Neutral Citation Number: [2008] EWHC 1312 (Admin)

Case No: CO/5660/04

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/06/2008

Before:

MR JUSTICE CRANSTON

- - - - - - - - - - - - - - - - - - - -

Between:

The Queen on the Application of Abdullahi Ahmed Mahamed	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- - - - - - - - - - - - - - - - - - - -
- - - - - - - - - - - - - - - - - - - -

Ronan Toal (instructed by **South West Law**) for the Claimant
Ingrid Simler QC (instructed by **Treasury Solicitors**) for the Defendant

Hearing dates: 2 May 2008

- - - - - - - - - - - - - - - - - - - -

Judgment

Mr Justice Cranston:

Introduction

1. The concepts of certification and of issuing a certificate have a long history in our law. At common law, before a system of appeals developed, a process of certification enabled a decision before the justices of assize to be brought before the King's Court at Westminster. With the growth of the state, officials and public bodies, not least the various registries which were established, gave certificates of matters within their knowledge or authority. The concept of issuing a document can also be traced back centuries. In relation to legal pleadings it is found in the Year Books and one meaning of issue in this context was to finish or get out the pleading. On occasion the two concepts combined – certificates were, in the relevant statutory language, issued.

2. The present case involves certification, and the issue of certificates, in the context of an application for judicial review of decisions by the Secretary of State for the Home Department ("the Secretary of State") taken in respect of Abdullahi Ahmed Mahamed ("the Claimant"). There are two types of certificate involved, first, safe third country certificates and secondly, certificates that a claimant's human rights claims are clearly unfounded. The effect of these certificates would be that the Claimant's asylum application will not be considered substantively in this country. Although the Claimant has a right of appeal against the decision to remove him to Italy this right may only be exercised abroad. The Claimant contends that the original safe third country certificate was a nullity because it was not "issued" until after the relevant

legislation was repealed. Issue, in his submission, means served. Recently the Secretary of State drew up another safe third country certificate, which the Claimant argues is also not effective to prevent an in-country appeal. Partly this revolves around whether a prohibition on bringing an appeal is a prohibition on bringing and continuing an appeal. The Claimant also contends that the Secretary of State was not justified in certifying his human rights claims as clearly unfounded.

Background

3. The Claimant is from Baidoa in Southern Somalia. There is only a short statement from the Claimant himself and it is necessary to piece together his story from an account he gave to a consultant psychiatrist, Dr Rhodri Huws, and from what his elder brother, Ibrahim, has said. Apparently the family all lived together in Baidoa until 1997. As a result of the fighting there the Claimant and his other brothers, Ali and Bashir, and Ali's wife, fled. Ibrahim, their mother and another brother, Said, remained behind to try to protect the family property. The very day the others left their home was attacked and the mother and Said were shot dead. Ibrahim himself was shot but the gunmen must have thought he was dead and left. Meanwhile the Claimant was separated from his other brothers. On his account he moved around the country, avoiding the fighting, returning to Baidoa in 2000. He learnt what had happened, lost his memory and wandered around aimlessly. He was looked after by relatives, hospitalised and then married but the marriage was unsuccessful. Ibrahim came to this country in 1999 and was granted refugee status. His brother Ali arrived in the United Kingdom in 2003 and was also given refugee status after an appeal. Both brothers live in Bristol with their families.

4. The Claimant came to the United Kingdom via Italy. On his account the journey to Italy was by ship: the boat broke down, a number of people were lost overboard and a friend lying next to him died. His elder brother, Ibrahim, has tracked down Italian television news footage which apparently shows a number of people being taken off the ship, many of whom appear to be quite traumatised. Ibrahim has said that at one point in the footage he could see the Claimant coming off the ship and then later there was a shot of him in hospital. The Claimant told Dr Huws that he spent fifteen days in hospital. On his account people at a local Italian church helped to get him to Britain.

5. The Claimant arrived in the United Kingdom at Stansted Airport on 24 December 2003 without a passport or other relevant documents and claimed asylum. He said that he left Somalia the previous day and that he had not sought asylum elsewhere. He maintained that account despite being told it was not credible. It was subsequently discovered, through a positive fingerprint match, that he had made an application for asylum in Italy in November. Thus in late December 2003 he was notified that he was liable to be detained and returned to Italy. His solicitors, South West Law, asked for a reconsideration of his case. Meanwhile Italy had been asked, and in March accepted responsibility, to take him back under terms of the Dublin Regulation, a European Union instrument designed to allocate responsibility for processing an asylum application to the Member State which permitted the applicant to enter or reside (Council Regulation (EC) No 343/2003 of 18 February 2003 establishing 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 [2003] OJ L 50/1.)

6. On 22 March 2004 the Defendant signed a certificate for the Claimant's removal to a safe third country, Italy. This is a key document in this case ("the safe third country certificate"). The certificate was in a standard form letter, signed by a Home Office official from the Third Country Unit on behalf of the Secretary of State. Headed "Immigration and Asylum Act 1999. Certification of Asylum Application on Third Country Grounds," the letter outlined that the Claimant, having claimed asylum, could be returned to Italy under the Dublin Regulation by virtue of section 11(1) of the 1999 Act and paragraph 8(1)(c) of Schedule 2 of the Immigration Act 1971, since Italy had accepted responsibility and was a safe third country. Paragraph 345 of the Immigration Rules provided that asylum applications would normally be returned without substantial consideration if there was a safe third country. There were no grounds for departing from the practice in the Claimant's case. The letter concluded:

> "Third country certificate
>
> It is hereby certified that the conditions mentioned in section 11 (2) of the Immigration and Asylum Act 1999 are satisfied, namely that:
>
> (a) the authorities in Italy have accepted that, under standing arrangements, Italy is the responsible State in relation to your claim for asylum; and
>
> (b) you are not a national or citizen of Italy.
>
> Right of Appeal
>
> You should refer to the attached notice of decision, appeals form and accompanying leaflet given to you with this certificate for details of how and when to appeal."

The certificate was sent to the Immigration Service at Bristol to be served on the Claimant but because of an administrative oversight it was not, in fact, served at that time, although this was not discovered until June. That month the Secretary of State wrote to South West Law, the law firm acting on behalf of the Claimant, confirming that Italy had been approached under the Dublin Regulation but that "a decision has not yet been served on your client."

7. After June the Secretary of State made efforts to locate the Claimant and to effect service of the certificate. However, it was not possible to locate him and by 18 June 2004 the Claimant was recorded as an immigration absconder. In a statement immediately before the trial the Claimant's brother said that in fact the Claimant lived continually at his house throughout this period. Admittedly he did not report consistently to the Immigration Service: on one occasion he was ill and on others he was told he did not need to do so. The Secretary of State has said that continuing efforts to relocate the Claimant were unsuccessful until 6 October 2004, when he was detained after voluntarily reporting to a police station. A form, IS82D, was served on him that day, together with the safe third country certificate. The IS82D is entitled "Notice of Refusal of Leave to Enter", and reads that the Claimant's application for asylum has been refused "for the reasons set out in the attached certificate." The Claimant is refused leave to enter and the form continues: "I have given/propose to give directions for your removal to Italy, by flight/ship/train to be notified." The right

of appeal, on identified grounds, is then explained, although the form makes plain that because of the certificate an appeal could not be instituted while the Claimant remained in the United Kingdom. Removal directions, dated 14 October 2004, were subsequently set to take effect at 7.50am on 22 October 2004. They were on form IS151D for removal of the Claimant to Italy on flight BA 572 as an illegal entrant or other immigration offender. The decision was said not to be appealable.

8. On 18 October the Claimant was seen for the first time by Dr Rhodri Huws, a consultant psychiatrist, acting on the instructions of South West Law. His report, dated 20 October, records the Claimant's story and the latter's feeling that he has lost everything, except for his brothers, so that if he were returned to Italy his life would not be worth anything. He told Dr Huws of his ideas of self-harm and that since being detained he had thought of hanging himself. In Dr Huws' opinion the Claimant was suffering from a depressive illness of moderate severity and post traumatic stress disorder. He had symptoms of unresolved grief in relation to the death of his mother, the symptoms he presented being consistent with the sequelae of the experiences he described in Somalia. Successful counselling would need to be conducted within a stable, social situation, which it appeared his brothers were providing. Since he had been informed of the decision to deport him his psychological condition had worsened. Removal from Britain, in Dr Huws' opinion, would compound the feeling of previous losses leaving him with the thought that there was nothing left for him. It would place him at significant risk of self-harm and the method that he had thought of, hanging, was potentially fatal.

9. Responding to Dr Huws' report, the Secretary of State wrote on 21 October to the Claimant's solicitors, explaining that the Claimant was properly returnable to Italy under the Dublin Regulation. Although the solicitors had not said expressly that it was a breach of Article 8 to remove the Claimant, for sake of completeness the Secretary of State addressed the issue. (The issue of the Secretary of State doing this was raised for the first time after the hearing; even if it is appropriate for me to consider the matter I am in no doubt that the Secretary of State was entitled to do this). Taking Dr Huws' medical opinion at its highest, the Claimant was suffering from a moderate severity of PTSD. There could be no suggestion that Italy did not have healthcare provision for treatment and support of this. The Italian authorities had been notified of it. Even if the Claimant's Article 8 rights were engaged, removal would be proportionate and justified. In the light of this there was no reason to depart from normal practice, and any allegation that the Claimant's return to Italy was in breach of his human rights was certified as unfounded under section 93 (2) of the Nationality, Immigration and Asylum Act 2002 ("the unfounded certificate").

10. Judicial review proceedings were issued on 15 November 2004. (It should be mentioned that a factor in the delay in the current proceedings is that that they were adjourned in 2005 pending the outcome of related test cases). Immediately prior to this the Claimant had purported to appeal to an Adjudicator and there was a further appeal lodged in December 2004. There had also been correspondence, including a letter of 9 November from the Secretary of State. That letter said that although the Claimant had been living with his brothers, no evidence had been provided that he was solely reliant on them. The Claimant had been married in 2001 and therefore it was thought unlikely he would be dependant on his brothers. The Secretary of State reiterated his views of the medical evidence.

11. As mentioned earlier, the only statement of the Claimant himself is dated October 2005. In less than a page he outlines his asylum claim and retracts his description of how he came to this country. He acknowledges that he arrived from Italy but says that the agent told him to deny that. There are a number of statements from his brothers. In October 2005 both Ibrahim and Ali said that in their view the Claimant had psychological problems. Although he had been given accommodation in a house for asylum seekers, he slept at Ibrahim's house. Either Ibrahim or Ali stayed with the Claimant and they ensured he did not go out alone. In Ibrahim's view the Claimant was better off than when he first arrived but continued to rely on the family for emotional support. In early February this year Ibrahim gave a further statement. He said that the Claimant still lived with him and his family, continued to spend most of his time indoors, only went out when accompanied by him or Ali, and suffered badly from anxiety. In Ibrahim's view, while the Claimant was in a stronger state than he was when he arrived in the United Kingdom, he did not believe he would be able to cope if he were sent to Italy and lost family support.

12. There was a supplementary report by Dr Huws in early July 2005. It was more positive about the Claimant – "a significant improvement compared to how he was in October 2004" – while acknowledging that there were still problems. Dr Huws recorded that the Claimant was sleeping normally and rarely had nightmares although he still worried about being taken away from his brothers and on occasions remembered events from Somalia. He spent most of his time with his brothers and their family and friends and did not go out by himself. There were periodic feelings of depression but no ideas of self-harm. He was preoccupied with worries about being sent to Italy and losing the support of his brothers and he could not imagine his life without them. He thought of his mother daily. In Dr Huws' opinion he still had typical symptoms of post-traumatic stress disorder, but did not meet the operational criteria for a depressive illness. He had stopped anti-depressant medication and was intending to attend college, which would aid social integration. However, in Dr Huws' opinion a significant element in his improvement was the support of his brothers and family and a return to Italy would precipitate a further episode of depressive illness. There is no further medical report available over the three years since then.

13. Because of the challenge to the original certificate in the judicial review, the Secretary of State withdrew it just prior to the hearing. While maintaining that it remained valid she nonetheless issued a new certificate under the current immigration legislation, the Asylum and Immigration (Treatment of Claimants, etc.) Act 2004, Schedule 3, Part 2 ("the 2004 Act"). In a letter of 16 April 2008 she also reconsidered the Claimant's Article 8 rights, taking into account the information advanced in the grounds for judicial review, the statements by the Claimant's brothers, the medical reports, as well as the matters in the Claimant's skeleton arguments for this hearing. In her letter she accepted that the Claimant has lived with relatives who have supported him emotionally and financially. She also expressed sympathy for the Claimant. Nonetheless, she maintained that the proper course would have been for him to apply from abroad to join his family as a dependant relative. In terms of his removal now, she noted what she described as carefully prepared procedures for those like the Claimant, including the provision of suitable reception arrangements on arrival in the receiving country. Considering all the circumstances the Secretary of State wrote that while she accepted his removal to Italy would involve some interference with his

family and private life, she was entirely satisfied that this would be justified and proportionate when balanced with his poor immigration history, his attempt to enter the country for a purpose for which entry clearance is required, and her duty to Parliament to maintain a fair and consistent immigration control, including the proper application of the Dublin Regulation. To allow the Claimant to remain would be to undermine the operation of immigration control to the disadvantage of those seeking to enter the country properly and those whose asylum claims were properly for the United Kingdom to consider. In conclusion, the Secretary of State again certified the Claimant's human rights claims as clearly unfounded.

Legislative Framework

14. For more than a decade there has been a statutory procedure for certifying safe third countries, to which asylum claimants can be returned, without having their claim considered here. Member States of the European Union have been regarded as safe third countries along with some other designated countries. Certification was first put on a statutory basis by section 2(2) of the Asylum and Immigration Act 1996 ("the 1996 Act"): the claimant was certified, in the opinion of the Secretary of State, as not being a national of the third country, as not facing persecution for a Refugee Convention reason in the third country, and as not returnable by the third country to any other country save in accordance with that Convention. Section 3 of the 1996 Act gave limited rights of appeal against a certificate "issued" by the Secretary of State. Then in 1999 sections 2 and 3 of the 1996 Act were repealed and sections 11 and 12 of the Immigration and Asylum Act 1999 ("the 1999 Act") provided for safe third country cases. Three years later a new section 11 was substituted by section 80 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). It had effect from 1 April 2003. With these regular changes in the legislative framework the importance of transitional provisions becomes obvious.

15. With respect to the third country certificate of March 2004, at issue in this case, the relevant version of section 11 of the 1999 Act reads as follows:

> (1) In determining whether a person in relation to whom a certificate has been issued under subsection (2) may be removed from the United Kingdom, a member State is to be regarded as -
>
> (a) a place where a person's life and liberty is not threatened by reason of his race, religion, nationality, membership of a particular social group, or political opinion; and
>
> (b) a place from which a person will not be sent to another country otherwise than in accordance with the Refugee Convention.
>
> (2) Nothing in section 77 of the Nationality, Immigration and Asylum Act 2002 prevents a person who has made a claim for asylum ("the claimant") from being removed from the United Kingdom to a Member State if the Secretary of State has certified that -

> (a) the member State has accepted that, under standing arrangements, it is the responsible State in relation to the claimant's claim for asylum; and
>
> (b) in his opinion, the claimant is not a national or citizen of the member State to which he is to be sent.
>
> (3) Subsection (4) applies where a person who is the subject of a certificate under subsection (2) -
>
> (i) has instituted or could institute an appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 (immigration appeal), and
>
> (ii) has made a human rights claim (within the meaning of section 113 of that Act).
>
> (4) The person may not be removed from the United Kingdom in reliance upon this section unless -
>
> (a) the appeal is finally determined, withdrawn or abandoned (within the meaning of section 104 of that Act) or can no longer be brought (ignoring any possibility of an appeal out of time with permission), or
>
> (b) the Secretary of State has issued a certificate in relation to the human rights claim under section 93(2) (b) of that Act (clearly unfounded claim).
>
> (5) In this section "standing arrangements" means arrangements in force between two or more Member States for determining which State is responsible for considering applications for asylum.

Member States are, of course, Member States of the European Union and the "standing arrangements" between Member States referred to is the Dublin Regulation, which in 2003 replaced the Dublin Convention. Section 11 therefore entitled the Secretary of State to remove an asylum claimant from the United Kingdom, without substantive consideration of his or her asylum claims, where he had certified that:

a) a Member State had accepted responsibility in relation to the claimant's asylum claim, under standing arrangements;

b) in his opinion, the claimant was not a national of the Member State with such responsibility; and

c) the claimant's human rights claims were clearly unfounded.

16. It can be seen that section 11(3) and (4) rule out appeals where a human rights claim is certified as clearly unfounded. For sake of completeness the statutory provisions governing appeals need to be set out in greater detail. As to the statutory provisions governing appeals, section 93 of the 2002 Act read:

> "(1) A person may not appeal under section 82(1) while he is in the United Kingdom if a certificate has been issued in relation to him under section 11(2) or 12(2) of the Immigration and Asylum Act 1999 (c.33) (removal of asylum claimants to "third country").
>
> (2) But subsection (1) does not apply to an appeal if -
>
> (a) the appellant has made a human rights claim, and
>
> (b) the Secretary of State has not certified that in his opinion the human rights claim is clearly unfounded."

Section 82 of the 2002 Act gives a right of appeal to the Asylum and Immigration Tribunal or its predecessor ("the Tribunal") where an "immigration decision" within the meaning of section 82(2) has been made. By section 82 (2) an "immigration decision" is defined as including a refusal of leave to enter the United Kingdom (section 82(2) (a)); and a decision that an illegal entrant is to be removed from the United Kingdom by way of directions under paragraphs 8 to 10 of Schedule 2 to the Immigration Act 1971 (control of entry: removal) (section 82(2) (h)). Subject to section 93, an appeal against either of those immigration decisions may be brought while the person is in the United Kingdom if he or she has made an asylum claim or human rights claim while in the United Kingdom (section 92(4)(a) of the 2002 Act).

17. To bring the legislative history up to date, there was further change to the safe third country provisions as a result of the Asylum and Immigration (Treatment of Claimants, etc) Act 2004. So far as material section 33 of that Act provides:

> "(1) Schedule 3 (which concerns the removal of persons claiming asylum to countries known to protect refugees and to respect human rights) shall have effect.
>
> (2) Sections 11 and 12 of the Immigration and Asylum Act 1999 (c. 33) (removal of asylum claimant to country under standing or other arrangements) shall cease to have effect.
>
> (3) The following provisions of the Nationality, Immigration and Asylum Act 2002 (c. 41) shall cease to have effect
>
> (a) section 80 (new section 11 of 1999 Act), and
>
> (b) section 93 (appeal from within United Kingdom: "third country" removal)"

Section 48 of the 2004 Act provides that section 33 shall come into force by order of the Secretary of State to be made by statutory instrument. Pursuant to section 48 the Secretary of State made the Asylum and Immigration (Treatment of Claimants, etc) Act 2004 (Commencement No 1) Order 2004 ("the 2004 Order"). Pursuant to the 2004 Order, section 33 of the 2004 Act came into force on 1 October 2004. Article 3 of that Order is headed "Transitional Provision" and reads:

> "Notwithstanding their repeal by Section 33 of the 2004 Act (removing asylum-seeker to safe country), sections 11 (removal of asylum claimant under standing arrangement with Member States) and 12 (removal of asylum claimants in other circumstances) of the 1999 Act and sections 80 (removal of asylum-seeker to third country) and 93 (appeal from within the United Kingdom: "third country" removal) of the Nationality, Immigration and Asylum Act 2002 shall continue to have effect in relation to a person who is subject to a certificate under section 11(2) or section 12(2) or (5) of the 1999 Act which was issued by the Secretary of State before 1 October 2004."

There is no definition of "issue" in the Order.

18. New provisions for certification are provided, as indicated, in Schedule 3 to the 2004 Act. Schedule 3, Part 2, provides that a person may be removed from the United Kingdom to a designated safe country and cannot bring an in-country immigration appeal under section 92 of the 2002 Act where the Secretary of State has certified that it is proposed to remove a person to a State to which that part of the Act applies; in his opinion the person is not a national or citizen of that State; and any allegation that removal to the specified State will breach the person's human rights is clearly unfounded. Italy is a designated safe country to which Schedule 3, Part 2, applies. Overall, there are some differences between certification under the 2002 Act and certification under the 2004 Act. For example, under the latter the Secretary of State is no longer required to certify that a Member State has accepted responsibility under the standing arrangements before issuing the certificate. Further, under the 2004 regime a claimant cannot pursue challenges (whether in or outside country) on human rights grounds about onward removal (paragraphs 5(4) and 6(b) of Schedule, and there is further prohibition on certain out of country appeals: paragraph 6).

Safe Third Country Certification

19. In the present case there is no dispute that Italy is the Member State responsible for examining the Claimant's asylum application (subject only to any human rights challenge capable of being sustained), and that the Secretary of State was, and remains, under the new provisions of the 2004 Act legally entitled to certify that the Claimant is returnable to Italy. The first dispute in this case is whether the certificate of March 2004 had legal effect. It will be recalled that in this case, although the Secretary of State had prepared and signed the safe third country certificate in March 2004, through administrative error it had been sent internally within the Home Office but never served on the Claimant until after 1 October. The Claimant's solicitors were told about the certificate earlier, in June, but the certificate was not sent to them. Hence there could be no argument that, although not served on the Claimant, it had been served on his agents, the solicitors, before 1 October. The Claimant's case is that the certificate was a nullity because it was not "issued" until after the relevant legislation was repealed on 1 October 2004. Thus it was not saved by the Transitional Provision in the 2004 Order. Since the certificate had no legal effect the Claimant was and remains entitled to appeal in-country against the decision to remove him to Italy. That follows because section 92(4) (a) of the 2002 Act generally allows an appeal to be brought from within the United Kingdom if a person has made an asylum or human rights claim. The Claimant, it is said, has made a claim for asylum. He

would have been prevented from appealing in-country by operation of s. 93(1) of the 2002 Act if a certificate had been issued in relation to him under section 11(2) of the 1999 Act, but the March certificate was not "issued" in time.

(a) "Issue" of the safe third country certificate

20. In the Claimant's submissions, a certificate to be issued in accordance with the meaning of that phrase in the 2004 Transitional Provision must have been served on the Claimant. Issue means service. The certificate not having been served until after 1 October 2004, the Claimant submits that it had not been issued under extant legal provisions and was thus a nullity. Section 11 of the 1999 Act and section 93 of the 2002 Act, which would have given it legal effect, had been repealed by section 33 of the 2004 Act as from 1 October 2004. After that date it was as if those sections had never existed and anything done in reliance on them, in this case service on 6 October 2004, was a nullity. The Transitional Provision could not save it. Consequently, under the statutory provisions outlined earlier, the Claimant is entitled to appeal to the Tribunal from within the United Kingdom.

21. By contrast the Secretary of State submits that "issue" when used in the Transitional Provision does not equate with service. Issue means confirming that limited factual circumstances hold for removal of the person to a safe third country. There needs to be the definite date which this meaning of issue produces rather than the uncertain dates which would occur if issue meant service. That is so that the Secretary of State can rely on it in her decision to refuse entry. The matter can also be tested because it would not have mattered whether a certificate was issued as in March under the previous legislation or after 1 October under the new legislation. This certificate was issued by the Secretary of State on 22 March 2004 when it was drawn up, well before the date of 1 October 2004 required by the Transitional Provision for it to be effective.

22. In the absence of any definition in the Transitional Provision of what is meant by issue of a certificate one considers initially whether there is any common meaning of the term. There does not seem to be, the concept of issuing a document having an ambiguity about it. At a high level of abstraction, in the context of documents, its meaning is along the lines of putting out or sending authoritatively. More concretely there seems to be a spectrum of meanings. The use of issue in the Year Books, referred to earlier, is perhaps some support for issue having a meaning at the creation or execution end of the spectrum. In other contexts issue has connoted further activity and involves the idea of delivery of the document or passing it from one person to another. In other words the meaning of issue ranges from creating or executing a document through to service of the document.

23. Nor is there any consistent meaning of issue in immigration and asylum legislation. For example, the first third country certification provisions, in the 1996 Act, referred to "has certified" (section 2) and a certificate "has been issued" under section 2(1) (section 3). The successor sections, 11 and 12 of the 1999 Act, each referred to "certifies" and to "issued". In the 2002 Act a number of sections mention the two concepts, "certifies" and "issued" in the same section: e.g. ss. 94, 96. In other words "certifies" is being used interchangeably with "issue" of a certificate. By contrast other sections of the 2002 Act refer only to certify, without reference to issued (ss. 97, 98). Section 99 of that Act refers to "issued", including in relation to a certificate

under section 98, notwithstanding that section 98 makes no express reference to a certificate being issued.

24. Mr Toal for the Claimant advanced a number of arguments supporting his contention that the concept of issue in the context of the Transition Order means service. First, he submitted that since a safe third country certificate affected a person's fundamental rights, any ambiguity in the meaning of the term had to be resolved in favour of the individual: R v Secretary of State for the Home Department, ex p Simms [2000] 2 AC 115, 131 E-G. Moreover, there is the important principle that a person has to have notice of a legal determination before it had legal effect because he or she must be in a position to challenge it in court: R v Secretary of State for the Home Department, ex p Anufrijeva [2003] UKHL 36 [2004] 1 AC 604, [27]. Access to justice was a fundamental right and that included access to the tribunal: R v Secretary of State for the Home Department ex p Saleem [2001] 1 WLR 443, 458A, per Hale LJ. Hence the effect of a certificate being issued is to affect what the subject of the certificate may do, namely, exercise the fundamental right of access to justice, in this instance appealing to the tribunal from within the United Kingdom. There were no exceptional features justifying a departure from these fundamental principles in this case and treating a certificate as effective unless served.

25. The difficulty with this argument is two-fold. There is no doubt that access to justice is a fundamental right, both at common law and under the European Convention of Human Rights. But access to justice can come in many forms, from access to the courts, through tribunals to institutions such as the Ombudsman. Nor does access to justice necessarily demand the presence of the person to argue the case. That is plain even with in-country cases before the tribunal. The result of a safe third country certificate is not that the Claimant is denied access to the tribunal but that he or she must conduct the case from abroad. There may well be advantages if the Claimant is present at the tribunal hearing, especially since his credibility is likely to be an important aspect of its inquiry. There was some discussion at the hearing about whether there could be a video link from Italy. But even if this were not possible, it cannot be said that the fundamental right of access to justice is being denied. Moreover, the fundamental right here must be matched with the policy choice, made across Europe, that asylum seekers should have their cases dealt with by the country where they first entered or resided.

26. Mr Toal then drew on a number of legislative sources to support his contention that to "issue" a certificate under the Transitional Provision meant to serve it. The way that concept is dealt with in other parts of the immigration and asylum legislation is not, in my view, of great assistance, given that it is very much a statutory jumble. However, Mr Toal referred to the Transitional Provision governing the introduction of the new appeals provisions in the Nationality, Immigration and Asylum Act 2002. Nationality, Immigration and Asylum Act 2002 (Commencement No 4) Order 2003, SI 2003 No 754. Schedule 2 of that reads, in part:

> "6 (3) Where a certificate is issued under section 11 (removal of asylum seeker to third country), as substituted by section 80 of the 2002 Act, before 1 April 2003 and an allegation is made after 1 April the allegation may be certified under section 72(2) of the 1999 Act, notwithstanding its repeal by the provisions of the 2002 Act commenced by this Order, and that certification

> shall have effect for the purposes of an appeal under the old appeal provisions."

Section 72(2), referred to in this article, prevented an in-country right of appeal where the Secretary of State certified a person's allegation of breach of human rights as manifestly unfounded. The Order in its definition section, article 4(3), provides that events are regarded as having taken place under the old Immigration Acts when, amongst other things, a certificate was issued. Significantly the definition of section continues:

> "(4) for the purposes of this Order –
>
> …
>
> (d) a certificate was issued;
>
> on the day on which it was or they were sent to the person concerned, if sent by post or by fax, or delivered to that person, if delivered by hand."

So issue of a certificate in that Transition Provision meant its service on the person. Thus, the Claimant contends, issue should be interpreted in the same manner in the Transition Provision applicable to the certificate in this case.

27. No judicial authorities were cited, nor indeed were any needed, in support of the proposition that when a word or phrase is defined in one legislative instrument, that definition may be carried over to its interpretation in a legislative instrument in pari materia. (See the illuminating discussion in Bennion on Statutory Interpretation, 5th edn, 2008, 603-4). Especially if a word or phrase is defined in an unusual manner in one legislative instrument, but is not defined in legislation in pari materia, the legislative intention may be taken to be that the same meaning should attach in both. So, too, in this case. Since the concept of issuing a certificate was defined in the 2003 Transitional Provision, dealing with immigration and asylum appeals, but not defined in the 2004 Transitional Provision, also relevant to such appeals, should not the definition in the former be carried over to the latter?

28. For the Secretary of State Ms Simler QC submitted that it would be wrong to use the definition of "issue" in the 2003 Order to give meaning to that concept in the Transitional Provision relevant in this case. Given the variety of ways the concept is used in the immigration and asylum legislation, it would be artificial to latch onto the definition in the 2003 Order. That Order is no more in pari materia than other parts of the legislative package governing the subject matter. That Order is concerned with preserving events for the purposes of appeals. The concept of issue in the context of the 2004 Transitional Provision is different. The context is a simple determination that another Member State of the European Union has accepted that it is responsible for processing a person's asylum claim, and that the person is not a national of that other Member State. The consequence of that determination is that the person may be returned to that Member State since the statutory law on removal of an asylum claimant is removed (e.g. section 11(2) of the 1999 Act). However, removal is not inevitable, for the Secretary of State may make an exception. In any event there

needs to be a decision of the Secretary of State to remove the asylum claimant, separate from the certificate itself.

29. In my judgment the Transitional Provisions in the two Orders are in pari materia. Both are concerned with the issue of safe third country certificates under section 11 of the 1999 Act. Albeit that the protective focus of the Transitional Provisions is somewhat different, nonetheless there is much overlap between the two. Thus the definition of "issue" in the 2003 Order, i.e. service, should be applied to give meaning to "issue" in the 2004 Order. There is no doubt that definitions in legislative instruments take meaning from their own particular context, but in this case I do not accept that there is anything artificial in applying the same meaning in secondary legislation having a common paternity. Accordingly, the safe third country certificate of March 2004 in this case was not issued because it was not served before the authorising legislation was repealed. It was thus a nullity.

(b) Recertification

30. Shortly before this hearing the Secretary of State, as outlined above, issued a further safe third country certificate under paragraph 5(1), Schedule 3, Part 2 of the 2004 legislation. The Claimant contends that this new certificate is to no effect in preventing his in-country appeal. The argument turns on the meaning of paragraph 5(2) of Schedule 3, Part 2:

> "The person may not bring an immigration appeal by virtue of section 92(2) or (3) of the Act (appeal from within the UK:general)."

Brought, it is submitted, means initiated or commenced. The Claimant, it is said, "brought" an appeal; he did so by giving notices of appeal back in 2004. If the 2004 safe third country certificate is, as contended, a nullity, then the Claimant was entitled to bring an appeal in-country, since section 93 of the 2002 Act did not prevent him from doing that. With respect to the new certificate under the 2004 Act, paragraph 5(2) has no effect. The Claimant has already brought his immigration appeal. A paragraph 5(1) certificate cannot prevent an appeal from being continued once brought.

31. In a sense, Ms Simler QC submitted that the Claimant is hoist with his own petard. If the March 2004 safe third country certificate is a nullity, as he has successfully argued, it follows that there was no decision attracting any right of appeal under section 82(2) of the 2002 Act, and the appeals commenced by him by notices of appeal in late 2004 are also to be treated as nullities. Furthermore, Ms Simler QC has made withering critiques of the appeal notices themselves. In her submission, clearly correct, the immigration decision which the Claimant needed to appeal was that contained in the IS82D, the "Notice of Refusal of Leave to Enter", served on 6 October 2004. The safe third country certificate was served along with that notice but under section 82 of the 2004 Act was not itself an immigration decision. The 9 November 2004 notice of appeal purporting to appeal the "decision of 22/3/04" was thus clearly ineffective. The notice of appeal dated 14 December 2004 appealed "Decisions of Various Dates including 22/3/04 and 21/10/04 to remove appellant from UK". The letter of 21 October 2004, as described earlier, certified that the Claimant's claim that removal to Italy would breach his Convention rights was clearly

unfounded. That decision attracted appeal rights under section 82(1) but under section 92(4)(a) (or its predecessor section) and paragraph 5(4) of Schedule 3 to the 2004 Act, he could only exercise those rights from abroad.

32. The Claimant's response to these criticisms is that, properly and generously interpreted, the appeal notices can relate to an immigration decision. The letter of 21 October is on a proper interpretation an immigration decision, and the letter of 22 March 2004 sufficiently identifies an appealable immigration decision. The reference to "decisions of various dates" was sufficient to identify the decision appealed. Moreover, the Claimant submits – and there appears to be some circularity here – it is a matter for the Tribunal to determine whether there is a 'relevant decision' (in accordance with Asylum and Immigration Tribunal (Procedure) Rules 2005, SI No 230 r. 9, applicable by virtue of r. 62(I) of the same rules). Finally, it is said that the appeal notice can be amended. Those latter points were not developed in oral argument.

33. Even were I inclined to adopt a sympathetic interpretation of the appeal notices, which afterall were drafted by solicitors, my view is that the Claimant's argument under this head falls at the first hurdle. That is because paragraph 5(2) of Schedule 3, Part 2 of the 2004 Act bites on any appeal by the Claimant. It will be recalled that the submission in this regard was that the prohibition there – a person "may not bring an immigration appeal" – cannot prevent an appeal from being continued, once brought. To have that effect the submission runs, the provision would have to prevent an appeal from being "brought or continued" in order for a safe third country certificate from having any legal effect on the claimant's appeal.

34. In my judgment the concept of bringing an appeal refers to a process. It is not a one-off event, when the appeal is initiated. Admittedly there are provisions in the immigration legislation which prevent an appeal from being "brought or continued" (e.g. Nationality, Immigration and Asylum Act 2002, ss 96, 97, 97). However, that does not deprive "bring" of its ordinary meaning in the context of appeals in paragraph 5(2). "To bring an appeal" has a transactional quality about it and the prohibition on bringing an appeal operates on any ongoing appeal. The prohibition did not have to operate expressly as one on bringing and continuing an appeal. The safe third country certificate of earlier this year therefore stopped any existing appeal in its tracks.

(c) Certification and discretion

35. The Claimant also relies on the Family Ties Policy in relation to safe third country cases announced to the House of Commons in July 2002. Under it the Secretary of State may exercise her discretion to permit asylum claims to be considered in the United Kingdom, rather than returning the person to the safe third country where, according to the merits, there is clear evidence that the applicant was wholly or mainly dependant on the relation in the United Kingdom and that there was an absence of similar support elsewhere. Factors which might influence the exercise of discretion in these cases, such as language, cultural links or the number of family links in the United Kingdom may have a bearing, but there would need to be a compelling combination of such factors to ensure the exercise of discretion in favour of the applicant. The intention of the policy is said to be to re-unite members of an

existing family unit who, through circumstances outside of their control, have become fragmented.

36. It is difficult to see how the Family Ties Policy can assist the Claimant. It was made clear at the time the policy was announced that cases falling within it were expected to be rare. A brother, not dependant on his siblings, would not normally have his case considered in the United Kingdom under the policy. It was also said expressly that where the relationship did not exist prior to the person's arrival to the United Kingdom the policy is only applied in the most exceptionally compelling cases. In her submissions the Secretary of State contended that given the history of the Claimant in the years prior to arriving in the United Kingdom, when he was not dependent on his brothers, he did not fall squarely within the policy. Moreover, the policy is applied on a discretionary basis. In my judgment it is difficult to see how the Secretary of State's interpretation of the application of this policy to the Claimant can be faulted in public law terms. Her view is that it does not apply and it cannot be said that no reasonable Secretary of State could take that view.

Certification of human rights as unfounded

37. Since the safe third country certification earlier this year is effective, it becomes necessary to consider the separate certification, that the Claimant's human rights claim is clearly unfounded. There was no disagreement as to the test to be applied: in R (Yogathas) v Secretary of State for the Home Department [2002] UKHL 36; [2003] 1 AC 920 it was said that the Secretary of State is entitled to certify a claim as clearly unfounded if, after carefully considering the allegation, the grounds on which it is made and any material relied on in support of it, "he is reasonably and conscientiously satisfied that the allegation must clearly fail" (per Lord Bingham at [14]), if the allegation is "so clearly without substance that the appeal would be bound to fail", (per Lord Hope at [34]) or if "it is plain that there is nothing of substance in the allegation" (per Lord Hutton at [72]). If on at least one legitimate view of the facts or the law the claim may succeed, the claim is not to be regarded as clearly unfounded: R (L) v Secretary of State for the Home Department [2003] EWCA Civ 25; [2003] 1 WLR 1230, [58]. The court's task is to ask whether in the light of all the present information the appellant's human rights claim was bound to fail: R (Atkinson) v Secretary of State for the Home Department [2004] EWCA Civ 846, [44]-[45].

38. The Claimant's submission, in short, is that removing him to Italy would breach his right to respect for private and family life, largely based upon his relationship with his brothers and their families in the UK. Whilst he is an adult he is nevertheless particularly dependant upon them owing to his and his family's past experiences and his mental ill-health for which those experiences are substantially responsible. Those experiences include the flight from his home, the death of his mother and other brother and the voyage to Italy. It is the nature and extent of the dependency which means that in his particular circumstances he is entitled to protection from removal by Article 8 of the European Convention on Human Rights. Since arriving in the UK he has lived with his older brother and his wife and their children, and his other brother lives nearby and sees him most days. On their account he does not leave the brothers' houses unless accompanied by one of them.

39. There is no need to examine whether Article 8 applies. Despite Ms Simler QC's submission at one point, it seems that the Secretary of State in her letter of 16 April

2008 has conceded that Article 8 of the European Convention on Human Rights has been engaged. The issue then becomes whether the interference with Article 8 rights is justified and proportionate under Article 8 (2): Huang v Secretary of State for the Home Department [2007] 2 AC 167; [2007] UKHL 16, [19]-[20]. Some of the factors that the Secretary of State has taken into account in considering this aspect are of doubtful value. The characterisation of the Claimant's attempt to enter the country "for a purpose for which the possession of a mandatory entry clearance is required" does not seem to advance the matter far, and the reliance placed on the Claimant's absconding must be placed alongside his brother's explanation of what happened between June and October 2004.

40. The fact is that the Claimant has been removable to Italy since 2004 and can have had no legitimate expectation that he would be able to remain. (No blame can attach to him for the delay, which derives in large part from the suspension of action against him in the light of test cases before the courts). The Secretary of State has a duty to Parliament to maintain fair and consistent immigration control, one part of which is the operation of the Dublin Regulation. There has been careful consideration, in particular, of the arrangements in Italy for the appropriate treatment of the Claimant when he arrives there in the light of the medical evidence of his moderate depression and post traumatic stress disorder. The policy of the Italian government is not to return Somali nationals to Somalia but to permit them to reside in Italy on humanitarian grounds. That humanitarian protection confers the same degree of access to health care as is enjoyed by Italian nationals. Giving the matter careful consideration, in my judgment any contention that the Secretary of State's action is disproportionate in returning the Claimant to Italy is bound to fail. On no legitimate view can it be said that return to Italy will result in a breach of the fundamental right contained in Article 8. There was nothing unlawful in the Secretary of State certifying the Claimant's human rights claim as clearly unfounded.

Conclusion

41. If the Claimant's account is accepted he has been particularly damaged by his experience of the violence in Somalia, his flight and the journey across the Mediterranean to Italy. The medical evidence is now dated but it indicated that the Claimant's condition improved with the care and support of his brothers, both having refugee status in this country. In human terms if the position is as it was to return him to Italy may have some effect on this. From the outset, however, the Claimant's status here has been tenuous. The Secretary of State has simply sought to give effect to a policy, agreed on a European wide basis, to return persons like the Claimant to countries where they first claimed asylum. In my view her initial attempt to do this misfired, through administrative error. But in my judgment there are no flaws in the safe third country certificate she has now issued, nor in her certification that his human rights claims are clearly unfounded. He must return to Italy to have his claims addressed.