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CO/8588/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 18th December 2008

**B e f o r e**:

**MR JUSTICE CRANSTON**

**Between**:
**KESHWARI**

**Claimant**

v

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Defendant**

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(Official Shorthand Writers to the Court)

**Mr B Bedford** (instructed by Sultan Lloyd Solicitors) appeared on behalf of the **Claimant**
**Mr J Johnson** (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

J U D G M E N T
(As Approved by the Court)

1. MR JUSTICE CRANSTON: This is an application for judicial review lodged by a claimant from Iran. The primary claim relates to unlawful delay in the consideration of his claim. Despite some ingenious arguments drawing, in part, on European Union law, in my judgment the claim fails.

Background

2. The background is that in September 2004 the claimant entered the United Kingdom in a lorry. When he was discovered he claimed asylum. His fingerprints were taken and that uncovered a previous claim for asylum made in Greece. He was then released and assessed for age. The Secretary of State asked Greece to take responsibility for determining his claim under the Dublin Regulation EC 343/2003, and in late 2004 the Greek authorities agreed. The claimant was then detained in early 2005 to be removed to Greece, but he harmed himself when he was in detention and the removal directions were cancelled.

3. Before new removal directions were set, there was an age assessment by Birmingham Social Services that he was a minor, and Social Services said that they would take responsibility for him. The Secretary of State then cancelled the removal, as she was obliged to do under the Dublin Regulation, since he was an unaccompanied minor. He was then released.

4. In late 2005 the claimant was detained under the Mental Health Act, although in December he was released. In early 2006 his solicitors wrote to the Secretary of State and alleged that the delay in considering his claim was exacerbating his mental health problems. There was also a complaint that there had been a failure to supply him an application registration card. The Secretary of State responded in a letter dated 2nd February 2006. In that letter the Secretary of State said:

> "I have reviewed the file and can confirm that your client was initially refused asylum on the basis of third country grounds but that we made a decision not to pursue these grounds on 5th April 2005. It is not clear why his case has not been progressed since this date and I apologise for the problems this inaction has caused."

There were then various letters from the claimant's solicitors in 2006 asking the Secretary of State to examine his case and also to exempt him from reporting conditions. He provided evidence from a GP, and also from a nurse, to the effect that he had poor concentration and was easily confused and would get lost. The Secretary of State declined to change the reporting conditions. But what of his asylum application?

5. We now know, in part, what happened during 2006 from a witness statement for these proceedings by Mr Nelson, a senior official in the Home Office. Mr Nelson first of all recalls that the claimant had been detained under the Mental Health Act, had been released, then records the letter from the solicitors and the letter sent on 2nd February by the Secretary of State indicating that a screening interview would be arranged and an

appointment set for 5th March. There was an internal note to the effect that after completion of the screening interview a substantive asylum interview should be arranged. On 1st March the claimant was issued with an application registration card. There are also Home Office records to the effect that the claimant failed to report on a number of occasions.

6. In May, June, September and December 2006 the solicitors for the claimant asked the Secretary of State to examine the case. On 5th July the Secretary of State's records indicate that the claimant was referred for an interview. However, on 11th July it is noted that the claimant's case was put into the "work in progress" storage. Mr Nelson explains that this is like an in-tray, in the sense that a case worker would have a number of current files ongoing at a particular time and a number of other files which are "work in progress" to be dealt with at a later date. Significantly Mr Nelson says this:

> "It is not clear why [the claimant's] case was put into WIPS [work in progress storage] at this time. However, the court may wish to note that this date coincides more or less with the announcement of a new system for dealing with the backlog of asylum cases within the IND as it then was. The Case Resolution Directorate was set up to deal with these cases and the programme, expected to last for five years started on 1st November 2006."

Mr Nelson goes on to say that the fact that a case is an initial asylum claim is a reason for giving it a priority, but it would not have been clear to the case worker that this was the situation for this claimant without a review of the file.

7. In early 2007 the claimant's solicitors sent a letter before action challenging the delay. The Secretary of State replied that the claimant's case fell within the ambit of the legacy policy, that there were some 400,000 to 450,000 cases in that category and it was not possible to say when the case would be dealt with. Then in July 2007 the claimant's solicitors asked that the case be given immediate attention and that he be granted discretionary leave to remain because he had developed a mental illness while in the United Kingdom. Finally, in October of that year the present proceedings were issued.

8. Subsequent steps following the initiation of proceedings need not detain me, but I note that in December of last year the Secretary of State informed the claimant that his asylum application was now under consideration by a case worker and that a decision would be reached as soon as practicable. The Secretary of State also gave the claimant permission to work and invited him to withdraw his judicial review application. The claimant's solicitors refused on the basis that they had received no firm timetable for dealing with the case. At one point early this year the Secretary of State offered to pay the claimant's costs of the application and promised to make a decision within six months. Ultimately, as I will explain in a moment, an asylum interview was held and an appeal to the Tribunal lodged.

The Medical Evidence

9. Let me turn to the medical evidence. I have already noted that the claimant was detained under the Mental Health Act in October 2005. That was at Ardenleigh Forensic Children's and Adolescents' Mental Health Service ("Ardenleigh") in January 2006 the claimant was seen by a Farsi speaking psychiatrist, Dr Abassi. The claimant was able to give an account to Dr Abassi about the details of his life in Iran prior to coming to the United Kingdom. In Dr Abassi's handwritten account of what the claimant told him, there is reference to the fact that although the claimant said in respect of some questions that he could not remember or did not know, he did say that his older brother had been executed by the regime for political reasons and that another brother was in prison.

10. When the claimant was discharged from Ardenleigh in February 2006 he was described by Dr Julie Withecombe, a consultant forensic child and adolescent psychiatrist, as "extremely well and mentally stable". On 7th September 2006 Dr Lister, a consultant psychiatrist, stated that she was not able to detect any evidence of deterioration or relapse. Subsequently, on 4th December 2006, Dr Lister recorded:

> "Objectively she could see little evidence of a change in his mental state from his previous presentations . . . He seems to have a fairly chaotic lifestyle and once again arrived late. He does not seem to have too much trouble expressing himself to the interpreter. He looks physically well and there is no evidence to suggest weight loss and there is little evidence of self neglect."

On 4th January 2007 a social worker informed the claimant's solicitors that:

> "The claimant had recently been prescribed new antipsychotic medication which seemed to be having detrimental effects on the claimant's ability to concentrate and remember where he was going. Consequently he has been missing significant appointments with the Home Office. The final factor in the claimant's case is causing undue distress in his immigration status."

11. In mid-2007 Dr Lister said that given the claimant's condition it was not in his best interests to defer the decision-making process regarding his status in the UK any further. Dr Lister said this:

> "Even with the assistance of an interpreter communication with Mr Keshwari in a clinical arena is extremely problematic. He is not able to [give] an account of himself or answer questions properly by virtue of his disability and other factors. He would not perform well in court or in a formal interview situation. This is unlikely to change in the immediate future."

In October 2007 Dr Abassi noted that there had been a deterioration since he had last seen the claimant and that the claimant had become less animated and had aged considerably.

12. Then we have the reports in 2008 from Dr Dale. In June Dr Dale noted that the claimant suffered from a mental disorder, that his deterioration followed an initial period of good pre-morbid functioning, that he had at times feigned psychiatric symptoms and made threats to self-harm, and that it was difficult to give a prognosis. He had experienced, in her view, a prolonged episode of mental ill-health, along with a decline in his functioning. As a Registrar, Dr Dale was not entitled to give a final opinion. As a result, the claimant's solicitors made enquiry of Dr McGovern, a consultant psychiatrist at the Birmingham and Solihull Mental Health NHS Foundation Trust. The solicitors asked for clarification in relation to Dr Abassi's view of a deterioration between January 2006 and 5th October 2007. In reply, Dr McGovern referred to a loss of memory of personal events -- the amnesia appeared to have coincided with the onset of mental symptoms -- which had never been recovered over the subsequent period. Dr McGovern went on to explore possible causes and rejected a reluctance to seek help and malingering. He said that it might be due to psychogenic amnesia. Later in the letter, Dr McGovern said he agreed with previous psychiatrists that the claimant was suffering from a psychosis. Its severity was moderate. In particular, Dr McGovern said this:

> "I am afraid that like Dr Dale I find it hard to understand the explanation for his amnesia for events prior to coming to the UK. The most likely explanatory factors are his psychotic illness or some form of psychogenic amnesia."

The Asylum Claim

13. To return to the asylum claim, the claimant had given an account to his solicitor in December 2004. There he said that seven years previously the Iranian security forces had raided his home looking for his older brother, who was involved with a political group. The claimant had tried to stop them from coming in and was beaten. His nose and hand had been injured and his brother had been taken by the security forces but the claimant did not know where. The claimant's mother had died of a heart attack and his father had died four months later of cancer. The claimant said that he had spent some time working for the political group, under duress. He told his solicitor that another of the claimant's elder brothers was also involved with the same political group. That brother had forced the claimant to assist him at demonstrations in setting fire to photographs of Khatami and Khamenei. The claimant said that the night the claimant left his house, three officers had raided it. The claimant's brother was at home. The claimant panicked, grabbed a knife and tried to threaten the officers but they would not stop and he stabbed one of them and fled the house. In January 2006 the claimant gave an update to his solicitor of his account.

14. The claimant's asylum interview occurred in early April 2008. The claimant said he was unable to or could not answer the questions. His claim was refused on 15th April 2008. The matter then went before Immigration Judge Forrester. On 5th August 2008 the Immigration Judge rejected the claim. The judge said that the evidence before him was scant in the extreme and came only from the notes the claimant's solicitor had taken in 2004. The Immigration Judge said that there was no evidence of the injuries which the claimant had said he had incurred, despite the considerable medical attention

he had received since 2005. It appeared to the learned judge that it was far more likely such an incident occurred in the way described if he were five years older than he said. In fact, the Immigration Judge went on to find that the claimant was older than he claimed. He noted that there was no evidence as to the time and circumstances of the claimant's departure from Iran. At paragraph 15 the Immigration Judge said this:

> "It was urged upon me that delay in the processing of the appellant's claim for asylum has either caused his mental illness or exacerbated it. What appears clear from the medical reports is that the appellant's condition was manifesting itself in early 2005 and may have worsened by his detention in March 2005 as a possible deportee. Insofar as his suicide risk is concerned that was the only occasion when he evidenced any attempt to self harm to a significant degree. But the onset of that medical condition was clearly not triggered by delay. It was also suggested that if the claim had been processed within a reasonable period of time, that that would have resulted in a grant of DLR even if the asylum claim had been refused. However given my conclusion as to the likely age of the appellant he would have been aged 23 in 2006, the age he appears to have claimed in conversations with his peers in that year."

The claimant sought a statutory review of the refusal but that was refused in late October of this year.

The Law

**(a) European Union Law**

15. A number of European Union instruments have been used to advance the claimant's case. First of all, the Charter of Fundamental Rights of the European Union ("the Charter") [2000] OJ C364/1 is invoked. Article 18 recognises a right to asylum as guaranteed by the Geneva Convention and Protocol. Article 47 of the Charter refers to a right to an effective remedy and to a fair trial, very much along the lines provided for in Article 6 of the European Convention on Human Rights ("the European Convention").

16. The second European Union instrument is the Dublin Regulation EC 343/2003 of 18th February 2003. In accordance with it member states have to assess, on the basis of objective and hierarchical criteria, which one is responsible for examining an asylum application lodged on their territory. The system is designed to prevent asylum shopping and at the same time to ensure that each asylum applicant's case is processed by only one member state. In the recitals the Regulation refers to a common European asylum system, and cross-refers to the fundamental right set out in the Charter, in particular the right to asylum guaranteed by Article 18. Article 2 contains definitions of "applications for asylum" and "unaccompanied minors". Article 3, paragraph (1) provides that member states shall examine the application of any third country national who applies at the border or in their territory to only one of them for asylum. The application shall be examined by a single member state which is the one responsible under the criteria set out in chapter 3. There is the provision alluded to earlier, Article

6, which deals with claims by unaccompanied minors. It indicates that in the absence of a family member, the member state responsible for examining the application is to be the one where the minor has lodged his or her application for asylum. Article 16 of the Regulation contains the obligation of the member state responsible under the criteria in chapter 3, when approached to take charge of the asylum seeker and, consequently, to examine the application to do so. Article 16 also provides that the member state responsible for examining an application for asylum under the regulation shall be obliged to:

> "(b) complete the examination of the application for asylum."

17. The third instrument is the so called Qualification Directive [2004] OJL 304/12. The Qualification Directive in its first recital refers to the common European asylum system. It also cross-refers to the fundamental rights in the Charter. Recital 12 refers to the best interests of the child as the primary consideration for member states when implementing the directive. Article 13 of the Qualification Directive says:

> "Member states shall grant refugee status to a third country national or a stateless person who qualifies as a refugee in accordance with chapters 2 and 3."

There follow in the Qualification Directive provisions such as Articles 26, 27 and 31, which set out the right to access certain social services and public services, and also the right to employment, for those who qualify for refugee status.

18. The final instrument is Council Directive 2005/85/EC of 1st December 2005 [2005] OJL 326/13 ("the Procedures Directive"). That Directive contains minimum standards for procedures in member states for granting and considering refugee status. Article 6(2) says that member states shall ensure that each adult having legal capacity has the right to make an application for asylum on his or her own behalf. Article 23, entitled "Examination Procedure", provides that member states shall process applications for asylum in accordance with the basic principles and guarantees of chapter 2. They shall ensure that such a procedure "is concluded as soon as possible without prejudice to an adequate and complete examination". In particular, member states need to ensure that where a decision cannot be taken within six months, the applicant concerned shall either be informed of the delay or shall receive, upon their request, information on the time frame within which the decision is to be expected:

> "Such information shall not constitute obligation for the member state towards the applicant concerned to take a decision within that time frame."

**(b) The Case Law**

19. Turning to the case law relied on by the claimant in this judicial review, the first concern Article 6 of the European Convention on Human Rights and the nature of the right given there. I have already referred to the mirror provision in the European Charter. Two cases decided by the Grand Chamber of the European Court of Human

Rights refer to the application of Article 6 to asylum claims. The first case, **Maaouia v France** (2000) 33 EHRR 1037, says:

> "The court concludes that decisions regarding the entry, stay and deportation of aliens do not concern the determination of an applicant's civil rights or obligations or of a criminal charge against him, within the meaning of Article 6(1) of the Convention." (Paragraph 40)

That was not a case which directly involved a claim for asylum. Nor did the subsequent case of **Eskelinen v Finland**, decided by the Grand Chamber on 19th April 2007. Nonetheless, the European Court of Human Rights said:

> "It should be emphasised, however, that this situation is distinct from other cases, which due to the claims being made are regarded as falling outside the civil and criminal heads of Article 6(1) of the Convention . . . for matters of asylum, nationality and residence in a country, **Maaouia v France** . . . "(Paragraph 61)

The approach of the Grand Chamber in **Maaouia** has been adopted by this court in cases such as **R (on the application of G) v Immigration Appeal Tribunal** [2004] 1 WLR 2953, [17]. There is a limited exception. In **Husain v Asylum Support Adjudicator** [2001] EWHC 852 Admin, at paragraph 54, it was said that a claim by destitute asylum seekers for support could be said to involve a claim to a civil right within the terms of Article 6. In general terms, the case law in relation to civil claims under Article 6(1) concludes that "civil" has the connotation of proceedings the result of which is decisive for private rights and obligations. The decision of **Konig v Federal Republic of Germany** [1978] 2 EHRR 170 is a leading authority.

20. The second body of case law the claimant refers to is that concerning delay in processing asylum claims. The leading case is **R (on the application of FH) v Secretary of State for the Home Department** [2007] EWHC 1571 (Admin). There Collins J considered a number of cases which were not initial claims cases, although he regarded one as akin to an initial claim case. There is a witness statement from a Miss Miles of the Home Office, which was before the court in **FH**. She said that some of the legacy cases were initial cases, but only a minority of the backlog of the some 450,000 cases. In his judgment, Collins J said that delays of 12 months or more in dealing with initial claims to asylum may well need an explanation but, provided the approach of the Secretary of State was based on a policy which was fair and applied consistently, such delays could not be regarded as unlawful. Collins J referred to Miss Miles' statement where she identified the different categories of cases which were to obtain priority. Included were cases which were truly exceptional and compassionate cases. The Home Office would attempt to resolve these cases within a relatively short period of time.

21. In **R (on the application of S) v Secretary of State for the Home Department** [2007] EWCA Civ 546, the claimant had entered the United Kingdom at the same time as his cousin and they both applied for asylum. The cousin was successful. The claimant's case had not been dealt with. There had been a policy decision to defer consideration of older asylum applications so as to meet certain performance targets. As a result, the

claimant was only interviewed a number of years later in 2004 and his asylum claim then rejected. The Taliban regime in Afghanistan had been removed and it meant that he was no longer at risk. Discretionary leave to remain had been refused. In the Court of Appeal, Carnwath LJ said that the postponement wholesale of all old cases was arbitrary and unlawful and it amounted to an abuse of power. He held, however, that the court itself could not grant indefinite leave to remain. Carnwath LJ said the absence of a decision had been caused by a deliberate and unlawful policy to postpone considering a category of cases which he said was solely for political reasons and without regard to fairness and consistency. His Lordship went on to observe that the statute implicitly contained a right that claims should be dealt within a reasonable time. That concept allowed a variation depending on the nature of the application, available resources and difference in circumstances, and the needs of different groups of asylum seekers. Nonetheless, fairness and consistency were also vital considerations. In conclusion, the Court of Appeal held that the court was entitled to conclude that the claimant in that case would have obtained exceptional leave to remain, and later indefinite leave to remain, and that his failure to obtain it was caused by illegality.

22. The third body of jurisprudence I was referred to includes the well-known cases of the European Court of Justice, Case C479/93 **Francovich** [1991] ECRI-5357 and Case C46/93 **Brasserie du Pecheur** [1991] QB 404. These establish a right to damages for breaches of European law. **Francovich**, of course, was a case where there was a failure to implement a directive. The court said that it was necessary for member states to ensure that directives took full effect. Member states had an obligation to protect the rights which a directive conferred on individuals. The effect of a directive's rules would be impaired and the protection of its rights weakened if individuals were unable to obtain redress when their rights were infringed by a breach of community law for which a member state could be held responsible. The European Court of Justice held that the directive in that case entailed a grant of rights to individuals, and that if a member state had not implemented it then, as long as it was possible to identify the content of the rights and the existence of a causal route between the breach of the state's obligation and the loss suffered, the member state was liable for damages. **Brasserie du Pecheur** was not a case of a directive not being implemented, but nonetheless the principle was reasserted.

The Claimant's Case

23. Let me turn to the claimant's arguments in this case. The claim is firstly a claim for damages on the basis (1) there has been a breach of the European Convention; and (2) because the United Kingdom has infringed a duty it owes the claimant under the various European Union instruments mentioned: the Dublin Regulation, the Qualification Directive and, to some extent, the Procedures Directive.

**(a) Article 6 ECHR and EU Law**

24. The argument starts with a consideration of Article 6. Mr Bedford began by drawing attention to **HH (Iran) v Secretary of State for the Home Department** [2008] EWCA 504, where Longmore LJ (with whom the other members of the court agreed) said that the question of whether Article 6 applied to an asylum claim was an important point to

be determined in the light of the Qualification Directive. It will be obvious that the jurisprudence referred to earlier is against that proposition. The argument of Mr Bedford is that the situation has changed completely and that that jurisprudence has been rendered redundant. No longer can asylum be regarded as the grant of a right by means of administrative discretion: cf**. Januzi v Secretary of State for the Home Department** [2006] UKHL 5; [2006] 2 AC 426.

25. In Mr Bedford's submission the United Kingdom, as a result of European Union law, is bound by the Qualification Directive. The rights given by that Directive are such that Article 6 of the European Convention now applies in the context of this claimant's case. That follows, Mr Bedford says, because Article 13 of the Directive obliges member states to grant refugee status to applicants who qualify for it. It is a mandatory requirement. Asylum is no longer a matter of discretion. As well, the grant of asylum gives rise to other rights under the Qualification Directive, such as the right to employment, housing and social benefits. All these rights, conferred by European Union law, mean that Article 6 of the European Convention now comes into play in asylum claims.

26. The difficulty I have with this argument is that it flies in the face of the two decisions of the Grand Chamber of the European Court of Human Rights. One of those decisions post-dated the Qualification Directive, although I accept that the Directive was not drawn to the attention of the Grand Chamber. It would be a very brave judge sitting in the Administrative Court who diverges from the jurisprudence expounded in two decisions of the Grand Chamber of the European Court of Human Rights. But even taking on board Mr Bedford's arguments, I cannot see that the Qualification Directive changes for the United Kingdom the nature of the rights of someone seeking asylum. It does not alter the nature of the right to claim asylum itself. Nor does it change the obligation to determine asylum claims. Those rights were already in our law. For more than half a century the UK has been under a mandatory duty to consider a claimant's asylum claim. Mr Bedford underlined his argument by reference to the special position of children in the Dublin Regulation and the Qualification Directive. That, to my mind, does not advance the argument. Mr Bedford failed to develop this point. I can conceive that there may be some impact on our law of the "best interests of the child" aspect of the Qualification Directive in cases where the child is accompanied, but that does not apply here. Notwithstanding Longmore LJ's hint that it may be that Article 6 needs to be reconsidered in the light of the Qualification Directive, I am not persuaded it does.

27. The Qualification Directive, in as much as it refers to other rights such as employment rights or housing rights, does not confer absolute rights to those benefits. It is couched in terms of the right to access those benefits. To my view, the intention was to ensure that once granted asylum or similar status, a person such as the claimant should be treated equally with other persons in this country. The Qualification Directive has to be seen against its background, which was to ensure a degree of consistency between member states in their approach to asylum applicants. The fact was that some states in the European Union did not confer equal rights on those granted asylum as enjoyed by ordinary citizens. So I am not persuaded that the Qualification Directive changes the nature of the Article 6 jurisprudence on asylum claimants.

**(b) Delay**

28. Mr Bedford says that the claimant's case has been unnecessarily delayed. Delay cannot give rise to a substantive right to remain but it leads to certain consequences because the claimant has lost an opportunity to put his case when mentally he was able to do so.

29. The decision on asylum was made earlier in the year. The refusal was in March and there was an appeal hearing within some four months. The claimant is before me today. The lapse between the issue of these proceedings in October 2007 and the hearing today has been relatively short. Overall, the claim does not seem to me to have involved an unreasonable delay. There was delay from September 2004 until April 2005 but the Secretary of State was trying, not unreasonably, to remove the claimant to Greece. There was no medical evidence available to the Secretary of State until mid-2007 to the effect that delay was arguably impacting on the claimant's mental health. When that did become available towards the end of 2007, the Secretary of State said she would accelerate her consideration of the claim.

30. But Mr Bedford then says that the delay involved in considering the matter prior to this year has been such as to deny the claimant the opportunity of putting a successful asylum claim. He refers to the case law, in particular the judgment of Collins J in **FH** [2007] EWHC 1571 (Admin), and submits that the delay of 12 months or more needs an explanation. He also refers to the long delay between the initial asylum claim and its determination earlier this year. In particular, he refers to Mr Nelson's statement that something obviously went wrong in the Home Office in relation to this claimant's case. Mr Bedford says that if the claimant had been able to advance his claim in calendar year 2006, when the medical evidence demonstrated that he was still reasonably competent, it might well be that he would have been able to found a successful claim. Because he lost the opportunity to have his asylum claim determined during that period and that gives rise to a claim for damages. Mr Bedford also invokes the decision of Carnwath LJ in **S** [2007] EWCA Civ 546. Therefore I am able to remit the matter so that the claimant can be considered for discretionary leave to remain. In all, Mr Bedford's argument is that this claimant's case is exceptional. It should have been determined at least by the end of 2006, when he was reasonably well mentally. Instead, it was determined earlier this year when he was mentally unfit and unable to give evidence.

31. In my view, the argument falls down at the very least on causation. There is the medical evidence, which I referred to earlier, which demonstrates that in 2006 the claimant was reasonably competent but there was a subsequent deterioration. But the fact is that in 2005 the claimant had been sectioned under the Mental Health Act. So even if the matter had been handled more expeditiously, so that he had his asylum interview and hearing before the end of 2006, there is no guarantee that the account which he was able to give to his solicitor in December 2004 would have been capable of being advanced by him at that point. The medical evidence seems to me to indicate that the claimant has fluctuated over the period since he arrived in the UK in terms of his mental condition. The claimant has not been helped by what I find to be, on the Home Office evidence, a failure on his part to report when required to do so. Given the claimant's mental condition in 2005, and the finding of the Immigration Judge that his

mental condition was not caused by the delay, it seems to me that the claim for damages for any lost opportunity or otherwise does not arise on the facts of this case.

32. There were, as I have indicated earlier, problems in the Home Office. But this was no abuse of power as in **S** [2007] EWCA Civ 546. It is well established that delay does not give rise to any substantive right for leave to remain in the United Kingdom. Moreover, I cannot see that Article 23 of the Procedure Directive adds anything to the rights of claimants for asylum to have their case speedily determined.

33. For the sake of completeness I should add that I am somewhat troubled by the medical evidence which indicates that in some respects there may have been some unwillingness on the part of the claimant to cooperate with those in authority. As well, Dr Dale's evidence about his possibly feigning symptoms is a matter of concern. However, since these matters have not been agitated before me I rest only on the factors to which I have already referred.

Conclusion

34. The result is that, in my view, the claimant is not entitled to damages, either as a result of Article 6 (there was no breach) or as a result of any European Union law. In addition, I am not persuaded that his claim relating to discretionary leave to remain should succeed. There was no gross failure on the part of the Secretary of State to deal with his claim. The delay was not unreasonable. In particular, it did not lose him the opportunity properly to advance his case. There were problems, as identified in Mr Nelson's statement, but these are not comparable to the wholesale policy which was so devastatingly criticised and held to be unlawful in Carnwath LJ's decision in **S**. In this case the failures were individual failures. The pressure on resources of dealing with the massive backlog of some half a million cases might well be a partial explanation for the administrative failing in this claimant's case. I refuse the relief.

35. Is there anything else?

36. MR JOHNSON: My Lord, we do not seek any application for costs.

37. MR BEDFORD: I would ask for the claimant's publicly funded costs to be assessed.

38. MR JUSTICE CRANSTON: Yes.

39. MR BEDFORD: My Lord, I would ask also for leave to appeal. My Lord, as you said, it would be a brave decision of a judge in the Administrative Court to depart from the authorities. But, my Lord, you also pointed out that the Court of Appeal indicated that the possibility existed. That is what I have to say in relation to the Article 6 point. My Lord, the Fundamental Charter of Rights, Article 7, does give one a right to a fair trial. Another point is that, as I understand it, my Lord, I have not dealt with the question whether delay was unlawful.

40. MR JUSTICE CRANSTON: I think I said that right at the end, Mr Bedford. You can have the costs assessment but you will have to go to the Court of Appeal. Thank you very much.