Neutral Citation Number: [2011] EWHC 205 (Admin)
Case No: CO/9992/2009, CO/12450/2009, CO/12776/2009

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

Birmingham Civil Justice Centre
33 Bull Street, Birmingham, B4 6DS

Date: 10/02/2011

Before :

THE HONOURABLE MR JUSTICE BEATSON

- -

Between :

The Queen (on the applications of) YZ, MT and YM	**Claimant**
- and -	
Secretary of State for the Home Department	**Defendant**

- -
- -

Mr Becket Bedford and Mr Nelson Enonchong (instructed by **Sultan Lloyd**) for the Claimants
Mr Vinesh Mandalia (instructed by **The Treasury Solicitor**) for the Defendant

Hearing date: 20 October 2010
Further Submissions 27 October, 3 November 2010

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Judgment

Mr Justice Beatson :

I. *Introduction*

1. These three linked claims are before the court following the grant of permission by Richards LJ on 24 February 2010. Their procedural history is summarised in the judgment his Lordship gave when doing so: see [2010] EWCA Civ 275. The claimants are nationals of Eritrea who made applications for asylum in this country. Their applications have not been considered substantively but have been certified pursuant to the power in Part 2 of Schedule 3 to the Asylum and Immigration (Treatment of Claimants etc) Act 2004 on the ground that, in different circumstances, Italy has accepted or is deemed to have accepted responsibility for their asylum claims under Council Regulation EC 343/2003 of 18 February 2003, which I shall refer to as the Dublin II Regulation.

2. In view of the nature of the claims, it will be necessary to set out the factual position of each claimant and the Secretary of State's responses to their positions before proceedings were instituted in some detail. At this stage, it is convenient to summarise a number of features which are common to each of the three claims. The claimants all arrived in the United Kingdom and made a claim for asylum. They did so without

disclosing that they had previously been apprehended and claimed asylum in another Member State of the European Union. Two of them, MT and YM, deny that they in fact did so. But the Eurodac automated fingerprint database subsequently matched the fingerprints of all three to a previous illegal entry into Italy. The United Kingdom then made formal requests under the terms of the Dublin II Regulation to Italy to "take-back" the claimants. The authorities in Italy were deemed under the terms of the Dublin II Regulation to have agreed to take the claimants back, and in the cases of MT and YM, formally agreed to do so.

3. The three claimants applied for permission to seek judicial review of the decision to remove them to Italy in accordance with the Dublin II Regulation. As a result, they were not removed within what would normally be the relevant time limit laid down by the Regulation. The dispute between the claimants and the defendant concerns whether that time limit applied and, if it did, whether it had been validly suspended. At this stage it suffices to state that Richards LJ granted permission, with some hesitation, so that three issues could be examined more fully. I have been assisted in doing so by helpful written and oral submissions by Mr Becket Bedford, on behalf of the claimants, and Mr Vinesh Mandalia, on behalf of the Secretary of State.

II. *The Issues*

4. **Issue 1:** This, which concerns YZ and YM, has two limbs. The first is whether the Secretary of State can suspend the time limit for implementing a person's transfer under the Dublin II system. By Article 20(1)(d) of Regulation 2003/343/EC the transfer of a person to the Member State which has agreed to take that person back must take place within 6 months of the date the Member State has accepted or is deemed to have accepted the request. On 11 May and 8 June 2009 respectively, YZ and YM were served with a "Third Country Certificate" notifying them that Italy was deemed to have accepted responsibility for their asylum claims.

5. By Article 20(1)(e) of the Regulation (set out at [22]) an appeal or review of the decision to transfer a person "shall not suspend the implementation of the transfer except when the courts or competent bodies so decide on a case-by-case basis if the national legislation allows for this". The Secretary of State is the authority responsible for implementing a transfer. The first limb of this issue is whether the Secretary of State is a 'competent body' within Article 20(1)(e). If she is, she can decide whether to suspend time running under the 6 month transfer period after which responsibility for determining the asylum claim would fall on the United Kingdom as the requesting Member State. It was submitted by Mr Bedford that a decision to suspend must be taken by a court or tribunal independent of the executive, and not by the Secretary of State.

6. The second limb of the first issue is whether, if the Secretary of State is a 'competent body' for the purpose of Article 20(1)(e), she did in fact suspend the implementation of the transfers and whether she can do so by a policy to do so in a class of case rather than by an individual decision. The relevant policy here is that, subject to exceptions not relevant in these cases, the Secretary of State defers removal and thus suspends the implementation of a transfer where judicial review proceedings have been

instituted.[1] It was submitted by Mr Bedford that this does not suffice. What is required is a decision in the individual case. Mr Bedford also submitted that both limbs of this question should be referred to the European Court of Justice in Luxembourg.

7. **Issue 2:** This only concerns YM. It is whether, in the circumstances of his particular case, the time limit for implementing his transfer was in fact "suspended" for the purposes of the Dublin II Regulation. It is submitted on YM's behalf that in his case: (a) there was no actual suspension of the transfer; (b) on the evidence, he was not notified of any such suspension; and (c) the judicial review proceedings cannot themselves have been effective to give rise to a suspension, not least because a stay was refused: see paragraph [17] of Richards LJ's decision.

8. **Issue 3:** This concerns MT and YM, who deny first claiming asylum in Italy. The question here is whether the determination of whether a person has claimed asylum in another member state so as to trigger the application of the relevant provisions of the Dublin II Regulation is one of jurisdictional or precedent fact. If so, would it be wrong to decide it at the permission stage by refusing permission as this would mean the claimant would not have the opportunity to give and to call evidence, or otherwise to test the matters relied on by the Secretary of State, in these cases a comparison of the claimants' fingerprints and fingerprint data supplied by the Eurodac Central Unit. Richards LJ described this ground as based on a claim of procedural unfairness: see [2010] EWCA Civ 275 at [11], [13] and [15].

9. Underlying the three particular issues is the broader question of whether, and, if so, to what extent, alleged breaches of the Dublin II Regulation are directly actionable by an individual applicant for asylum. A number of authorities have held that its provisions govern responsibility as between Member States, but do not give directly actionable personal rights to the individual asylum seekers unless the Secretary of State acts in a *Wednesbury* unreasonable manner or in breach of that individual's human rights.

III. *The Evidence*

10. At the time of hearing the evidence in support of the claimants consisted of the contents of section 8 of the N461 forms and the documents included with their applications. In the case of YM there is additionally an undated statement by him. At that stage no evidence had been filed by the Secretary of State. After the hearing, pursuant to my direction, on 27 October and 3 November 2010 further written submissions and evidence were filed. These concerned the measures taken by the Secretary of State to comply with the provisions of Council Regulation (EC) 2725/2000 ("the Eurodac Regulation"), the policy of the Secretary of State with regard to deferring removal directions in cases where a claimant has applied for permission to seek judicial review, and the procedure by which a suspension of transfer under the Dublin II process is implemented and was in these cases. The evidence filed on behalf of the Secretary of State is the statement of Lazarus Lebechi, a Senior Caseworker at the Third Country Unit of the UK Border Agency, which is responsible for the certification of asylum cases on third country grounds under the provisions of the Dublin II Regulation. The statement is dated 27 October 2010.

[1] The current guidelines, *Judicial Review and Injunctions* came into effect on 26 July 2010. The exceptions (see section 6) are where less than three months have elapsed since a judicial review or a statutory appeal "on the same or similar issues".

IV. *The legislative and policy framework*

11. Since the European Council of Tampere in 1999 the European Union has sought to develop a common asylum system. It is an evolving process. In 2008 the European Commission published a proposal for the recasting of the system which seeks to improve its efficiency and ensure the needs of those seeking international protection are covered by the procedure for determining responsibility.

12. At present, the legal framework 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" is now contained in the Dublin II Regulation, Council Regulation (EC) 343/2003 of 18 February 2003. Its predecessor was the Dublin Convention 1997, EC 97/C 254. There are differences. For example, Article 15(7) of the Dublin Convention provides that "an applicant for asylum shall have the right to receive, on request, the information exchanged concerning him or her, for such time as it remains available". There is no similar provision in the Dublin II Regulation.

13. The criteria and mechanisms of the Dublin II Regulation rely *inter alia* on the earlier "Eurodac" Regulation (Council Regulation (EC) No 2725/2000), which had applied to the earlier Dublin Convention. The Eurodac Regulation was adopted because of the recognition that "fingerprints constitute an important element in establishing the exact identity" of applicants for asylum and whether they had made applications in more than one Member State. It provided for the establishment of a system for the comparison of fingerprints known as "Eurodac". The third relevant Regulation is the Implementation Regulation (Council Regulation (EC) No 1560/2003) which lays down detailed rules for the application of the Dublin II Regulation.

14. The recitals in the preamble to the Dublin II Regulation include:

> (1) "a common policy on asylum, including a Common European Asylum System" as part of the objective of establishing freedom, security and justice for those who legitimately seek protection;
>
> (3) "a clear and workable method for determining the Member State responsible for the examination of an asylum application";
>
> (4) "based on objective, fair criteria both for the Member States and for the persons concerned" which "should, in particular, make it possible to determine rapidly the Member State responsible so as to guarantee effective access to the procedures for determining refugee status and not to compromise the objective of the rapid processing of asylum application"; and
>
> (11) "the operation of the Eurodac system…should facilitate the implementation of this Regulation".

15. Article 2(1)(e) of the Dublin II Regulation provides "'examination of an asylum application' means any examination of, or decision or ruling concerning, an application for asylum by the competent authorities in accordance with national law except for procedures for determining the Member State responsible in accordance with this Regulation".

16. Articles 3-4 of the Regulation are in Chapter II under the heading "General Principles". Article 3(1) provides that applications for asylum "shall be examined by a single Member State, which shall be the one which the criteria set out in chapter III indicate is responsible". Chapter III contains what its heading describes as the "hierarchy of criteria". Article 3(2) enables a Member State to accept responsibility to deal with a claim although it has no obligation to do so. In such a case it is required to inform the Member State previously responsible and any other Member State conducting a procedure for determining the Member State responsible.

17. By Article 4(1) the process of determining the Member State responsible "shall start as soon as an application for asylum is first lodged with a Member State". That (see Article 4(2)) is "once a form submitted by the applicant for asylum or a report prepared by the authorities has reached the competent authorities of the Member State concerned". Article 4(4) provides that "where an application is lodged with the competent authorities of one Member State by an applicant who is in the territory of another Member State, the determination of the Member State responsible shall be made by the Member State in whose territory the applicant is present". The provision also provides that "the latter Member State shall be informed without delay by the Member State which received the application and shall then, for the purposes of this Regulation, be regarded as the Member State with which the application for asylum was lodged". This provision also states that "the applicant shall be informed in writing of this transfer and of the date on which it took place".

18. By Article 4(5) "an asylum seeker who is present in another Member State and there lodges an application after withdrawing his application during the process of determining the Member State responsible shall be taken back, under the conditions laid down in Article 20, by the Member State with which that application for asylum was lodged, with a view to completing the process of determining the Member State responsible for examining the application for asylum".

19. The material provisions in Chapter III's hierarchy of criteria are Articles 5 and 6. Article 5(1) provides that the criteria for determining the Member State responsible for examining an application for asylum are to be applied in the order in which they are set out in Chapter III. By Article 5(2) the determination of such responsibility is to be made on the basis of the situation obtaining when the asylum seeker first lodged his application with a Member State.

20. Article 6 provides that where, as in the present cases, the applicant for asylum is an unaccompanied minor "the Member State responsible for examining the application shall be that where a member of his or her family is legally present, provided that this is in the best interest of the minor" but, in the absence of a family member, shall be the Member State in which the minor has lodged his or her application for asylum.

21. Chapter V deals with "Taking Charge and Taking Back". Article 16 provides:

> "(1) The Member State responsible for examining an application for asylum under this Regulation shall be obliged to:
>
> …

(c) take back, under the conditions laid down in Article 20, an applicant whose application is under examination and who is in the territory of another Member State without permission;
(d) take back, under the conditions laid down in Article 20, an applicant who has withdrawn the application under examination and made an application in another Member State;
(e) 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."

(2) Where a Member State issues a residence document to the applicant, the obligations in paragraph 1 shall be transferred to that Member State.

22. The conditions laid down in Article 20 are:

"(1) An asylum seeker shall be taken back in accordance with Article 4(5) and 16(1)(c), (d) and (e) as follows:

(a) the request for the applicant to be taken back must contain information enabling the requested Member State to check that it is responsible;
(b) the Member State called upon to take back the applicant shall be obliged to make the necessary checks and reply to the request addressed to it as quickly as possible and under no circumstances exceeding a period of one month from the referral. When the request is based on data obtained from the Eurodac system, this time limit is reduced to two weeks;
(c) where the requested Member State does not communicate its decision within the one month period or the two weeks period mentioned in subparagraph (b), it shall be considered to have agreed to take back the asylum seeker;
(d) 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;
(e) the requesting Member State shall notify the asylum seeker of the decision concerning his being taken back by the Member State responsible. The decision shall set out the grounds on which it is based. It shall contain details of the time limit on carrying out the transfer and shall, if necessary, contain information on the place and date at which the applicant should appear, if he is traveling to the Member State responsible by his own means. This decision may be subject to an appeal or a review. Appeal or review concerning this decision shall not suspend the implementation of the transfer except when the courts or competent bodies so decide in a case-by-case basis if the national legislation allows for this. (emphasis added)

…

(2) 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 eighteen months if the asylum seeker absconds."

23. By Article 21 Member States are required to communicate to any Member State that so requests such personal data concerning the asylum seeker as "appropriate, relevant and non-excessive" for the determination of the Member State responsible for examining the application and implementing any obligation arising under the Regulation. By Article 21(5) "the requested Member State shall be obliged to reply

within six weeks". By Article 21(9) "the asylum seeker shall have the right to be informed, on request, of any data that is processed concerning him" and if the information has been processed in breach of the Regulation or Directive 95/46/EC on Data Protection "in particular because it is incomplete or inaccurate, he is entitled to have it corrected, erased or blocked". The Dublin II Regulation came into force on 1 September 2003. It applies to asylum applications lodged from six months after that date.

24. The preamble to the Implementation Regulation states:- (1) a number of specific arrangements must be established for the effective application of the Dublin II Regulation which must be "clearly defined so as to facilitate co-operation between the authorities in the Member States competent for implementing that Regulation"; (2) its purpose is "to ensure the greatest possible continuity between the convention determining the state responsible for examining applications for asylum lodged in one of the Member States"; and (3) the interaction between the procedures laid down in the Dublin II Regulation and the application of the Eurodac Regulation dealing with the comparison of fingerprints must be taken into account.

25. The Implementation Regulation *inter alia* concerns the establishment of an electronic transmission network to facilitate the implementation of the Dublin II Regulation. Article 4 is entitled "Processing of requests for taking back". It provides:

> "Where a request for taking back is based on data supplied by the Eurodac central unit and checked by the requesting Member State…the requested Member State shall acknowledge its responsibility unless the checks carried out reveal that its obligations have ceased under…Article 16(2), (3) or (4) of Regulation (EC) No 343/2003".
>
> and
>
> "the fact that obligations have ceased on the basis of those provisions may be relied on only on the basis of material evidence or substantiated and verifiable statements by the asylum seeker". (emphasis added).

26. The system under the Eurodac Regulation involved the establishment of a computerised central database of fingerprint data and electronic means of transmission between the Member States and the central database (see Recital 5). Article 1 provides that the purpose of this system is to be to assist in determining which Member State is to be responsible pursuant to the Dublin Convention (and now the Dublin II Convention) for examining an application for asylum lodged in a Member State and otherwise to facilitate the application of the Dublin Convention.

27. By Article 2(1):

> "(c)'Member State of origin' means:
>
> (i) in relation to an applicant for asylum, the Member State which transmits the personal data to the Central Unit and receives the results of the comparison;
> …
>
> (e) 'Hit' shall mean the existence of a match or matches established by the Central Unit by comparison between fingerprint data recorded in the data bank and those transmitted by a Member State with regard to a person, without prejudice to the requirement that Member States shall immediately check the results of the comparison pursuant to Article 4(6)."

28. Article 4 deals with the collection, transmission and comparison of fingerprints. It obliges each Member State promptly to take the fingerprints of all fingers of every applicant for asylum of at least 14 years of age and to transmit the fingerprint data and the sex, reference number and date on which the fingerprints were taken (see Article 5(1)) to the Central Unit. By Article 4(6):

> "The results of the comparison shall be immediately checked in the Member State of origin."

29. Article 8 makes provision for the collection and transmission of fingerprint data of persons apprehended in connection with the irregular crossing of an external border. Article 11 makes provision for the comparison of fingerprint data. Article 15 deals with access to, and correction or erasure of data recorded in Eurodac by the Member State of origin. By Article 15(4), if a Member State "has evidence to suggest that data recorded…are factually inaccurate, it shall advise the Member State of origin as soon as is possible".

30. Article 18 deals with the rights of the data subject. By Article 18(1) a person covered by the Regulation "shall be informed by the Member State of origin" of (a) "the identity of the controller", (b) "the purpose for which the data will be processed", (c) "the recipients of the data", and (e) "the existence of the right of access to, and the right to rectify, the data concerning him/her". Article 18(1) also provides that in relation to a person covered by Article 4 or Article 8 the information "shall be provided when his/her fingerprints are taken".

31. Article 18(2) provides that:

> "…the data subject shall have the right to obtain communication of the data relating to him/her recorded in the central database and of the Member State which transmitted them to the Central Unit. Such access to data may be granted only by a Member State."

Article 18(3) provides that any person may request that data which are factually inaccurate be corrected or that data recorded unlawfully be erased, and that the correction and erasure "shall be carried out without excessive delay by the Member State which transmitted the data…". Article 18(4) provides that, if the right to correct and erase is exercised in a Member State other than that which transmitted the data, the authorities of that Member State "shall contact the authorities of the Member State or States in question so that the latter may check the accuracy of the data and the lawfulness of their transmission and recording" of it. Articles 18(5) and (6) provide that the Member State which transmitted factually inaccurate or unlawfully recorded data shall correct or erase the data and shall confirm this in writing to the data subject "without excessive delay" or, where it does not agree that the data are factually inaccurate or unlawfully recorded, shall explain in writing to the data subject "without excessive delay" why it is not prepared to correct or erase the data.

32. Article 18(9) provides that in each Member State the national supervisory authority shall assist the data subject in exercising his or her rights. Article 18(10) provides that the national supervisory authority of the Member State which transmitted the data and the national supervisory authority of the Member State in which the data subject is

present shall assist and, where requested, advise the data subject in exercising his or her right to correct or erase data.

V. *The Facts*

(a) YZ's case – CO/9992/2009:

33. YZ, who had previously entered the United Kingdom illegally, was removed to Italy on 14 February 2008 under the Dublin II Regulation. He re-entered the United Kingdom and claimed asylum on 12 January 2009. His screening interview was on 22 January. He was served with form IS86 which required him to be fingerprinted. I set out the material wording at [40]).

34. A Eurodac search dated 5 February matched YZ with a "hit" in the UK dated 3 January 2008 and two "hits" in Italy, one on 15 August 2007 and one on 19 February 2008, after his removal from the United Kingdom. On 28 March 2008 he was granted a permit of stay in Italy for subsidiary protection. In letters dated 19 March and 16 April 2009 the United Kingdom Border Agency (hereafter "UK Border Agency") invited YZ to attend an interview to discuss his asylum claim and his other claims to remain in the United Kingdom. At that stage the UK Border Agency had not accepted that he was a minor. However, on 1 April 2009 Solihull Social Services informed the UK Border Agency that it had completed a Merton compliant age assessment and assessed YZ to be a minor.

35. On 20 April the UK Border Agency sent a formal request to the Italian authorities asking them to accept responsibility for consideration of YZ's asylum application under Article 16(1) of the Dublin II Regulation. YZ's solicitor was informed of this. Two weeks later, on 4 May 2009, since there had not been a response from the Italian authorities and the request was based on a Eurodac hit, pursuant to Article 20(1)(c) of the Regulation Italy was deemed to have accepted responsibility for YZ's asylum claim. YZ was notified of this on 11 May, when the Secretary of State also certified his asylum claim on third country grounds.

36. In the light of Italy's deemed acceptance on 4 May, Article 20(1)(d) of the Regulation required YZ 's transfer to be completed by 7 November 2009. By Article 20(2), after the six month period "responsibility shall lie with the Member State in which the application for asylum was lodged". In short, after the end of that period, leaving aside any question of suspension, the Secretary of State was required to accept responsibility for YZ's asylum application.

37. In a letter dated 3 June, YZ's solicitors sought details of the evidence on which the Secretary of State relied to show that YZ was transferable to Italy. The UK Border Agency responded in a letter dated 25 June explaining what Eurodac was and stating that it relied on the Eurodac match and Italy's deemed acceptance of responsibility. Note that the matches were with fingerprints taken from an illegal entrant to Italy on 15 August 2008 and a person who had claimed asylum in Italy on 19 February 2008. The letter only referred to the latter as "unequivocally [confirming]" that YZ claimed asylum on that date. It was submitted by Mr Bedford that the UK Border Agency failed to inform YZ's solicitor of the decision to transfer YZ which it had already taken: see skeleton argument paragraph 5. His post-hearing submissions (paragraph

15) state that the letter dated 25 June "neglected to say that [the Secretary of State] had taken a transfer decision". "Transfer" is his term for the decision to certify on third country grounds. He also submitted that it was only by the Secretary of State's summary grounds of defence that YZ was informed of the decision. In a letter dated 2 September the NSPCC, expressed concern about the removal of YZ, who was said to be an unaccompanied minor who had been traumatised and needed counselling, On 4 September arrangements were made to remove YZ to Italy on 11 September. It is submitted on behalf of YZ that neither he nor his solicitors were informed of this until service of the Secretary of State's summary grounds.

38. On 7 September, three days after the arrangements to remove him were made, YZ launched these proceedings. The UKBA replied to the NSPCC in a letter dated 8 September stating that a clear set of fingerprints identified YZ as a person who had already been removed from the United Kingdom to Italy as an adult and that the Italian authorities had confirmed that he "had been granted subsidiary protection there". On 10 September, before the Third Country Unit was aware that proceedings had been launched, it asked the Italian authorities for an extension of time for the transfer because he was not found at his accommodation. .On 17 September the UK Border Agency asked the Italian authorities for an extension of time to remove him because his lawyers "have now taken suspensive judicial action against the decision". Evidence of this was provided in Mr Lebechi's post-hearing statement. Mr Bedford submitted that the Secretary of State also failed to notify YZ or his solicitors of this.

39. By an Order made on 14 December, and served on 16 December, I refused YZ permission on the papers. On 8 February 2010 Hickinbottom J refused his renewed oral application at the same time as he considered and refused the applications of YM and MT.

(b) MT's case – CO/12450/2009

40. MT claimed asylum in this country on 13 May 2008. He claimed to be 16 years old. His account at his screening interview on 19 May was that he had left Eritrea in April 2008 and flown from Khartoum to Europe on 8 May 2008 and then travelled to the UK by lorry. He denied travelling outside Eritrea before this trip. On 19 May he was served with form IS86 which required him to be fingerprinted. The form stated that fingerprints provided "to the Home Office" may be disclosed "to the asylum authorities of other countries which may have responsibility for considering your claim".

41. The IS86 form used in the case of the claimants in these proceedings do not inform the individual served of the existence of the right of access to and the right to rectify data concerning him or her. Mr Mandalia, in his second skeleton argument, dated 27 October 2010 conceded that the current forms used do not impart the information that individuals are entitled to under Article 18(1)(e) of the Eurodac Regulation. The concession is only made in respect of YM, but since the same form was used in the cases of YZ and MT, and is still in use, the logic of the concession must apply to all three.

42. The Secretary of State claimed (see pages 2-3 of the factual background in the summary grounds) that MT deliberately damaged his fingertips in an attempt to

obstruct the Eurodac process. Nevertheless, on 27 July 2009 the UK Border Agency obtained a Eurodac search match with a person who had claimed asylum in Italy on 11 September 2007 when apprehended in Palermo, and, on 4 August 2009 formally requested the Italian authorities to accept responsibility and notified MT's solicitors of this.

43. By 3 September the Italian authorities were deemed to have accepted responsibility for him. On 3 September in a letter signed by Mr Hughes, a Third Country Unit caseworker, the UK Border Agency informed MT that Italy had accepted responsibility and certified his claim on Third Country grounds. On 22 September MT's solicitors wrote to the UK Border Agency requesting evidence that MT passed through and claimed asylum in Italy. On 13 October they repeated their request, and asked the UK Border Agency to reconsider the decision to return MT to Italy because of the time limits under the Dublin II Regulation.

44. MT's application for judicial review was issued on 23 October. The Secretary of State received notification of the application on 29 October. Mr Lebechi's post-hearing statement exhibits a letter to the Italian authorities dated 29 October. This states that the Third Country Unit had been informed by the relevant UK Border Agency department that MT's "application is under review and this review has suspensive effect" and asks for an extension of time to effect the removal". On 30 October the Italian authorities formally accepted the transfer of MT back to Italy and responsibility for consideration of his asylum application.

45. On 11 December the UK Border Agency responded to the letters dated 22 September and 13 October. That letter informed MT's solicitors of the Eurodac match, the 4 August request for MT's transfer (of which his solicitors had previously been informed), and states that his claim was certified on Third Country grounds on 28 April 2009 after the Italian authorities were deemed to have accepted responsibility. The 28 April date is a clear mistake: three lines earlier the letter stated that the request to the Italian Authorities was only sent on 4 August.

46. The letter also sets out why the Secretary of State was satisfied of the Eurodac match despite MT's assertion that he did not claim asylum in Italy. It states that his credibility is questioned in view of the account he had given and his attempts to obscure his fingerprints by damaging his fingertips. It states that despite being satisfied that the results of the Eurodac and the acceptance letter from Italy is sufficient evidence, the UK Border Agency had requested confirmation of MT's status in Italy and on 3 December had been informed by the liaison officer in Italy that he was known by the Italian authorities, had been refused asylum in Italy, but was issued a permit of stay for humanitarian reasons for one year.

47. I refused permission on the papers on 21 December. MT's application was renewed on the ground that he denied that he had previously claimed asylum in Italy. His renewed application was also refused on 8 February 2010 by Hickinbottom J.

(c) YM's case – CO/12776/2009

48. YM was born on 23 April 1993. On 4 December 2008, and then 15 years old, YM presented himself to the Immigration Office in Solihull and claimed asylum. He was

served with form IS86 and subsequently fingerprinted. At his screening interview on 18 December he falsely claimed to have left Eritrea on 11 September 2008, to have travelled to Sudan, and then to France. A Eurodac search on 6 January 2009 matched his fingerprints with those taken in Italy on 6 July 2008 from an illegal entrant, and fingerprints taken on 17 July from a person who applied for asylum. The claim for asylum is denoted by the use of the case reference IT/PAA09JKG. In a letter dated 14 April 2009, responding to a request for a substantive interview by YM's solicitors, the UK Border Agency stated that the matter had been referred to the Third Country Unit. On 24 April it requested Italy to "take-back" YM under the Dublin II Regulation, and on the same day informed his solicitors she was considering his case in line with Dublin II as it was believed another Member State may be responsible for his case.

49. On 8 May 2009 Italy was deemed to have accepted responsibility pursuant to Article 20(1)(c) of the Regulations. In a letter dated 3 June YM's solicitors requested disclosure of the information relied on to conclude that Italy was responsible for determining his application. On 4 June the UK Border Agency reminded the Italian authorities of the request and asked them to "confirm in writing without any delay that [Italy] acknowledged responsibility for YM".

50. In a letter dated 8 June 2009 the UK Border Agency notified YM's solicitors of the Eurodac match and the request to Italy. The solicitors responded, now accepting that YM had been fingerprinted in Italy, but stating he had not made or been given an opportunity to make an asylum claim there. They have [since] sought the UK Border Agency's assistance in obtaining a copy of the asylum claim and photograph from Italy. The UK Border Agency has refused to do so and has relied on the Eurodac match.

51. In a letter dated 1 September 2009 the Italian authorities stated that "[a]ccording to Article 16(2), Italy accepted the transfer of" YM and thus responsibility for him. Article 16(2) (see [21]) applies where the Member State has issued a residence document to a person. On 8 September the Secretary of State refused to consider his claim for asylum and certified it on "third country grounds" i.e. on the basis of the Dublin II Regulations. It is submitted on behalf of YM that the Secretary of State did not inform either him or his solicitors of these decisions. Notwithstanding that, a letter before action dated 13 October was sent. The UK Border Agency responded in a letter dated 14 October stating that YM's case is a "take-back" case subject to Article 16(1)(c) of the Regulations and therefore not subject to the time limit to make a request to the Member State deemed responsible. If the case is subject to Article 16(1)(d) the time limit for transfer would have expired on 7 November 2009. Eurodac stated "a positive and conclusive match" for YM was recorded in Italy on 17 July 2008 "when he claimed asylum" and referred to the earlier Eurodac hit for illegal entry. It also stated it had been premature to send a pre-action protocol letter because "no decision has been made" and "no removal directions have been set".

52. No removal directions had been served but, on 28 October an immigration officer informed Solihull Children's Services that YM was to be collected at 3:30am on 3 November, told of the decision to return him to Italy to pursue his asylum claim and put on a flight for Italy with an escort at 7:30am. The policy of giving certain individuals less than seventy two hours notice of removal directions was declared as unlawful denial of access to the court in *R (Medical Justice) v Secretary of State*

[2010] EWHC 1925 (Admin). In the case of YM, the policy was thwarted because a member of staff at Solihull Children's Services forwarded the UK Border Agency's email to YM's solicitors and these proceedings were launched on 30 October. HHJ Kirkham refused interim relief on the same day. The post-hearing evidence includes a document dated 30 October stating that YM had "taken suspensive judicial action" and asking for an extension of time. The Secretary of State's summary grounds were served on 16 December. The claimant maintains that it was only on that date that he was informed that his claim for asylum had been refused and certified. HHJ McKenna refused permission on 21 December. YM's case was renewed together with the other two cases on 8 February and Hickinbottom J refused the application.

VI. *Discussion*

(a) Can individuals rely on breaches of Dublin II, and if so, in what circumstances?

53. I first address what Mr Mandalia referred to as a preliminary point. Although preliminary, it is in a sense fundamental. It is whether the claimants' cases fall within the limited situations in which alleged breaches of the Dublin II Regulation are directly actionable by an individual. Mr Bedford submitted that, notwithstanding the approach taken in the cases, they do. He has made similar submissions in a number of the cases to which I will refer. His starting point is the direct applicability of the criteria in the Dublin II Regulation: on which see *Omar v Secretary of State for the Home Department* [2005] EWCA Civ 285. In Case C-253/00 *Munoz y Cia SA v Frumar Ltd and Redbridge Produce Marketing Ltd* [2002] ECR 1-7289 at [27], the European Court of Justice (hereafter "ECJ) stated:

> "…regulations have general application and are directly applicable in all Member States. Accordingly, owing to their very nature and their place in the system of sources of Community law, regulations operate to confer rights on individuals which the national courts have a duty to protect."

54. Mr Bedford relied on the only decision of the ECJ on the Dublin II Regulation, C-19/08 *Migrationsverket v Petrosian* [2009] 2 CMLR 33, in which the judgment of the Fourth Chamber was handed down on 29 January 2009. He recognised that the case, a reference for a preliminary ruling by the Kammarräten I of the Migrationsöverdomstolen (the Court of Appeal in Immigration Matters) in Stockholm, was primarily concerned with the point from which a suspension pursuant to Article 20 of the Regulation began for the purposes of the timetable for a transfer under the Regulation. But he submitted that the ECJ's judgment proceeded on the basis that the Regulation does have direct effect and give individual rights. In doing so, he argued that the decision of Cranston J in *R (J) v Secretary of State* [2009] EWHC 1182 (Admin), to which I shall return, was wrong.

55. The next stage in Mr Bedford's argument was the submission that, since it has been contemplated, for example, by Laws LJ in *R (AA (Afghanistan)) v Secretary of State* [2006] EWCA Civ 1150 [14], [16] and [21], that a challenge by an individual on *Wednesbury* or human rights grounds might lie where the provisions of the Dublin II Regulation have been applied properly, the position where there has been a breach of those provisions is *a fortiori*. Article 20(1)(e) requires the requesting Member State to inform the applicant for asylum of the decision, and to set out the grounds on which the decision is based and details of the time limit on carrying out the transfer. It also

expressly contemplates an appeal or review of the Member State's decision concerning his being taken back by the Member State responsible and provides for the effect of such appeal or review on the timetable. That provision, Mr Bedford submitted, assumes the individual may have rights. Why, he asked, should there be an appeal or review at all if the individual has no rights.

56. He illustrated this submission by reference to *AA (Somalia)* [2006] EWCA Civ 1540 at [21], decided three weeks before *AA (Afghanistan*). In *AA (Somalia)* consideration was given to the point in time by reference to which the question under Article 6 of the Dublin II Regulation whether an unaccompanied minor has a family member present in a particular Member State was addressed. The consequence of finding a family member present at the relevant time is to make that State responsible for examining the minor's application for asylum. Laws LJ stated that consideration of this point in time may be logically prior to consideration of whether a family member is present in that State. Mr Bedford accepted the issue that arose in *AA (Somalia)* does not arise in the present case, but asked how the position of an unaccompanied minor would be protected against transfer contrary to the provisions of Article 6 without a right to institute proceedings.

57. Mr Bedford also relied on the fact that the Eurodac regulation confers rights on the individual whose fingerprints are said to be matched with fingerprints taken in another Member State. Those rights include the right to request that factually incorrect data are corrected. In *YI (Previous claims – fingerprint match – Eurodac) Eritrea v Secretary of State for the Home Department* [2007] UKAIT 00054, the Asylum and Immigration Tribunal stated that an Immigration Judge hearing an appeal needs to be satisfied on the specific evidence in the particular case, including, if available, evidence of a match on the Eurodac system, whether the appellant has made a previous claim. The Tribunal (Hodge J and Batiste SIJ) stated (at [15]) that an Immigration Judge will, as a matter of fairness, need to be satisfied that the appellant has had the facility to access information about the assertion against him that would enable him "to make a meaningful forensic rebuttal beyond mere denial". Mr Bedford submitted that without direct rights to the information the individual is not able to do so.

58. I reject these submissions. The statement in *YI (Previous claims – fingerprint match – Eurodac) Eritrea* was made in an entirely different context and the Asylum and Immigration has since taken a different view on the particular issue: see [100] – [102]. Moreover, there is a formidable body of case law, including a number of decisions of the Court of Appeal, which is contrary to them. Those cases proceed on the basis that, absent *Wednesbury* unreasonableness or a breach of an individual's human rights, although the Dublin II Regulation is directly applicable in Member States, alleged breaches of it are not actionable by an individual claimant. Moreover, in those cases, it is not the breach of the Regulation in itself which gives rise to the claim, but the breach of a norm of domestic public law (the *Wednesbury* principle) or of the European Convention on Human Rights.

59. In *AA (Somalia)* the court rejected the submission that a claimant was entitled to a second screening process in which hierarchy criteria in the Regulation are considered. It did so in the light of the decisions of Wilson J and the Court of Appeal in *R (G) v Secretary of State* [2004] EWHC Admin 2848 and [2005] EWCA Civ 546. In the

Court of Appeal in *G*'s case, Maurice Kay LJ stated (at [25]) that "the effect of Article 15 [of the Dublin II Regulation] is not to confer a free-standing substantive right on individual applicants. Rather it is to regulate the relationship between two or more Member States". In *AA (Somalia)* Laws LJ, who gave the main judgment, stated (at [29] – [30]) that was the context in which the Regulation "advisedly located consideration of new found or lately discovered facts" (in that case a possible family member of an unaccompanied minor in the United Kingdom). The remedy was not a direct right but the ability to submit to the Member State first approached that it make a request to the United Kingdom pursuant to Article 15. Maurice Kay LJ gave a concurring judgment.

60. In *AA (Somalia)* the court (at [53] and [59]) did grant permission to challenge removal directions on a ground based on expiry of the time limit under Article 20. This ground, however, emerged only on the morning of the hearing and counsel for the Secretary of State was not in a position to deal with it. In giving permission on that single ground Laws and Maurice Kay LJJ said nothing to qualify what was said about directly actionable personal rights in the earlier part of their judgments.

61. In *AA (Afghanistan)* [2006] EWCA Civ 1550, Laws LJ, with whom May and Gage LJJ agreed, stated at [13]:

> "I certainly accept in general terms that an asylum claimant cannot challenge (save perhaps on human rights grounds) the allocation of responsibility between states for the determination of his claim where that has been effected by proper application of Dublin I or II."

He qualified this statement by recognising that there might be a challenge on *Wednesbury* grounds where there had been, as there was in that case, a gross breach of the time limit for completing a transfer but the receiving state continued to accept responsibility for the claim. His Lordship was thus dealing not only with the situation where there had been a proper application of the Dublin process but also with a breach. Nevertheless, and contrary to Mr Bedford's *a fortiori* submission, he only contemplated a direct challenge on *Wednesbury* and human rights grounds.

62. The third Court of Appeal decision is that in *R (MK (Iran)) v Secretary of State* [2010] EWCA Civ 115. In that case it was submitted, also by Mr Bedford, that MK had derived an unconditional right pursuant to Article 16(1)(b) of the Dublin II Regulation to the completion of the examination of his asylum application by the Secretary of State. The submission was rejected. Carnwath LJ stated (at [42]) that "the Regulation is concerned with the allocation of responsibility as between States, not the creation of personal rights". His Lordship recognised that "it may be" that "a claimant threatened with removal from the country which has responsibility under the Regulation, has an enforceable right to prevent his removal to another country before his claim is determined". But, he continued, "there is nothing in the Regulation…which can be said to create a personal right to have the claim determined within any particular time. That is not its purpose."

63. Mr Bedford submitted that Carnwath LJ's statement was *per incuriam* because the decision in *Omar v Secretary of State* [2005] EWCA Civ 285 was not considered. In *Omar*'s case the Court of Appeal held that the criteria but not the mechanisms in the Dublin I Convention, had direct effect during the transitional period before the Dublin II Regulation was fully in force. Chadwick LJ stated (at [35]) that he would have been

prepared to hold that Article 29 of the regulation gave an asylum seeker a direct right to require State A to call upon State B to take charge and, if State B accepted the obligation to take charge, to transfer him to State B. But the point did not arise in that case and there is no inconsistency between the decision and Carnwath LJ's statement in *MK (Iran)*'s case. Carnwath LJ's statement is, moreover, entirely consistent with the approach in *AA (Somalia)* and *AA (Afghanistan)*.

64. The last Court of Appeal case is *Mota v Secretary of State* [2006] EWCA Civ 1380. When refusing permission to appeal, Pill LJ (with whom Moses LJ agreed) took the same approach. Burton J had decided ([2006] EWHC 1182 (Admin) that once there had been acceptance of a transfer application the applicant for asylum is not entitled to challenge the transfer and that the Dublin II Regulation conferred no rights upon individuals to challenge decisions between States, notwithstanding that the Regulation is directly applicable in Member States. The decisions of Silber J in *R (Chen) v Secretary of State* [2008] EWHC 437 (Admin) at [30] and [35], and of Christopher Symons QC in *R (Haedare) v Secretary of State* [2009] EWHC 3444 (Admin) are to the same effect.

65. Finally, I come to the decision in *R (J) v Secretary of State* [2009] EWHC 1182 (Admin) and its consideration of the ECJ's judgment in *Migrationsverket v Petrosian*. By the time *J*'s case came before Cranston J, it was largely academic because the claimant had not been removed and had indeed been granted asylum in the United Kingdom. Cranston J (at [19]) rejected the submission that, in the light of the ECJ's decision, after the six month period in Article 20 of the Dublin II Regulation had passed, it was unlawful for the Secretary of State to remove a claimant.

66. In the *Migrationsverket* case members of the Petrosian family applied for asylum in Sweden. On examination of their application it became apparent to the relevant Swedish authority (the Migrationsverket) that the family had earlier applied for asylum in France: see ECJ judgment at [16]. The Migrationsverket requested the French authorities to take back the members of the family. The family appealed against the decision of the Migrationsverket and claimed that their asylum claim should be examined in Sweden. On 23 August 2006 a County Administrative Court stayed the transfer pending its final decision, which it made on 8 May 2007. It dismissed the family's appeal and ordered that the suspension should no longer apply.

67. The family appealed to the Kammarräten I of the Migrationsöverdomstolen (the Court of Appeal in Immigration Matters). On 10 May that court stayed execution pending its final decision, which it gave on 16 May, when it set aside the judgment of the County Administrative Court. It did so on the ground of procedural error relating to the composition of the bench, and referred the case back. It also ordered that the decision to transfer the family was not to be carried out before the County Administrative Court had given its final judgment.

68. The County Administrative Court made a fresh decision on 29 June 2007. It annulled the decision of the Migrationsverket on the ground that the six month period in Article 20 of the Dublin II Regulation had expired. The County Administrative Court held that time ran from the time of the provisional judicial decision suspending the implementation of the transfer procedure and not from the time of the judicial decision on the merits. The Migrationsverket appealed against that decision and the

Court of Appeal in Immigration Matters referred the issue for a preliminary ruling to the ECJ. The ECJ held that Article 20 was to be interpreted as meaning that the time for implementation of a transfer ran from the time of the judicial decision which ruled on the merits of the procedure.

69. Cranston J rejected the submission made on behalf of J on the basis of the *Migrationsverket* case. He considered that the ECJ had directed itself only to the issue of how the time limits in the Dublin II Regulation are to be calculated and did not question the annulment decision of the County Administrative Court. He stated (at [21]) that:

> "The time limits in Article 20 are applicable as between the States concerned. A country's obligations are discharged once the six month 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 [the requested State] had refused to accept the claimant on the basis that time periods had lapsed and the United Kingdom demurred, that would have been a matter of dispute between [the requested State] and the United Kingdom. Conversely, if [the requested State] agreed to process the claimant's claim, notwithstanding the time limits were exceeded, that was a matter for [the requested State], 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."

He reiterated at [32] that the time limits in the Dublin II Regulation "do not confer any individual right on the claimant: rather, they give rise to claims between Member States of the European Union".

70. I respectfully agree with Cranston J's analysis of both the scope of the decision in the *Migrationsverket* case and the effect of agreements between Member States to reassign responsibility. The question referred to the ECJ was not whether breach of the Dublin II Regulation conferred rights on individuals, and the judgment of the ECJ does not suggest that the approach taken in the courts of England and Wales has been put into question. Both the written observations of eight Member States and the European Commission ([2009] EWHC 1182 (Admin) at [30] – [31]) and the ECJ (judgment, [41]) focused on the practicality of the periods, the undesirability of national appeal remedies being truncated or having the consequence that requesting States would automatically be responsible, and the risk of abuse by applicants for asylum aiming to produce that consequence. I note that in *R (Vatheesan) v Secretary of State* [2009] EWHC 3727 (Admin), while HH Judge Bidder QC gave permission to apply for judicial review on the basis of *Migrationsverket v Petrosian*, he did not refer to the decision in *J*'s case, which may not have been cited to him.

71. The *traveaux préparatoires*, referred to in both *Migrationsverket v Petrosian* and *J*'s case, give no support for the contrary proposition. In COM (2001) 447 Final, issued on 26 July 2001, the European Commission set out the purposes of what became the Dublin II Regulation. Those (see paragraph 2.1) included: 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 ensure that the Member State responsible will be ascertained as quickly as possible; and to increase the system's effectiveness.

72. Paragraph 2.2 of COM (2001) 447 Final states that, in order to take the lessons of the past on board, the proposal includes:

> "new provisions emphasising each Member State's responsibility *vis a vis all its partners*…when it allows illegal residents to remain on its territory", (emphasis added)
>
> and that the provisions on Member States' obligations:
>
> "are being examined with a view to determining which Member State is responsible *only insofar as those provisions affect the course of proceedings between Member States or are necessary to ensure consistency* with the proposal for a directive on procedures for granting and withdrawing refugee status" (emphasis added).

(b) Issue 1: Suspending time under Article 20(1)(e):

73. Article 20(1)(e) empowers "the courts or competent bodies" to suspend the time for implementing a transfer to the Member State which has agreed to take that person back. Is the Secretary of State is a "competent body" for this purpose? If she is, can she suspend time by a policy such as her policy to suspend whenever an application for judicial review is made? Mr Bedford submitted that the Secretary of State is not a competent body, but that, if she is, she must make an individual decision and cannot rely on a policy.

74. Mr Bedford relied on the difference between the term "competent authorities" (used in Articles 2(e) and 4(2)) to denote the authority responsible for determining applications for asylum (in the United Kingdom, the Secretary of State), and the term "competent bodies" in Article 20(1)(e). He submitted this shows the latter must be an entity independent of the authority responsible for the transfer. The phrase "court or competent bodies" in his submission showed that Article 20(1)(e) refers to the body responsible for the appeal or review rather than the body responsible for determining the application for asylum and for making requests under the Dublin II process.

75. Mr Bedford also argued that the body must be a body independent of the executive. He submitted that to suspend time it was necessary for the Secretary of State to apply to the court for an appropriate order. Where the individual had instituted judicial review proceedings challenging the decision to transfer him, it was likely that the claimant would consent to such an order pending the outcome of the judicial review. To allow the Secretary of State to suspend transfer unilaterally would mean that neither the applicant nor the requested state would know that the timetable has been suspended.

76. On the first limb of this issue I accept Mr Mandalia's submissions. I deal here with the general principle. I will consider the submission that, if the Secretary of State can act unilaterally, neither the applicant nor the requested state will know in [84] – [88].

77. *Migrationsverket v Petrosian* does not assist the claimants on this point. It was ([2009] 2 CMLR 33 at [64] – [66]) concerned only with the time from which suspension ran and was concerned with the decision of a court. Unsurprisingly, the ECJ did not address the question of what bodies could be "competent bodies". Mr

Bedford sought support from the reference in the judgment in the *Migrationsverket* case ([31]) to the observations submitted by a number of Member States about applicants for asylum abusing the appeals process where courts are overburdened and are unable to deal with a matter within the six months period. He argued this showed that "competent bodies" excludes the Secretary of State because, if she could suspend time, the institution of court or tribunal proceedings could not be used to abuse the process. But this is stated in the part of the judgment summarising observations by Member States, not in the part setting out the ECJ's views or its decision. Although the ECJ was also concerned ([2009] 2 CMLR 33 at [52]) with the practical impact on the relevant court, it only addressed the question of *when* time commenced. It was not concerned with *who* could suspend time.

78. I therefore turn to the wording of Article 20(1)(e). This deals with suspension pending "appeal or review". "Review" is a term broad enough to encompass a process undertaken by a non-judicial body, including an internal review by the body responsible for making the original decision, in this context to initiate the Dublin II process. Such internal reviews are commonplace in many administrative contexts. Moreover, the use of a term different to that used to denote the authorities responsible for considering the asylum application and the transfer does not indicate that the "bodies" must be independent of the executive. The framers of the Regulation did not so indicate by using the term "court or tribunal" or "court or independent competent bodies". They used the term "competent bodies". It is within the scope of the Secretary of State's power to consider whether a transfer is to be implemented or, in the event that further representations are made, to review her decision.

79. The practical consequence of excluding the Secretary of State would also in many cases have an adverse impact of the Regulation's policy of rapidly determining the Member State responsible and thereafter transferring individuals in accordance with a tight timetable: see Recital 4 and Articles 20(1) and 21, which I have set out at [14], [22] and [23]. This is because in any case in which further representations were made or legal proceedings instituted it would impose an obligation on the Secretary of State to institute proceedings seeking an order from the court suspending the implementation of the transfer with the consequent delay. In *Migrationsverket v Petrosian* the ECJ had regard (at [52]) to the impact of the construction of the Regulation for which the Petrosian family contended on the practical position of the court in the requesting state. In that case the court considered that, on the construction for which the Petrosians contended, in order to comply with the timetable, the requesting court may have had to rule on the merits of a transfer procedure without sufficient time to take account of the complex nature of the proceedings.

80. Mr Bedford's submissions assumed that there would generally already be judicial review proceedings before the court. But, if his argument is correct, the Secretary of State would also be obliged to institute proceedings where there were none. She would have to issue proceedings even where she considers that there may be some merit in the representations made by the applicant for asylum. The problem would be similar where no view has yet been taken of the representations because they require complex assessments and examinations. Requiring the institution of proceedings would impose a considerable burden both on the Secretary of State and on what is already an overburdened jurisdiction. If the Secretary of State wished to suspend time she would be required to seek what is, in effect, an injunction against herself.

Requiring her to do this opens the door to abuse because a claimant may not, as Mr Bedford suggested, agree to a consent order but procrastinate in an effort to delay matters until after the expiry of the six month period.

81. I turn to the second limb of this issue. Can the Secretary of State decide to suspend implementation of a transfer by a policy? Understandably, Mr Bedford relied on the use of the phrase "decide on a case by case basis" in Article 20(1)(e). He submitted this precludes a general policy. Moreover, he argued that if the Secretary of State made the decision to suspend time, neither the applicant for asylum nor the requested State would know of this or know when the time for transfer expires. Similarly, he submitted one cannot infer a decision to suspend timing and to stay the process simply because an applicant for asylum has brought judicial review proceedings. He relied in particular on the fact that the summary grounds in each of the three cases asked the court to order that any renewal of the application for permission should not act as a bar to the removal to Italy. Mr Bedford also submitted that the requests for extensions of time sent to Italy were misleading. They implied that the institution of judicial review proceedings has a suspensive effect and there was no evidence that the UK Border Agency informed the Italian authorities that the courts had refused to stay removal.

82. The evidence of Mr Lebechi is that the guidelines as to suspension of time in place in 2009, when the three claimants arrived in the United Kingdom and when "Third Country" decisions were made in their cases, were the same as they are now. He stated:

> "In summary, subject to exceptions, UK Border Agency will defer removal if an application for judicial review is made prior to removal and UK Border Agency has received: (a) a copy of the claim form as issued by the court; and (b) a copy of the grounds for judicial review. I can confirm that this is the policy followed by the Third Country Unit." (paragraph 3)

The guidelines are published by the UK Border Agency on behalf of the Secretary of State.

83. Mr Lebechi's evidence is (paragraphs 7-9) that where an applicant for asylum institutes judicial review, the Third Country Unit sends a formal notification to the receiving state informing them that "the applicant has taken suspensive judicial action against the decision" to transfer and asking for an extension of time. He states this is a reference to the claim for judicial review and the Secretary of State's "decision to suspend the removal in line with the published policy".

84. In the present cases the UK Border Agency informed YZ and YM of the decisions to ask Italy to take responsibility for them on 20 April 2009 (YZ) and 8 June 2009 (YM). It had previously informed YM that his case was being considered under Dublin II on 24 April. MT was told, at the latest, by the letter dated 3 September 2009, when the Third Country certificate was issued. The UK Border Agency informed the Italian authorities the claimants had taken "suspensive judicial action" and asked for extensions of time on 17 September (YZ), 29 October (MT) and 30 October (YM). This was shortly after the institution of judicial review proceedings on 7 September (YZ), 23 October (MT) and 30 October (YM). In YZ's case, an earlier request for an extension had been made after he was not found at his accommodation:

see[38]. What in fact happened in their cases shows that the requested State, Italy, was told the United Kingdom authorities were suspending the implementation of the transfers and stopping time running, and the relevant Italian authorities knew of this.

85. The general position with regard to policies in English law is that it is permissible for a public body to adopt a policy as to the approach it will adopt in the generality of cases provided that it does not unlawfully fetter itself from considering an individual case: see, e.g., *British Oxygen Co Ltd v Board of Trade* [1971] AC 610, 625, 631.

86. It is not suggested that the guidelines as to suspension constitute an impermissible fetter in English law terms. The question is whether the need to decide on "a case by case basis" in Article 21(1)(e) precludes a decision made in the case of an individual by the application of a published policy guideline. It clearly does not. It is, as Lord Scarman observed in *Re Findlay* [1985] AC 318, 335, difficult to see how a Secretary of State "could manage the complexities of his statutory duty without a policy" (in that case concerning parole) and attempting to do so is likely to impede the achievement of consistency and fairness. The Secretary of State's policy as to suspension is, in my judgment, consistent with the general thrust of not allowing the policy of the Dublin II process to prejudice judicial protection in the requesting state: see *Migrationsverket v Petrosian* [2009] 2 CMLR 33 at [48] and [50]. It also facilitates the policy to allocate responsibility "rapidly" and thereafter to transfer in a timely way.

87. In the present cases the claimants or their solicitors were informed of the decision to transfer on "Third Country" grounds, i.e. under the Dublin II Regulation, before they instituted their applications for judicial review. The Italian authorities were informed they had taken "suspensive judicial action" shortly after proceedings were launched and a request for an extension of time was made.

88. There is a certain unreality in the position taken on behalf of the claimants, and force in the observation made by Sullivan LJ when refusing permission on the papers. Richards LJ at [2010] EWCA Civ 275 at [17] notes that Sullivan LJ stated that the claimants' solicitors would have been the first to protest if the Secretary of State had not suspended implementation of the removal in response to their judicial review claims. It was not unlawful for the Secretary of State to have a policy to assist in the orderly administration of the Dublin II process when legal proceedings have been instituted by a person who is the subject of a request to another Member State. It is no objection that this is part of a wider policy about the institution of judicial review in immigration cases. The claimants or their legal representatives had all been informed of the requests made to Italy. Their legal representatives knew, or should have known, of the published guidelines about removal.

89. Since the Dublin II process does not, save in the cases and in the sense I have identified (see [58]) create actionable rights by individuals, I do not consider the Secretary of State was under a duty to inform the claimants that a request to suspend time for implementing the transfers had been made to the Italian authorities. In *Chen*'s case [2008] EWHC 437 (Admin) at [25] Silber J stated that it was his provisional view that an asylum seeker does not have the right to be informed before a certification is made under the Dublin II Regulation. Cranston J, in *J*'s case, in the passage set out at [69] stated it would not be unlawful for the United Kingdom to return a person even after the expiry of the six month period if the other Member State

agrees to accept responsibility. So also, the question of the suspension of the time limit is a matter for the requesting and the requested Member States.

90. It may, in the light of the Secretary of State's policy, be desirable for there to be consideration of whether the almost standard-form words regularly used in the Secretary of State's Acknowledgements of Service in removal cases should be amended to reflect the fact that a case is a Dublin II case. But I do not consider that Mr Bedford is assisted by his reliance on the fact that in these cases the Secretary of State sought orders permitting removal notwithstanding a renewal of the applications. Strictly speaking, seeking an order which permits the freedom to remove is not inconsistent with seeking the suspension of the timetable under the Dublin II process while the court seised of the judicial review proceedings decides what to do. Moreover, in only one of the three cases, that of YM, did the court in fact order that renewal of the application be no bar to removal. Finally, as to whether "suspensive judicial action" is misleading, it is shorthand and has the potential disadvantages of shorthand. But since the Secretary of State is, in my judgment, one of the bodies competent to suspend time for implementing a transfer, I do not consider that the shorthand phrase used in what is often a *pro forma* document is materially misleading.

(b) Issue 2:

91. My conclusions on the second limb of the first issue mean that the second issue, whether in the circumstances of YM's particular case, the time in which to implement the transfer was in fact suspended, is also resolved in favour of the Secretary of State.

(c) Issue 3: Is the question whether a person has claimed asylum in another Member State a jurisdictional or precedent fact, and, if so, were YM and MT unfairly deprived of the opportunity to call evidence testing the Secretary of State's determination?

92. The decision in *R v Fulham, Hammersmith and Kensington Rent Tribunal*, ex p *Zerek* [1951] 2 KB 1, 6 and 10, which has been followed in many cases, establishes that a court considering an application for judicial review must consider the correctness of the finding of the subordinate body on a question of jurisdictional or precedent fact. This is because the question is one on which the jurisdiction of the body which decides it depends. The court will consider whether the evidence relied on, in the present context by the Secretary of State, is sufficient to resolve a question against a claimant and establish jurisdiction (*R (Ullah) v Secretary of State* [2003] EWCA Civ 1366 at [28]) and (see Wade and Forsyth, *Administrative Law*, 10th ed 216) will consider any admissible evidence of the non-fulfilment of a jurisdictional fact, which would mean there is no jurisdiction.

93. It is submitted on behalf of YM and MT that establishing that they have made a claim for protection in another Member State is a jurisdictional fact. It is also submitted that the consideration of their cases has been procedurally unfair, primarily because they were not told of the right of access to data on the Eurodac system and the right to rectify it conferred by Article 18(1)(e) of the Eurodac Regulation. This, it is suggested, has precluded them from putting evidence before the court to support their claims that the Secretary of State did not in fact have jurisdiction under the Dublin II system in their cases. Mr Bedford also submitted that there were breaches of their rights under Article 18(1)(a) and (b) to be informed of the identity of the data

controller and the purpose for which the data will be processed within Eurodac. He referred to the right under Article 47 of the Charter of Fundamental Rights of the European Union to an effective remedy and to a fair hearing by an independent and impartial tribunal, a provision which is substantially in the same terms as Article 6 of the European Convention on Human Rights.

94. I can deal with Article 18(1)(a) and (b) briefly. The IS86 forms served on YM and MT were signed by an Immigration Officer. The document is headed "Home Office UK Border Agency" and states that the fingerprints and information are being provided "to the Home Office". It is utterly unarguable that there is any failure to comply with the requirements of Article 18(1)(a) Similarly, there is no breach of Article 18(1)(b) or (c). The document states that the information "may be disclosed to…foreign governments and other bodies for immigration purposes… [and] "in particular, if your fingerprints were taken for asylum purposes, they may be disclosed in confidence to the asylum authorities of other countries which may responsibility for considering your claim".

95. The real issue concerns Article 18(1)(e). On behalf of the Secretary of State, it is conceded that the current IS86 forms used do not impart the information that applicants for asylum whose fingerprints are being taken are entitled to under Article 18(1)(e). Clearly consideration should be given to amending the form. Mr Mandalia, however, submitted that the rights of YM to challenge the accuracy of the data have been respected. His supplementary written submissions do not address the position of MT, but it is the Secretary of State's position that MT's claim on this ground should also fail.

96. I deal first with the submission that this question is a jurisdictional or precedent fact. The Dublin II system recognises that fingerprints constitute an important element in establishing whether an applicant has claimed asylum in another Member State (recital 4 to the Eurodac Regulation). This is why the "Eurodac" computerised central database of fingerprint data and electronic means of transmission was established. It was submitted on behalf of YM and MT that they have not been afforded a chance to dispute the Eurodac hits beyond a mere denial and that because the determination of whether they claimed protection in another state is a precedent fact to the operation of the Dublin system they were not able to put before the court material enabling the court to determine whether the jurisdictional fact was satisfied.

97. One of the purposes of the Dublin system is to establish a common policy on asylum and justice for those who legitimately seek protection, but (see [58] – [69] of this judgment) Dublin II does so by regulating relations between Member States rather than by in itself generating rights in individuals. It is difficult to see the question of which State has responsibility to determine an application for asylum as a precedent fact *quoad* an individual, especially in the light of the ability of Member States to make arrangements between themselves accepting responsibility notwithstanding the normal application of the Dublin II provisions.

98. It is also difficult to see this question as a precedent fact *quoad* other Member States. The Dublin system provides that a Eurodac hit is, subject to the provisions of Article 4 of the Implementation Regulation, the means of establishing the responsibility of a Member State. Article 4 (see [25]) provides that when a request for taking back is

based on data supplied by Eurodac and checked by the requesting Member State in accordance with Article 4(6) of the Eurodac Regulation "the requested Member State shall acknowledge its responsibility unless the checks carried out reveal that its obligations have ceased" under specified paragraphs of the Dublin II Regulation. Article 4(6) provides that final identification shall be made co-operatively pursuant to Article 15 of the Dublin Convention but the mechanism for administrative co-operation, including checking, is now set out in chapter VI of the Dublin II Regulation, in particular Article 21 which (Article 21(8)) provides that a Member State which forwards information to another Member State that has, pursuant to Article 21(1) requested such data "shall ensure that it is accurate and up-to-date".

99. The asylum seeker is, by Article 21(9), given the right to be informed on request of any data that is processed concerning him. Article 4 of the Implementation Regulation demonstrates the weight to be attached to the matches revealed by the Eurodac system. It also provides that "the fact that obligations have ceased because the applicant for asylum has left the territories of Member States for at least three months or has obtained a residence document (i.e. under Articles 4(2), 16(2), (3) or (4) of the Dublin II Regulation) may be relied on only on the basis of material evidence or substantiated and verifiable statements by the asylum seeker". The Implementation Regulation thus provides for the means of establishing where a person made his or her first claim to protection and thus the Member State responsible. It is the data supplied by the Eurodac Central Unit and checked which is conclusive unless the individual provides substantiated and verifiable statements.

100. Mr Bedford relied on the statement in *YI (Previous claims – fingerprint match – Eurodac) Eritrea* [2007] UKAIT 00054, to which I have referred (see [57]), for the proposition that YM and MT must have an opportunity, in the Tribunal's words at [15], "to make a meaningful forensic rebuttal beyond mere denial". But that statement was made in a completely different context. That context was the use of a Eurodac hit in the substantive consideration by the Tribunal of an appeal against the Secretary of State's decision to remove an individual as an illegal entrant. The Immigration Judge found in favour of the individual despite the Eurodac hit because the Secretary of State failed to back it up with adequate supporting evidence. On reconsideration it was held that the Immigration Judge had not made a material error of law. Secondly, the Eurodac data was produced essentially to assert deception and fraud and the Tribunal reconsidering the Immigration Judge's decision referred to the higher civil standard of proof necessary in such cases.

101. Thirdly, and significantly, the panel reconsidering the decision accepted (see [14]) that it was not "in a position to make a meaningful assessment of the [Eurodac] system in general". Its decision was as to what (see [15]) "absent such an assessment of the system in general" an Immigration Judge acting fairly would need to be satisfied of.

102. It was only in the later decision of *RZ (Eurodac – Fingerprint Match – Admissible) Eritrea* [2008] UKAIT 00007 that the Tribunal undertook a general assessment of the Eurodac system. It concluded (see [42]) that fingerprint evidence from the Eurodac system is admissible in evidence not only in considering which Member State is responsible for examining an application under the Dublin II Regulation but generally as part of the examination of a claim to asylum. It also held (see [45]) that if there is a dispute as to a match, that must be a question of fact to be

determined on the available evidence but, in the light of the evidence the Tribunal heard about the system and its accompanying safeguards, in its judgment "evidence of a match produced through the Eurodac and confirmed by [the Immigration Fingerprint Bureau in Lunar House] should be regarded as determinate of that issue in the absence of cogent evidence to the contrary". The Tribunal (at [50]) rejected the submission that there was any requirement for corroboration in respect of fingerprint evidence.

103. One of the questions canvassed before me was whether it is legitimate to refuse permission to apply for judicial review where a fact in issue is a jurisdictional fact. A court may be more cautious in practice in shutting out a claim where the claimant wishes to challenge a fact upon which jurisdiction rests. But, in principle, if there is no arguable basis for stating that the decision-maker's conclusion on that fact is wrong, permission should not be given.

104. I return to what happened in the cases of YM and MT. The process under the Eurodac Regulation is that the Member State that transmitted the data to the Central Registry (in these cases the United Kingdom) is required to contact the other State (in these cases Italy) so that the latter may check the accuracy of the data.

105. In the case of YM, in the letter dated 3 June his solicitors asked for disclosure of the information relied on to conclude that Italy was responsible. When informed by the letter dated 8 June of the Eurodac match, the solicitors did not challenge the accuracy of the match or of the data transmitted. What they then maintained was that YM had not made or been given an opportunity to make a claim for protection in Italy. They asked for confirmation of the asylum claim and a photograph of YM from Italy. There is no entitlement to these under the Eurodac Regulation. The rights of data subjects are set out in Article 18 and do not include this right (cf the position under Article 15(7) of the Dublin Convention). No assistance is gained from Article 4(6) of the Eurodac Regulation, both for the reason I gave earlier (see [98]) and because Article 4 is in chapter II of the Regulation which deals with arrangements for collection, transmission, comparison, storage and erasure of data, not the chapter on the rights of data subjects.The Secretary of State did not certify YM's claim until after the Italian authorities expressly accepted responsibility, "according to Article 16(2)" of Dublin II, i.e. that it had issued a residence document to YM. In these circumstances, in the light of the fingerprint match and the residence permit, the Secretary of State was entitled to conclude that the data was not incorrect and YM had claimed protection in Italy.

106. I turn to MT's case. Subject to two differences (see [107]) , his position is substantially the same as YM's. He was served with form IS86 on 19 May 2008. On 4 August 2009, the day the UK Border Agency formally requested the Italian authorities to accept responsibility she notified MT's solicitors. He was informed on 3 September that Italy had accepted responsibility and that his claim had been certified on Third Country grounds. After he instituted proceedings on 29 October the UK Border Agency asked the Italian authorities for an extension of time to effect the removal. The following day the UK Border Agency received a formal acceptance letter from the Italian authorities stating that they accepted MT's transfer under Article 16(2); that is they had issued MT with a residence document.

107. The differences between MT's position and YM's are first that the Secretary of State certified MT's claim on Third Country grounds before she received the formal acceptance letter from the Italian authorities on 30 October, although after the deemed date of acceptance. Secondly, the UK Border Agency did not to reply to MT's solicitors' letters dated 22 September and 13 October (see [46]) until well after proceedings were issued. That was a particularly unfortunate lapse in the case of a non-adult applicant for asylum. The Agency did not reply to the solicitors even after receiving the formal acceptance letter from the Italian authorities.

108. It appears, however, from the letter dated 11 December to MT's solicitors that further enquiries had in fact been made of the Italian authorities and that on 3 December the UK Border Agency was informed by the liaison officer in Italy that MT was known to the Italian authorities under a different name, had been refused asylum in Italy, but had been issued a permit of stay for humanitarian reasons for one year. I have concluded that in the light of the formal acceptance on the basis of having issued a residence permit, and the further information given on 3 December 2009, the Secretary of State was entitled to conclude that the fingerprint data was not incorrect and MT had claimed protection in Italy. Whatever failings of communication there may have been before receipt of the letter dated 11 December 2009, MTs lawyers have not, since that date sought to challenge the reported statement of the Italian authorities that they had issued a permit to MT.

109. My conclusion is that, for the reasons given in [96] – [99], the question of having claimed asylum in another Member State is not one of jurisdictional or precedent fact but, if it is, on the evidence before me (see [105] – [108]), the Secretary of State was correct in concluding that YM and MT had claimed protection in Italy.

VI. Conclusion

110. For the reasons given in this judgment, these claims must fail and the applications for judicial review be dismissed.