibility for the claim. These facts had come to their attention only because they were included within the Immigration Factual Summary served with the removal directions. They further drew attention to the fact that the Claimant had made claims in this country on 6 March 2007 under the Human Rights Act 1998 with reference to Articles 2, 3, 8 and 14 of the European Convention on Human Rights. Whether in reply or simply coincidently on the same day the Border and Immigration Agency sent a letter to the Claimant's solicitors in which the Agency answered the claims made under the European Convention on Human Rights. The letter pointed out that the intended removal was to France and it asserted that there could be no question that the removal would give rise to breaches or potential breaches of Articles 2, 3, 8 and 14 of the Convention. The letter dealt in some detail with the alleged breach of Article 8. I should also record that the letter went on to certify that the Claimant's human rights claims were clearly unfounded by virtue of paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc) Act 2004.

14. On 10 September 2007 the Claimant commenced these proceedings. He sought judicial review of the decision to return the Claimant to France. The relief sought was a mandatory order "*requiring the Defendant to reconsider her decision to certify the Claimant's asylum application on third country grounds* and an order "*quashing the decision of the Defendant to refuse the Claimant's human rights claim and setting removal directions to France.*" Shortly before the proceedings were instituted the Defendant deferred the removal directions.

15. It is necessary to record the grounds for judicial review then relied upon. First the Claimant asserted that the decision of the Defendant to certify the Claimant's asylum claim on "*safe third-party grounds*" was unreasonable and not in accordance with

Article 16(3) of Dublin II. Second it was asserted that the Defendant had failed to have regard to its own "*family links policy*" in relation to third-country cases and linked with that assertion was the suggestion that the Defendant had failed to have regard to Article 15(1) of Dublin II.

16. On 26 October 2007 the Border and Immigration Agency sent a long letter to the Claimant's solicitors responding to the grounds put forward in the judicial review. One aspect of the claim, as then formulated, was the suggestion that the Defendant's decision to remove the Claimant to France was unreasonable because it failed to take into account Article 16(3) of Dublin II. Central to this contention was the suggestion made by the Claimant that he had returned to Sri Lanka following his arrival in France in June 2003. By 26 October 2007 the Claimant had supplied a document which, according to him, supported the contention that he had returned to Sri Lanka. The letter of 26 October 2007 had this to say about that document:-

> *"42. As proof of your Client's claim to return to Sri Lanka, he has stated that the French authorities returned him to Sri Lanka, prior to him entering the United Kingdom, and he has also submitted a copy of a document dated 15 November 2006, from the District Officer of Humanitarian Agencies Vivunlay, Sri Lanka, which he alleges proves he returned to Sri Lanka prior to entering the United Kingdom.*
>
> *45. ….your client states in his grounds of claim that the document he supplied to the Border and Immigration Agency on 6 September 2007 at the same time he informed them that it was his intention to undertake judicial proceedings, has not previously been considered. I note that this document was adduced the [day] before your client's planned removal from the United Kingdom and consider that the fact that it was not submitted prior to this day, leads to unfavourable conclusions as to credibility. Nevertheless and in any event, consideration has been given as to whether this document is evidence that your client's case falls under Article 16(3) of the Dublin Regulation. I am not satisfied, given the fact that your client has consistently supplied inaccurate accounts of his previous immigration history that the document provides sufficient evidence to prove your client returned to Sri Lanka prior to entering the United Kingdom, or has in fact been out of the territory of the EU since claiming asylum in France on 23 June 2003. Even if this document is genuine, it only proves your client was in Sri Lanka on 15 November 2006. It does not cover a period of time exceeding 3 months……"*

I should also record what is said in paragraph 44 of this letter. It reads:-

> *"44. Given that the French authorities have clearly stated that they have researched their records on your client and found that he absconded in France in June 2003, I am satisfied that your client's account that he was either told to leave France or removed from France by the French authorities has no credibility."*

The significance of this part of the letter will become apparent shortly.

17. On 1 November 2007 the Defendant filed her Acknowledgement of Service and Summary Grounds of Opposition. The Summary Grounds followed, essentially, the line which had been taken in the letter of 26 October 2007.

18. On 21 January 2008 the application for permission to apply for judicial review was considered by Sullivan J (as he then was). He refused permission to apply for judicial review. He observed:-

> *"The decision letter dated 26 October 2007 comprehensively answers all of the arguments set out in the Claimant's statement of grounds. Those advising the Claimant have had ten weeks in which to respond to the points made in the decision letter: e.g. by providing further evidence that the Claimant was out of the EU for period of excess of 3 months. No further representations have been made, and there has been no request to amend the grounds so as to engage with the points made in the decision letter."*

19. On 29 January 2008 the Claimant's lawyers renewed the application for permission to apply for judicial review. Further, the day following, amended grounds were submitted in support of the claim. The amended grounds continued to rely on the assertion that it was unreasonable for the Defendant to have certified the Claimant's asylum claim on safe third-country grounds and that the decision was not in accordance with Article 16(3) of Dublin II. However the grounds relating to the "*family links policy"* and Article 15 of Dublin II were deleted. The additional grounds, in summary, consisted of two assertions. First that the letter of 26 October 2007 contained a *"fundamental error"* in that it asserted that the Claimant had claimed that the French authorities had removed him to Sri Lanka or facilitated his removal. In fact no such thing had occurred and he had never claimed that it had. Second the grounds referred to further documentation which had been supplied to the Defendant which showed that he had been in Sri Lanka for a period in excess of 3 months and yet this documentation had been ignored. I set out the amended grounds as they relate to this last issue in full:-

> "*25. In any event, the Claimant has finally succeeded in obtaining some evidence from K Uthayakumaran, High Court Registrar, confirming that the Claimant was resident at 13 Outer Circular Road Vavuniya between July 2006 and January 2007. This document has been faxed from Sri Lanka and the original had not been received by post as at the date of drafting. The reference* [within the document] *to "sister" is the Claimant's cousin sister.*
>
> *26. It is further understood that the Claimant, since receiving the letter from the Defendant of 26 October 2007, has been making attempts to obtain evidence to confirm his residence in Sri Lanka. A statement of truth of the Claimant is submitted to these amended grounds in support, setting out the difficulties he has faced in obtaining the evidence due to the current security situation there.*

> *27. It is also understood that he is awaiting further evidence from Sri Lanka and that his representatives are also making attempts to follow the matter up."*

20. A copy of the letter from Mr Uthayakumaran certainly exists and was placed before me. The copy is dated 28 January 2008. So far as I am aware the original of this document has not been produced either to the Court or to the Defendant. That said a copy of the front of an envelope apparently coming from Mr. Uthayakumaran was produced to me.

21. On 9 May 2008 the renewed application came before Saunders J. He granted permission. A transcript of his short judgment is before me. The relevant extracts are these:-

> *"2. One of the reasons that the Secretary of State concluded that he had not been out of France for three months and returned to Sri Lanka was because she claimed that he stated that he was returned to Sri Lanka by the French authorities some time after he made the asylum application in France. The French authorities say that that this is incorrect, he simply absconded. Therefore, that was one of the bases on which the Defendant has concluded that his account of being out of France for three months is not reliable.*
>
> *3. I simply cannot find the evidential basis upon which the Defendant has come to that conclusion. If she has acted under a mistake of fact, in my judgment, this Court at least should look in more detail at whether or not the decision should stand. Accordingly, in this case, I grant leave."*

22. On the same day as the renewed hearing came before Saunders J Ms Parameswaran, a paralegal employed by the solicitors then acting for the Claimant made a witness statement. She certified its contents as being truthful. In the statement she explained that a letter dated 20 December 2007 from a man called Sivanatan Kisshor an MP for the Vanni Electoral District within Sri Lanka had been received by fax. In the light of the contents of the letter the Claimant's solicitors had written to the MP seeking clarification of its contents. Mr Kisshor had sent a letter in reply which had been received by the solicitors on 28 April 2008. Ms Parameswaran attached copies of these letters to her witness statement. The Claimant's current solicitors have obtained and sent to me a letter from Ms Parameswaran's principal in which she says in terms that Ms Parameswaran's statement and exhibits were sent both to the Court and to the Treasury Solicitor in advance of the hearing before Saunders J.

23. There is no reference to these documents in the short judgment of Saunders J. That, in itself, is not surprising.

24. On 5 June 2008 the Border Agency wrote to the Claimant's solicitor. It did so to clarify its position in the light of observations of Saunders J quoted above. The letter of 5 June 2008 made no reference to the documents which had been submitted to the court immediately prior to the hearing before Saunders J. The Claimant's solicitors responded in detail to that letter. It is to be noted that the solicitors' letter contained the following complaint:-

> "*In paragraph 6 of the Secretary of State's letter dated 5 June 2008, the Secretary of State submits that the evidence our client has provided is not sufficient to prove that he had left the territory of the EU for a period exceeding three months prior to him leaving France and entering the UK. We submit that the Secretary of State has not given the appropriate consideration to each one of the independent pieces of evidence submitted. We fail to see how the Secretary of State could come to a conclusion without considering the documentation substantially.* "

This extract from the letter can only be a reference to the documents submitted to the Court on 8 May 2008 together with the earlier letter dated 28 January 2008 from Mr Uthayakumaran.

25. On 18 July 2008 the Defendant served detailed grounds of defence. These detailed grounds do not mention the documents which the Claimant's solicitors had submitted to the Court during 2008.

26. On 17 April 2009 the UK Border Agency wrote to the solicitors currently instructed by the Claimant. They did so because the Claimant had recently applied for and been granted a certificate of approval allowing him to marry a British Citizen (the marriage took place shortly after). The letter of 17 April 2009 was intended to set out the Defendant's stance on whether removal to France would infringe the Claimant's rights under Article 8 of the Convention in the light of this development. In summary the decision was reached that there would be no breach of Article 8. Further, the decision was made that the certificate that the claim under Article 8 was clearly unfounded under paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004 should be maintained.

27. On 8 May 2009 this court received a further document on behalf of the Claimant. It is headed Amended Grounds and Skeleton Argument and it is settled by Miss Jegarajah. The document was put in to address the decisions made on 5 June 2008 and 17 April 2009. I granted permission to the Claimant to rely upon such new points as was contained within that document.

28. As I have said, the letter of 5 June 2008 was written so as to clarify the position of the Defendant in the light of the observations made by Saunders J. Having done so, it maintained the view that the Claimant's asylum claim should be determined in France. In her Amended Grounds and Skeleton Argument Ms Jegarajah takes issue with the lawfulness of that decision. In summary, she complains that the Defendant was under a duty which was a continuing one to make representations to the French authorities which set out the true factual position in the light of the whole of the evidence about which country should take responsibility for determining the Claimant's asylum claim. This duty was said to arise and continue particularly in a case, such as the present, in which the French authorities had twice refused responsibility for the asylum claim before accepting it. Ms Jegarajah submits that this is simply a matter of transparency, good faith and fairness. In making this submission she appreciates that the alleged independent information upon which the Claimant relies to support his assertion that he had left France for a period of more than three months before coming to the UK did not reach the Defendant until after France

accepted responsibility to determine the asylum application. In effect, Ms Jegarajah submits that makes no difference. In so far as a decision of Silber J in **R(Chen) v Secretary of State for the Home Department** [2008] EWHC 437 (Admin) suggests otherwise it was wrong, so she submits.

29. Ms Jegarajah's attack upon the decision of 17 April 2009 related to that part of it which certified that the Claimant's Article 8 claim was clearly unfounded. She submits that the Defendant has made a clear error of law in so certifying.

30. During the course of oral argument it became clear that the Claimant no longer relied upon the ground which had persuaded Saunders J to grant permission. Ms Jegarajah frankly conceded that this ground fell away in the light of the Defendant's letter of 5 June 2008. I need say no more about it. In essence, therefore, the oral hearing proceeded on the basis of the Amended Grounds and Skeleton Arguments submitted by Ms Jegarajah and her oral submissions in support thereof summarised above. I should record that I gave her permission to proceed on that basis notwithstanding objection from Mr Barnes. I did so having first obtained his assurance that he was in a position to deal with the points raised in Ms Jegarajah's Skeleton.

The decisions under Dublin II

31. Ms Jegararah does not and could not suggest that the Defendant did anything unlawful by making a request to the French authorities that they should determine the Claimant's application for asylum. The Claimant made his claim for asylum in the United Kingdom on 22 February 2007 and the Defendant made her request to the French authorities that they assume responsibility for the asylum claim on 7 March 2007. That was well within the time limit specified for making such a request to the French authorities (see Article 17 of Dublin II). Article 3.4 of Dublin II provides that the asylum seeker should be provided with written information about Dublin II – its application, its time limits and its effects. It is not suggested on behalf of the Claimant that the letter sent on behalf of the Defendant dated 15 March 2007 did not comply with that Article.

32. In my judgment this letter is important. As Mr Barnes submits it gives a clear indication to the Claimant that the Defendant was considering the possibility that another country might be responsible for determining his asylum claim. It is not suggested on behalf of the Claimant that he made any protest about that possibility at that stage or in the weeks immediately following.

33. As I set out in paragraphs 6 to 10 above, between 20 March 2007 and 26 April 2007 there was a debate in correspondence between the French authorities and the Defendant about whether the French authorities or the Defendant should assume responsibility for determining the Claimant's asylum claim. In that period no information was provided by the Claimant to the Defendant about his whereabouts prior to his entry into the United Kingdom notwithstanding the fact that he had been warned by the letter of 15 March 2007 that the Defendant was considering asking another country to determine his asylum application.

34. On 1 May 2007 the solicitors acting on behalf of the Claimant requested a progress report. There was no suggestion in the letter of 1 May 2007 that the Claimant would resist a transfer to another country for the determination of his asylum claim. As I

have said (see paragraph 9 above) the letter of 1 May 2007 provoked a reply dated 10 May 2007. In that letter the solicitors were informed that a formal request had been made to France to accept responsibility for the Claimant's asylum claim.

35. The terms of that letter were not entirely accurate as I have set out above in paragraph 9. However the letter was accurate to the extent that the Claimant's solicitors were informed that a formal request had been made to the French authorities to accept responsibility for the Claimant's asylum claim. Further the letter was accurate in informing the Claimant's solicitors that he had previously claimed asylum in France on 23 June 2003.

36. The Claimant did not respond to that letter. He did not protest about the request which had been made to France and he did not provide any information to the Defendant which would have alerted her to the possibility that the Claimant was contesting the notion that the French authorities should determine his asylum claim.

37. As is clear from the foregoing the Claimant was aware of the real possibility that the French authorities would accept that they were responsible for determining his asylum claim by the middle of May 2007 yet he said or did nothing to suggest that this was inappropriate until September 2007. By that date, of course, the French authorities had accepted responsibility for determining the Claimant's asylum claim.

38. I accept that the letter of 10 May 2007 was written in terms which did not suggest that the French authorities had, twice, suggested that they should not be responsible for determining the Claimant's asylum claim. I find it difficult to accept, however, that had this information been imparted to the Claimant but he had also been told (as was the case) that the Defendant was pressing the French authorities to accept responsibility he would have behaved any differently in the period May to September to the way in which he did. Just is importantly it seems unlikely that in that time scale he could have produced any convincing evidence to suggest that he had left France for more than three months before claiming asylum in the UK. To repeat the plain fact is that from March 2007 to September 2007 the Claimant had the opportunity of giving accurate information to the Defendant about the countries in which he had been in the years leading to his entry into the United Kingdom. Specifically, as from receipt of the letter of 10 May 2007 the Claimant had the opportunity to produce evidence to rebut the Defendant's view that the French authorities should determine the Claimant's claim for asylum because he had claimed asylum in June 2003 in that country. He did nothing.

39. When one member state makes a request of another to assume responsibility for an asylum claim it must do so:-

> *" …… using a standard form and including proof or circumstantial evidence as described in the two lists mentioned in Article 18(3) and/or relevant elements from the asylum seekers statement, enabling the authorities of the requested member state to check whether it was responsible on the basis of the criteria laid down by this Regulation."* (see Article 17(3))

There is no suggestion that the Defendant did not comply with that Article in her dealings with the French authorities prior to their assumption of responsibility for the Claimant's claim. The Defendant knew nothing prior to June 2007 which was not communicated to the French authorities.

40. Article 21 of Dublin II contains detailed provisions about the information which may be provided to the member state which is asked assume responsibility for the asylum claim. The provisions of Article 21(8) and (9) are worth noting:-

> *"(8) The Member State which forwards the information shall ensure that it is accurate and up-to-date. If it transpires that that Member State has forwarded information which is inaccurate or which would not have been forwarded, the recipient Member States shall be informed thereof immediately. They shall be obliged to correct such information or to have it erased.*
>
> *(9) The asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him."*

It has not been suggested that the Defendant forwarded information to the French authorities in advance of its determination which was inaccurate or which should not have been forwarded. Further, there is no suggestion that the Defendant knew or should have known of information about the Claimant which cast doubt upon the information provided to the French authorities before the decision was taken by them to assume responsibility for the Claimant's asylum claim. There is no suggestion in this case that the Claimant sought any information about the data that had been processed concerning him before the French authorities made their determination.

41. In the light of the foregoing I can find no basis for the suggestion that the Defendant acted unfairly towards the Claimant. I accept, as I have said, that the letter sent on behalf of the Defendant to the Claimant's solicitors on 10 May 2007 did not contain a complete record of what had transpired between the French authorities and the Defendant. However given the facts and conclusions set out above I have reached the clear conclusion that the Claimant has failed to establish that this resulted in any unfairness.

42. As I have set out in some detail, from September 2007 onwards the Claimant sought to establish by evidence that he was in Sri Lanka for a significant period in 2006 and early 2007. From 2007, onwards, the Claimant has asserted that the French authorities should not assume responsibility for determining his asylum claim by virtue of Article 16(3) of Dublin II. That reads:-

> "*The obligations specified in paragraph 1* [to take back the asylum seeker and determine his claim for asylum] *shall ceased where the third country national has left the territory of the member states for at least three months ……*"

As I have said the Claimant has sought to provide evidence to suggest that he was in Sri Lanka for a period of more than three months in 2006 and 2007.

43. It seems clear to me that the Defendant has never considered the material which is said to support the Claimant's assertion. In the particular context of this case, however, I am completely satisfied that this does not matter. I say that firstly by reason of the decision of Silber J in **Chen**. In that case Silber J considered, specifically, what obligations (if any) fell upon the Defendant in relation to information communicated to her on behalf of the Claimant tending to show that the Claimant fell within Article 16(3) but after the requested member state had accepted responsibility to determine the claim for asylum. In **Chen**, Counsel for the Claimant made the specific submission that upon receipt of such information the Defendant became under an obligation or duty to inform the authorities of the member state of such information or themselves assume responsibility for the asylum claim. Silber J dealt with this submission in the following passage of his judgment:-

> *"30. I am unable to accept the claimant's submission because it runs in the face of the scheme set out in the Dublin Regulations II. I have already explained that the purpose of the Dublin Regulations II as set out in the recital to the Dublin Regulations was "to determine rapidly the Member States [for examining an asylum application lodged in one of the member states by a third country national]"*
>
> *31. Indeed the position is made clear by article 4 of the Implementation Regulations which states*
>
> > *"When a request for taking back is based on data supplied by the Eurodac Central Unit and checked by the requesting member State in accordance with ... the requested Member State shall acknowledge its responsibility unless the checks carried out reveal its obligations have ceased".*
>
> *32. I attached importance to the mandatory nature of this obligation which is shown by the use of the word "shall" which demonstrates that the obligation is mandatory. There is no provision in either of these regulations or any other regulation which requires or even enables a country to withdraw a request to a member state under the Dublin Regulation in the situation arising in this case. As I have explained, the pre-amble to the Dublin Regulations II explains the need to deal with the asylum applications "rapidly" and that shows that a speedy decision is required rather than a long drawn-out procedure."*

44. Ms Jegarajah submits that Silber J's reasoning is wrong and that he has attached too much attention to that part of the recital to Dublin II which emphasises the need to determine rapidly the member state which should determine the asylum claim. Miss Jegarajah points out, correctly, that the recital to Dublin II also contains the following passage:-

> *"4. Such a method [i.e. the method for determining the member state responsible for the determination for the asylum application] should be based on objective fair criteria both the member states and for the persons concerned."*

45. In my judgment there is nothing unfair to an asylum seeker to hold that the requesting member state has no duty to provide information to the member state which has been asked to determine the asylum claim if that information comes to light after the requested state has accepted responsibility to determine the claim. The asylum seeker will, in the vast majority of cases, have the opportunity of making representations about his proposed removal before the requested state makes its decision. Essentially, I agree with the views of Silber J. However, there is no need to decide the point of principle definitively in this case. The issue I have to consider is whether, on the facts of this case, the Defendant became obliged to pass on information which came into her hands which was provided by the Claimant many months after the French authorities had accepted responsibility to determine the claim and against a context that the Claimant had failed without explanation to provide such information in the many weeks before the French authorities accepted responsibility to determine the claim.

46. I have reached the clear conclusion that the Defendant did not act unfairly towards the Claimant at any time prior to the French authorities accepting responsibility to determine the Claimant's asylum claim and that on the facts of this case, at the very least, there was nothing unfair about the Defendant's failure to pass on information to the French authorities which came into her hands many months after they had assumed responsibility for the claim.

47. I add one further observation about the suggestion that it can be unfair to a Claimant if information tending to suggest that Article 16(3) may apply is withheld from the member state requested to determine the asylum claim. The whole purpose of Dublin II is to provide a mechanism for determining which of the contracting states should determine an application for asylum. It is very difficult to envisage circumstances in which it could be thought to be unfair to an asylum seeker that his application for asylum was determined in one member country as opposed to another. If removal to a third country would involve a breach of the asylum seeker's human rights under the European Convention on Human Rights, of course, the removal can be challenged and it may be that a separate and parallel challenge can also be brought and maintained against the allocation of responsibility under Dublin II (see **R (AA v Secretary of State for the Home Department** [2006] EWCA Civ 1550 per Laws LJ). That same case suggests that a challenge to allocation may also be brought on rationality grounds.

48. Once the French authorities accepted responsibility for determining the Claimant's asylum claim the Defendant certified that she proposed to remove the Claimant to France and that, in her opinion, the Claimant was not French. In so doing she acted entirely lawfully in accordance with Schedule 3 paragraph 3(2) of the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004.

The Certification of the Claimant's Article 8 Claim as clearly unfounded

49. By virtue of paragraph 5(4) of Schedule 3 to the 2004 Act it was open to the Defendant to certify that any human rights claim brought by the Claimant was clearly unfounded. Indeed by virtue of that paragraph it was mandatory for the Defendant so to certify *"unless satisfied that the Claim [was] not clearly unfounded"*.

50. The Defendant considered the human rights claims made by the Claimant, first, in the letter of 3 September 2007. To recap, she dealt with claims under Article 2, 3, 8 and 14 of the Convention. In summary, the Defendant rejected all the Claimant's claims. Additionally, however, she said:-

> *"13. In addition, your client's human rights claim is one to which paragraph 5(4) of schedule 3 to the Asylum and Immigration (Treatment of Claimant etc) Act 2004 applies. This requires the Secretary of State to certify your client's human rights claim as being clearly unfounded unless she is satisfied that it is not clearly unfounded.*
>
> *Having carefully considered all of the evidence available to him, the Secretary of State has decided that she is not satisfied that your client's human rights' claim is not clearly unfounded.*
>
> *14. Therefore, she hereby certifies under the provisions of paragraph 5(4) of schedule 3 to the Asylum and Immigration (Treatment of Claimant etc) Act 2004 that your client's human rights claim is clearly unfounded."*

51. In the original ground for judicial review this certification was not impugned. Further it was not impugned in the Amended Statement of Grounds dated 30 June 2008. The first time that certification was alleged to be unlawful was when Ms Jegarajah presented her Amended Grounds and Skeleton Argument dated 8 May 2009. In that document she alleged that the certification of the Claimant's human rights claims, in so far as it related to the claim under Article 8, was unlawful.

52. The approach to be adopted to challenges to certification has recently been considered in the House of Lords in **ZT(Kosovo) v Secretary of State for the Home Department** [2009] 1 WLR 348. It is unnecessary to quote from the speeches of their Lordships. It suffices that I record that in judging the issue of whether or not the Defendant acted unlawfully in certifying the claim under Article 8 I have followed the principles elucidated in those speeches.

53. The relevant decision letter for me to consider is the letter of 17 April 2009. In paragraph 1 the letter records:-

> *"Your client has recently applied for and been granted a certificate of approval (COA) allowing him to marry a British Citizen. In light of this change in your client's circumstances, the UK Border Agency has reconsidered ECHR Article 8 in regard to his removal to France."*

54. In paragraph 3 the letter records the information provided by the Claimant about the circumstances leading to the grant of the COA. The application for COA was made on 9 January 2009. It revealed that the Claimant proposed to marry Miss S Satkunarajah who is a British citizen. The Claimant had met his intended bride in June 2008 and in August 2008 the Claimant's parents and the parents of Miss Satkunarajah had proposed a marriage. The further information provided was that the Claimant and Miss Satkunarajah planned to marry in a religious ceremony on 11 April 2009 and thereafter enter into a civil wedding according to the law of the United Kingdom. As I

understand it the Claimant and Miss Satkunarajah married under the laws of the UK on 22 April 2009 having undergone a religious ceremony on 11 April.

55. In paragraphs 5 to 10 of its letter the Border Agency explains why it is that it reached the conclusion that removal to France would not breach the Claimant's rights under Article 8. It suffices that I say that the paragraphs relate to all of the features usually associated with the proposed removal of a person who is married to a British citizen. Ms Jegarajah does not suggest that it was not open to the Defendant to reach the conclusion that a removal to France would not breach the Claimant's rights under Article 8. She does not need to do so, of course, for the purpose of her challenge to the certification.

56. The only mention of certification in the letter of 17 April 2009 is that contained within paragraph 10. That paragraph reads:-

> *"In light of the above, the UK Border Agency is satisfied that your Client's removal to France will not be a breach of ECHR Article 8. The UK Border Agency is satisfied that your client's removal to France is also reasonable and proportionate under 8(2) of the ECHR. Therefore, the previous certification of 3 September 2007 certifying your client's Article 8 ECHR claim as 'clearly unfounded' under paragraph 5(4) of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act is hereby maintained."*

57. A literal reading of this paragraph would suggest that the decision maker has certified simply because the decision has been reached that the removal would not breach the Claimant's rights under Article 8. If that is the true position the decision maker has applied the wrong test. Clearly, the claim need not be clearly unfounded even though the decision maker has reached the conclusion, on balance, that he or she should not accede to it.

58. Ms Jegarajah points out that the Claimant's marriage to a British citizen cannot be viewed as the only aspect which should be considered in relation to a claim under Article 8. The Claimant's close family members reside, lawfully, in the UK. His father was granted refugee status in 2001. The Claimant's mother and siblings joined his father in 2002 and the Claimant's sister is now a British citizen.

59. On the basis of the decision letter of 17 April 2009 I cannot be satisfied that the decision maker applied the correct test when determining whether or not the Claimant's claim under Article 8 should be certified. Further I am persuaded that the decision to certify was not rational as that word is explained in the speeches of their Lordships in **ZT(Kosovo**). In my judgment there are sufficient features in support of a claim under Article 8 in this case, to make it irrational to certify such a claim as clearly unfounded.

60. In reaching this conclusion I have ignored the letter which was sent to the Claimant when he was granted approval to marry. I have done so since there is no basis upon which I could conclude that the letter had been considered by the decision maker before the claim had been certified. However, even if I am wrong to ignore that letter it does not seem to me that its terms are such that I could conclude that it was not irrational to certify the claim under Article 8.

61. The Claimant should understand that my decision affects only certification. He will now be free to appeal against the dismissal of his human rights claim under Article 8. I say nothing about the merits of such an appeal save, of course, that it follows from my judgment that his claim under Article 8 cannot be categorised as clearly unfounded.

62. I propose to make an order quashing the decision of the Defendant to certify the Claimant's claim under Article 8 of the European Convention on Human Rights as clearly unfounded. Otherwise this application for judicial review is dismissed.