Neutral Citation Number: [2009] EWHC 1182 (Admin)

Case No. CO/11234/2007

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

Royal Courts of Justice
Strand
London WC2A 2LL

Date: Thursday, 26 February 2009

B e f o r e:

MR JUSTICE CRANSTON

- -

Between:
THE QUEEN ON THE APPLICATION OF J

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

- -

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MR R SCANNELL (instructed by Bindmans LLP) appeared on behalf of the **Claimant**
MR S KOVATS (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

MR JUSTICE CRANSTON:

Introduction

1. This claim began as a judicial review designed to quash a decision of the Secretary of State for the Home Department ("the Secretary of State") to remove the claimant to Austria and to order his return. As a result of an order of Mr Justice Collins, the claimant was returned to the United Kingdom. Indeed the claimant, who was claiming asylum, has now been given it. That being the case, and over a year after his removal, his claim is largely academic. Nonetheless, it has been pursued.

2. In the recently dated skeleton argument of Mr Scannell, who represents the claimant, a quashing order in respect of the decision to remove the claimant in early November 2007 is still sought, along with damages. On opening the case, however, after I pressed him, Mr Scannell said that in fact he was seeking a declaration as to the unlawfulness of the removal and damages. There were not damages at large in relation to the removal, but damages because of what was said to be the claimant's unlawful detention over a period of a day in November 2008, from the time that he was taken from his foster home early in the morning until he was placed in the hands of the Austrian authorities later that day. During the course of the hearing, Mr Scannell said for the first time that those damages could also be exemplary damages.

3. In my view the claim Mr Scannell advanced raises a large number of factual issues. Some of these are contested, indeed hotly contested. Some involve the relationship, obviously soured, between the Secretary of State and the London Borough of Richmond ("Richmond"), or at least the relationship between the Secretary of State and one of that Borough's agencies. The London Borough of Richmond is not a party to this claim. Some of the factual aspects of the claim also turn on what happened when the claimant was returned to Austria. The facts are contested and Austria is not before this court. Clearly I cannot make findings in relation to a considerable number of the factual matters agitated before me in what was listed as a three-hour hearing on an application for judicial review. Nor need I. What I intend to do is to concentrate on those factual matters which in my view are relevant to the claim.

Background

4. The claimant, J, is an Iraqi national. He was born, as we now know, on 25 December 1991. In November 2006 he was arrested in Austria and claimed asylum. He gave his date of birth to the Austrian authorities as 3 December 1989. For his name he gave an alias. A month later, in December 2006, he arrived in the United Kingdom and claimed asylum. He gave his date of birth as 1 June 1989. He was granted temporary admission and the London Borough of Richmond assumed a responsibility for his care. The Borough has the care of a considerable number of young asylum seekers. In January 2007 the Secretary of State gave temporary admission to the claimant with a condition of residence at a specified address and, importantly, subject to weekly reporting.

5. Later in January 2007 Austria was asked to accept responsibility for determining the claimant's claim for asylum. That was pursuant to the so-called Dublin II, which I

explain later. On 1 February 2007 the Secretary of State certified the asylum claim on safe third-country grounds, pursuant to Dublin II. In early May 2007 the claimant had by then moved to another address, shared housing, in Feltham in London. The Secretary of State knew of that address.

6. On 11 May the Secretary of State set directions for the claimant's removal to Austria on 24 May. There is dispute as to whether, in accordance with assurances which had been given to the London Borough of Richmond, the Borough was informed of the removal directions. I make no finding as to whether a fax sent at 5.01 pm should have been seen by Richmond's officials or as to whether the contents of that fax were notification to Richmond of removal in accordance with the assurances given.

7. When the Secretary of State's officials arrived in the early hours of 24 May, they found that the claimant was not at the address. On his account he was away, apparently overnight, watching a UEFA football final. The Secretary of State, that day, told Austria that the claimant was an absconder and they asked for an extension of the period within which he could be returned to Austria to have his asylum claim determined. A month later the Secretary of State treated the claimant as an absconder for the additional reason that he had not reported as required by the conditions set out in his notice of admission.

8. In July the claimant moved to a foster home. In September Richmond undertook an age assessment. The claimant's identity card from Iraq had arrived and that had in part triggered the age assessment. Richmond concluded that the claimant was 15 years old, and they treated his date of birth on the ID card, namely 25 December 1991, as accurate. In their report in mid-September they emphasised the claimant's "evident vulnerability". They referred to his demeanour as "that of a lost boy". They also referred to his anxiety. The report was sent to the Secretary of State.

9. In October of that year the Secretary of State told Austria that the claimant was to be returned there on the 26th that month. That return was aborted since that day is a national holiday in Austria. Then, on 22 October, the Secretary of State notified Austria that the claimant was to be removed there on 8 November. That in fact occurred.

10. There is no need to go into extensive details of the nature of his removal. The claimant, as I explained, was living in a foster home with a Jennifer Gardham as the foster parent. Notwithstanding that Ms Gardham's statement has been prepared for legal proceedings, her evident fondness and care for the claimant shines through. She explains in her statement that the Secretary of State's officials entered her house at 3.40 in the morning and that the claimant was escorted from the property at just before 4 o'clock. He was handed over to escorts in preparation for the flight to Austria at 6.45 that morning. Ms Gardham explains his evident distress at the removal, and she also explains that she was not able properly to prepare him for departure.

11. The claimant arrived in Austria later that day. Some days after that Austrian authorities requested the Secretary of State to take the claimant back for humanitarian reasons, referring in particular to Article 8 of the European Convention on Human Rights. The

Secretary of State refused but, as I have explained, in December 2007 Mr Justice Collins, hearing the matter on an inter partes basis, ordered that the claimant be returned to this country.

12. The claimant having been twice in Austria and twice in the United Kingdom, and being only 16 years old, the Secretary of State decided not to pursue the matter with Austria and, as indicated, processed the claimant's asylum claim so that ultimately he was granted asylum.

The law.

(a) Dublin II

13. There are three main bodies of law relevant to the claim. The first involves Dublin II. This is Regulation 343/2003/EC of the European Union, which establishes the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national. The Regulation sets out in its recitals the aim, to establish a clear and workable method for determining the Member State responsible for the examination of an asylum application. It underlines the need to ensure that this is based on objective, fair criteria, both for the Member States and for the persons concerned. In addition, the recitals emphasise the need for matters to be determined rapidly as to which Member State is responsible.

14. Article 1 sets out the aim of the Regulation. Article 3(1) provides that Member States shall examine the application of any third-country national who applies at the border or in their territory for asylum in accordance with the criteria set out in Chapter III. Importantly, Article 3(2) states that a Member State may examine an asylum claim substantively, even if it is not the Member State designated by the criteria set out in Chapter III.

15. Article 4 requires that the process of determining the Member State responsible under the Regulation should start as soon as application for asylum is first lodged with a Member State. Chapter V concerns the taking charge of and taking back of asylum seekers. Article 16(e) provides that a Member State responsible for examining an application for asylum shall be obliged to "take back, under the conditions laid down in Article 20, a third-country national whose application it has rejected and who is in the territory of another Member State without permission". Article 20 sets out certain criteria, including time criteria. Article 20(1)(d) provides that an asylum seeker shall be taken back under the Regulation as follows:

> "A Member State which agrees to take back an asylum seeker shall be obliged to readmit that person to its territory. The transfer shall be carried out in accordance with the national law of the requesting Member State, after consultation between the Member States concerned, as soon as practically possible, and at the latest within six months of acceptance of the request that charge be taken by another Member State or of the decision on an appeal or review where there is a suspensive effect."

Article 20(2) provides for an extension of the six-months' time limit:

> "Where the transfer does not take place within the six-months' time limit, responsibility shall lie with the Member State in which the application for asylum was lodged. This time-limit may be extended up to a maximum of one year if the transfer or the examination of the application could not be carried out due to imprisonment of the asylum seeker or up to a maximum of 18 months if the asylum seeker absconds."

Dublin II makes clear that it does not supersede Member States' obligations under instruments of international law with respect to the treatment of persons falling within the scope of the Regulation.

16. The time limits set out in Article 20 of Dublin II were considered by the Fourth Chamber of the European Court of Justice in a judgment handed down on 29 January 2009: Case C-19/08 Migrationsverket v Petrosian. That involved a dispute where members of the Petrosian family had claimed asylum in Sweden. The Swedish authorities found that the family had claimed asylum earlier, inter alia, in France. The Swedish Immigration Board therefore requested that the French authorities take the Petrosian family back, pursuant to Dublin II. The family appealed against that decision to the County Administrative Court and claimed that their asylum claim should be examined in Sweden. That court stayed the execution of the transfer pending its final decision. The family appealed to the Court of Appeal in Immigration Matters, Stockholm. They said that the decision to transfer to France should be annulled or, in the alternative, the case should be referred back to the County Administrative Court on the basis of procedural error. The Court of Appeal stayed execution of the transfer to France pending its final decision. On 16 May 2007, it gave a final ruling in the case. It set aside the judgment of the County Administrative Court and referred the case back to it on grounds of procedural error. It further ordered that the decision to transfer the family to France was not to be carried out before the County Administrative Court had given its final judgment on the merits. The County Administrative Court gave a fresh ruling in June 2007. It annulled the decision of the Swedish Immigration Board, ordering the transfer of members of the family to France. In its reasons for judgment it invoked the six-months' period in Article 20 of the Regulation.

17. The Swedish authorities appealed that judgment to the Court of Appeal in Stockholm. The Court of Appeal referred a question to the European Court of Justice, essentially asking about the effect of Article 20 of Dublin II where the legislation of Sweden provided for suspensive effect of an appeal. Did the period for implementation of the transfer began to run as from the time of the provisional judicial decision suspending the implementation of the transfer procedure, or only as from the time of the judicial decision which ruled on the merits of the procedure (and which was no longer such as to prevent the implementation from taking place)? The European Court of Justice addressed that issue and held that Article 20 of the Regulation was to be interpreted as meaning that the period for implementation of the transfer began to run from the time of the judicial decision which ruled on the merits of the procedure.

18. For the claimant, Mr Scannell submitted that Petrosian is authority for the proposition that if the six-months' period set out in Article 20 of Dublin II has been exceeded, it is unlawful for the Secretary of State to remove a claimant. In his submission nothing in the judgment of the European Court of Justice suggests the contrary. The Petrosian family in that case had had their removal annulled by the Swedish County Court on the basis that the six-months' period had expired. There was no suggestion in the judgment of the European Court of Justice that that decision was incorrect.

19. In my view there is no basis in the Petrosian decision for Mr Scannell's contention. The European Court of Justice did not question the annulment decision of the Swedish County Administrative Court because it was directing itself to an entirely different issue, namely how the time periods in Dublin II are to be calculated. In the course of its judgment, the European Court of Justice makes a reference to the European Commission document, COM(2001) 447 final, which contained the proposal for the replacement of the original Dublin Convention by what eventually became Dublin II. In that proposal document the Commission set out the aims and objectives of its proposed Regulation: to ensure that asylum seekers have effective access to procedures for determining refugee status; to prevent abuse of asylum procedures in the form of multiple applications; to close loopholes in the Dublin Convention; to adapt the system to the new realities resulting from the progress made as regards the establishment of an area without internal borders; to ensure that the Member State responsible will be determined as quickly as possible; and to increase the system's efficiencies. Later in the proposal document the European Commission refers to other factors such as the need to set out provisions for extending deadlines for implementing transfers to the Member State responsible so as to allow for the practical difficulties which arise in connection with such transfers.

20. The proposed document says that the main criteria for allocating responsibility were to reflect the general approach of placing the burden of responsibility on the Member State which, by issuing the claimant with a visa or residence document, being negligent in border control, or admitting a claimant without a visa, played the greatest part in the applicant's entry into or residence on the territories of Member States. Later the document says that the responsibility of a Member State is discharged where the asylum seeker has stayed for at least six months without permission in the Member State where he now is. The explanatory memorandum attached to the proposal document also explains the effect of the time periods. It says:

> "If the transfer is not performed within the six-month time limit provided for in paragraph 3, the acceptance of responsibility by the Member State requested lapses, and responsibility lies with the Member State where the application was lodged. This provision, which was not in the Dublin Convention (the latter did not provide for such a consequence if a transfer should fail), is based on the considerations ... that a Member State which has been deficient in implementing the common objectives concerning the control of illegal immigration must assume the consequences vis-a-vis its partners. It also seeks to avoid the creation of a pool of 'asylum seekers in orbit', whose applications are not examined in any Member State."

21. Background materials such as these can be used under principles established by the European Court of Justice to determine the meaning of a European Union instrument such as Dublin II. Nothing in the proposal or the explanatory memorandum gives any support to the claimant's contention; precisely the opposite. The time limits in Article 20 are applicable as between the States concerned. A country's obligations are discharged once the six-months' period has elapsed, subject to any extension. It is clear from the background material, and from Dublin II itself, that there is no intention that individual asylum seekers should derive rights from Article 20. If in this case Austria had refused to accept the claimant on the basis that the time periods had lapsed and the United Kingdom demurred, that would have been a matter of dispute between Austria and the United Kingdom. Conversely, if Austria agreed to process the claimant's asylum claim, notwithstanding the time limits were exceeded, that was a matter for Austria, notwithstanding the normal application of the provisions. Indeed, as indicated, Article 3(2) enables a Member State to accept responsibility to deal with an asylum claim, notwithstanding that it has no obligations to do so. In neither case could the claimant have objected. Dublin II gives rise to obligations between Member States; it does not confer claims on individual asylum seekers.

(b) Public authorities and policy

The second strand of law relevant to this claim relates to the application by public authorities of policy. In broad terms, under the principles of public law, a public authority may adopt a policy for the exercise of its statutory discretion, so long as it does not apply that policy inflexibly. Generally speaking, a public authority will be expected to follow that policy and a decision outwith the ambit of the policy may be regarded as flawed. That is because it is generally a relevant consideration and must be given weight, possibly great weight, in decision-making: see DeSmith's Judicial Review, 6th edition, 2007, 5-121, 5-122.

22. In this case the primary policy advanced is the UK Border Agency's Operation Enforcement Manual. At the time of the original claim an earlier version of the manual was in force, but the up-to-date version does not differ, as far as this claim is concerned, in any material respect. Paragraph 26.1 of the manual, which falls under the chapter heading "Unaccompanied children", provides that unaccompanied children must only ever be detained in the most exceptional circumstances, and then only overnight with appropriate care whilst alternative arrangements for their safety are made. That policy applies, paragraph 26.1 says expressly, equally in third country cases. Paragraph 26.4, headed "Removal of unaccompanied children", provides as follows:

> "Where a case is referred to an enforcement office to effect removal:
>
> - establish with the country to which the child is to be removed that adequate reception arrangements are in place;
>
> - liaise with the Children's services and/or nominated guardian with responsibility for care of the child in the UK to ensure the removal is effected in the most sensitive manner possible."

23. Mr Kovats submitted that this chapter, "Unaccompanied children", might well not apply in third-country cases. He pointed out that there is a separate chapter, chapter 27, dealing with third-country cases, and that chapter 28 of the Operation Enforcement Manual deals specifically with the Dublin Regulation. The policy in paragraph 26.4 should not be read as applying in these cases. It seems to me that that submission is unattractive. The general obligation set out in 26.4 should be read as applicable in all relevant cases where an unaccompanied child is to be removed from the United Kingdom. However, in interpreting the Operation Enforcement Manual it is necessary to take into account that this is not a statute. It is a practical document for use on a day-to-day basis by the Secretary of State's officials. It should be interpreted with that context in mind.

(c) Public law remedies

24. The third area of relevant law for this case relates to remedies. The claim as advanced before me at the hearing is for a declaration and for damages.

25. It is possible, although not usual, for this court to issue a declaration as to the unlawfulness of acts of public officials. One requirement of a declaration is that it must serve a practical purpose. That does not mean that the claimant needs to demonstrate benefit in any material or tangible way as a result of the declaration, but it does mean that the declaration must solve a real difficulty with which the claimant is faced. The existence of other remedies does not preclude the issue of a declaration, but the declaration must be, in general terms, convenient and useful. The fact that the legal rights of a person may not be of great significance in the opinion of others does not in any way preclude the issue of a declaration" see Rt Hon Lord Woolf and Jeremy Woolf, The Declaratory Judgment, 2002, 4.096-4.098.

26. Mr Scannell submits that in this case a declaration would have a practical benefit. It would be of benefit to the claimant as some vindication of his position in November 2007. Further, adopting a suggestion I made in argument, Mr Scannell contended that a declaration would have a beneficial impact on good administration. On the other hand, Mr Kovats submits that a declaration would not have any practical benefit. Were I to find that the decision of the Secretary of State was unlawful, that of itself, with any findings of fact accompanying it, would have a sufficient impact on good administration. Since in my view the issue of a declaration does not arise in this case, there is no need for me to decide that issue.

27. As to damages, the claim is now refined to one for damages for what is said to be the unlawful detention on the day of 24 May. That is an unexceptional claim, although that might not necessarily be said of the argument advanced by Mr~Scannell at a late stage, that exemplary damages could also be awarded. I return to the issue later but where a claim for damages is raised in this type of matter and important facts are in dispute, the case is best tried in the ordinary civil courts.

The Secretary of State's decision to remove

28. The three bases on which the claimant contends that the Secretary of State's decision to remove on 8 November 2007 was flawed are: first, a breach of the time limit set out in Dublin II; secondly, the manner of the claimant's removal; and thirdly, the failure to inform Austria of certain matters relevant to the claimant, in particular his age. The second and third bases are said to be a breach of the Operation Enforcement Manual policy, in particular that set out in paragraph 26.4.

The Dublin II time limits

29. The claimant's submission here is that the decision to remove him to Austria was unlawful in that it exceeded the time limits permitted by the Regulation. Pursuant to Article 20(1)(d), he had to be transferred to Austria within six months of the acceptance by the Austrian authorities, which was early February 2007. The removal was in November, so that the six-months' period was exceeded. The failure to remove within the six months meant that the United Kingdom became responsible for considering the claimant's asylum claim. Mr Scannell submits that insofar as the Secretary of State seeks to rely on the abortive removal in November 2007 as a basis for treating him as an absconder, and thus for obtaining the extension pursuant to Article 20(2) of Dublin II, that is Wednesbury unreasonable given the circumstances.

30. Let me deal with the absconder point first. It seems to me that it was inaccurate for the Secretary of State to treat the claimant as an absconder as a result of his absence from his accommodation on 24 May. First, he was not obliged to be at his accommodation at all times under his conditions. The conditions are not akin, as I understand it, to bail conditions, where persons might need to be overnight at a specified address. Moreover, no assistance was sought from Richmond as to why the claimant was not there on that evening. There was reliance, in my view, unwise reliance, on what the Secretary of State's officials were told by an Afghan asylum seeker also resident at that address.

31. So in my view, it was inaccurate to tell Austria on 24 May that the claimant was an absconder. However, it soon became clear that the claimant was an absconder in the sense that that term is used under the Secretary of State's policies. He failed to report, and once he had failed to report on a weekly basis for a month, he was treated under those policies as an absconder. These policies were not before me and were not directly challenged. As I have explained, the claimant was required to report on a weekly basis under his notice of admission. He said that he was scared to do so, given the events of the night of 24 May, but that is no excuse.

32. So in my view, although the Secretary of State may have been wrong to treat the claimant as an absconder simply on the basis that he was not there overnight on 24 May, subsequent events gave her a ground to that categorisation. I cannot accept that the approach of the Secretary of State in treating him as an absconder, because of his failure to report over four weeks, is unreasonable in a public law sense. In reality, it may well have been that he could have been found with the assistance of Richmond, but in my view the Secretary of State was entitled to treat him as an absconder. That being the case, the extension obtained from Austria could be justified. In any event, even if the Secretary of State was wrong to conclude that the claimant was an absconder, that gives rise to no claim by the claimant under Dublin II. As I have

already indicated, I reject the interpretation put on the Petrosian case by Mr Scannell. In my view, the time limits do not confer any individual right on the claimant: rather they give rise to claims between Member States of the European Union.

Manner of removal

33. The second basis to the claim that the decision to remove is unlawful is based on the manner of his removal in November 2007. The claimant says that this was effected in a way which was inconsistent with the defendant's own policies, notably the Operation Enforcement Manual provisions, but also contrary to the assurances which had been given to Richmond that they would be notified in advance. The result, in the claimant's submission, is that the removal was unlawful, and that led to the unlawful detention for the period between his being taken from the foster home and being handed over later in the day to the Austrian authorities. The result was that the claimant's removal was very distressing to him. In Mr Scannell's submission, it meant that the claimant could not be adequately received in Austria so that no adequate provision was made for his welfare. On arrival in Austria the claimant was treated, it is said, as an adult, and as a result had to live on the streets for three days before a charity took him in.

34. The provision of the Operation Enforcement Manual provides that the Secretary of State's officials will liaise with social service departments "to ensure the removal is effected in the most sensitive manner possible". In defence of the methods used to remove the claimant in November, Mr Kovats points, firstly, to the policy set out in the manual that minors are to be detained for the shortest possible period necessary. That meant that if the claimant was not to be detained overnight, it was necessary to collect him from his foster home early in the morning so that he could be in Austria by 2 o'clock in the afternoon. It seems that there is an arrangement between the United Kingdom and Austria that if persons are to be removed, they should arrive in Austria by that time so that arrangements can be made there for their accommodation.

35. As to the lack of notice in this case, Mr Kovats says that this is justified, because the Secretary of State took the view that his return to Austria in May had been frustrated, and that therefore in this case it was not appropriate to give notice to either him or to Richmond. The explanation is set out in detail in letters which the Secretary of State wrote to the claimant's solicitors in December.

36. Given these rival contentions, I am in no position, sitting in this jurisdiction, to make extensive factual findings in relation to them. My task is to decide whether the behaviour of the Secretary of State, in the light of the policies set out at 26.4 of the Operation Enforcement Manual, falls within the acceptable spectrum so that it can be said that her action is not flawed in the public law sense.

37. At first impression it seems to me that the behaviour of the Secretary of State in this case was heavy-handed and did not properly take into account the interests of the claimant, legally a child, an obligation which runs as a thread through European instruments and national law. In particular, I have mentioned Ms Gardham's statement as to the effect on the claimant of the way he was treated. But I make no finding to that effect, given the rival contentions and given that Richmond is not a party to these

proceedings. Nor need I. Even if the removal was heavy-handed that does not mean that the manner of his removal was unlawful, the decision to remove is unlawful, or causes the detention for the short period on that day in November to become unlawful detention. The Secretary of State took the policy into account, that children should not be detained for longer than necessary and did not detain the claimant overnight. The liaison with Richmond's social services, which might otherwise have occurred, did not happen, but for what are reasons I cannot regard as flawed in public law terms. The Secretary of State had regard to the policy, treated it as a relevant consideration and gave it weight, but decided that there were countervailing considerations not to notify.

38. As far as the arrangements in Austria are concerned, that is in my view a matter between the claimant and the Austrian authorities. There is a factual dispute as to why the claimant had to spend three days on the streets in Austria. I am simply in no position to make any findings about that. The appropriate forum for any dispute in that regard is the Austrian courts. In particular, if a dispute were to be advanced, it may be an argument about whether or not there has been a breach of Directive 2003/9/EC, L31/18 which imposes certain minimum standards in relation to the treatment of asylum seekers. I am in no position to address that issue.

Failure to inform Austria of the claimant's circumstances

39. The third basis on which Mr Scannell advances the claim is the failure, it is said, to inform the Austrian authorities of the claimant's full circumstances, including that he was a minor, aged 15, and that he was in foster care in the United Kingdom. It is said that that is a breach of the Enforcement Manual paragraph 26.4, to ensure that adequate facilities are in place as regards an asylum seeker's reception in the country to which he is to be removed. Mr Scannell submits that the Secretary of State's failure to inform the Austrian authorities of the claimant's full circumstances arose, in particular, because of the failure to inform them as to his age. The Secretary of State did not treat as significant this important fact. It may be that the correct date of birth was in some of the documents sent to the Austrian authorities but, as Mr Scannell put it in his oral submissions, the Secretary of State had to ensure that the young age of the claimant got into the consciousness of the Austrians. The Secretary of State had treated the claimant's date of birth as not being worthy of drawing specifically to the attention of the Austrian authorities and, as a result, he spent a night at a police station on arrival in Austria, and thereafter three days on the streets.

40. In brief, the factual background to this part of the claim is that in the transfer request of 23 January 2007 the date of birth was given as 1 June 1989. In a comment on that standard form for request for taking back, the Secretary of State had added the comment, "Applicant is a disputed minor". In notification of transfer arrangements for Austria, dated 11 May and 24 May 2007, that incorrect date was repeated. There was, of course, the age assessment by Richmond in September 2007, where it was firmly established that his date of birth was in 1991. The Secretary of State had been informed of that. In a statement by an official of the Secretary of State, Laura Saunders, it is said that the Austrian authorities thought that the claimant was 17 years old, and there is a statement by an Austrian immigration official which suggests that she, too, thought that the claimant was of that age.

41. However, in the notification of transfer arrangements on 11 and 22 October 2007, sent to the Austrian authorities, the correct date of birth was given. The Austrian authorities, in a response, set out the correct date of birth, although they also set out the earlier date. It may be that the Austrian authorities were keeping an open mind: the claimant told them that the earlier date was his date of birth when he first made his asylum claim on arrival there, when he also gave an alias.

42. It seems to me that I cannot find the Secretary of State acted in an unlawful way in a public law sense in informing the Austrians about the date of birth. After the Richmond age assessment the Austrians were told about the correct date of birth. Admittedly they were told earlier the wrong date, but that was at a time when it was unclear. It may have been that the comment in January 2007, "is a disputed minor", was never corrected, but the Austrians were aware that there were two dates involved. In as much as the issue of the application of this policy is concerned, that the Secretary of State must establish with Austria that adequate reception arrangements are in place, I accept Mr Kovats' submission that, given that Austria is a member of the European Union, some reliance may be placed on that fact by the Secretary of State in any consideration by her that her policy has been fulfilled. She was entitled to give weight to that fact and the expectation that Austria would treat the claimant appropriately.

Conclusion

43. The result is that I dismiss the claim. It seems to me that the claim illustrates the limits of judicial review. Judicial review is not geared to making extensive findings of fact. In as much as what happened in the claimant's case gives an impression that the Secretary of State may have lacked some sensitivity, as regards which I make no finding, that does not lead to the conclusion that there was unlawful detention or that the removal was unlawful. The claim also highlights in my view the need for claimants to focus on the legal basis of claims being advanced. Facts are obviously crucial, but it is also necessary for there to be a clear analysis, without embroidery, of how it is said that the behaviour of a public authority is unlawful in a public law sense.

44. Thank you.

45. MR SCANNELL: My Lord, as a matter of one correction in your Lordship's judgment, there was an occasion when your Lordship mentioned November 2007, and from the context I think my Lord meant to say May 2007.

46. My Lord, I would, with respect, seek permission to appeal. My Lord, in relation to the general point, reiterated in my Lord's summary, whilst accepting, of course, that your Lordship's fact-finding role is by definition limited, a general proposition upon which I would suggest that it is appropriate for your Lordship to give leave to appeal arises because this is not only a broad and general Wednesbury challenge. It is a challenge to specific obligations that flow from a specific policy, and if your Lordship is to make a proper assessment as to whether there was a breach of a policy which in and of itself would render the situation that thereby followed unlawful, it would in those circumstances be incumbent upon your Lordship, in my respectful submission, to find

facts, and upon that first basis I would respectfully seek my Lord's permission to appeal.

47. So far as my Lord's analysis in relation to the first point was concerned, the first of the three grounds, my Lord, in terms of assessment of time, treated as relevant the fact that no assistance had been sought from Richmond as to why the claimant was not present at his address in relation to the fact that he was not there on 24 May. I say that that was an entirely appropriate approach for my Lord to take.

48. The flaw, in my respectful submission, in what followed was that my Lord nevertheless did not consider the same point in relation to Richmond in deciding whether he was subsequently an absconder. My Lord observed that in reality he could have been found with the assistance of Richmond, and if that be the case, then the failure to ask was as much a failure as it was, as recognised by my Lord in relation to 24 May.

49. I would submit that my Lord's approach to Petrosian is flawed, and I would say that I should be entitled to leave to appeal on that basis, and I think that the other two points I deal with by reference to the general observation that I have made.

50. My Lord, for those reasons, I respectfully seek my Lord's permission to appeal.

51. MR JUSTICE CRANSTON: Mr Kovats, do you want to say anything?

52. MR KOVATS: My Lord, the defendant opposes permission to appeal. If I may be allowed to say so, the judgment is conspicuously thorough and careful and there is no realistic prospect of the Court of Appeal coming to a different view on any of the points; nor is there any other compelling reason for an appeal.

53. MR JUSTICE CRANSTON: It seems to me, Mr Scannell, that you will have to go elsewhere to get permission.

54. MR SCANNELL: I'm grateful, my Lord. My Lord, the only other matter that I would ask for is a detailed assessment of the claimant's costs.

55. MR JUSTICE CRANSTON: Yes. Anything more?

56. MR KOVATS: No applications, my Lord.

57. MR JUSTICE CRANSTON: No? All right. Well, thanks very much.