CO/10450/2006

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

Royal Courts of Justice
Strand
London WC2A 2LL

Friday, 4th April 2008

B e f o r e:

MR JUSTICE WILKIE

Between:
THE QUEEN ON THE APPLICATION OF IBRAHIM KORKMAZ
Claimant

v

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Defendant

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(Official Shorthand Writers to the Court)

Nabila Mallick (instructed by Stuart Karatas Solicitors) appeared on behalf of the **Claimant**
Alan Payne (instructed by the Treasury Solicitor) appeared on behalf of the **Defendant**

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

1. MR JUSTICE WILKIE: This is a claim by Ibrahim Korkmaz for judicial review of decisions of the Secretary of State dated respectively the 4th December 2006 and 8th December 2006. The issue which arises in respect of 4th December 2006 concerns the lawfulness or otherwise of the detention of the claimant with a view to his removal as a failed asylum seeker in circumstances where, as of that date, there was in being an outstanding application by way of representations made by his solicitors that a fresh claim for asylum should be considered by the Secretary of State. The issue arising in respect of 8th December 2006 is a straightforward challenge to the lawfulness of the decision of the Secretary of State on that date refusing to accept that the representations already referred to did give rise to any fresh asylum claim.

2. Permission was granted by Munby J on 24th January 2007 for this claim to proceed to a full hearing. Since the date of that decision, there has been a judgment of the Administrative Court in the case of **WM v the Secretary of State for the Home Department**, in which Beatson J considered the issue which arises in relation to detention in a case which has many similar features to the present.

3. The underlying facts of the claims are that the claimant is a national of Turkey who arrived in the United Kingdom on 1st February 2000 and claimed asylum. He did so on the basis of his alleged fear of persecution, which in turn arose from the involvement of his siblings in the PKK. The defendant refused his claim by a letter dated 27th February 2002. There was then an appeal to an adjudicator, who refused the appeal in a decision promulgated on 28th January 2003. I will return to that determination later. The claimant sought permission to appeal against the adjudicator's determination, but on 20th March 2003 that application for permission was refused. That was the end of the appeal route and thereafter he had no lawful basis for remaining in the UK.

4. On 23rd October 2003, the claimant again applied to remain in the United Kingdom on human rights grounds, but this application was refused on 21st March 2005. The claimant elected not to challenge the Secretary of State's decision to refuse that particular claim. On 15th March 2005 the claimant made yet a further claim to remain, based on the then existing ECAA arrangements in relation to an alleged business. That was initially refused on 30th March 2005. He applied for judicial review arising out of that refusal. The Secretary of State agreed to reconsider his ECAA application, but maintained the initial decision on refusal by his decision on 14th November 2005.

5. The claimant then sought a further judicial review of that refusal. Permission was refused on paper on 7th March 2006. There was no renewal of that application, but a yet further application for judicial review was commenced on 17th March 2006. That claim for judicial review was finally withdrawn on 30th November 2006, at which point the Secretary of State was of the view that there was no further bar to his removal. However, the claimant's solicitors, on the face of it, wrote two letters to the Secretary of State, one dated 14th April 2006 and the other dated 15th June 2006. Each of them purported to make additional representations, and enclosed a large number of documents, which it was said were sufficient to give rise to a fresh claim for asylum pursuant to paragraph 353 of the Immigration Rules, to which I will return in due course.

6. One of the disputes in this case is whether those letters were ever truly sent, and if they were truly sent, whether the Secretary of State received them, either by them being delivered to the relevant department, or having been delivered, having come to the attention of the relevant decision-taking official.

7. The decision, the subject of the first limb of this claim, was a two-fold one taken on 4th December 2006. One such decision was a decision to issue removal directions pursuant to paragraphs 9-10(a) of Schedule 2 of the Immigration Act 1971, section 10(1) of the Immigration and Asylum Act 1999. The direction was for removal by flight to Turkey at 1.20 pm on 15th December 2006. The linked decision, which is the one that is the subject of challenge, was also made on 4th December 2006, and that was a decision to detain the claimant under the powers contained in the Immigration Act 1971 or the Nationality, Immigration and Asylum Act 2002. The decision reads that:

> "It has been decided that you should remain in detention because your removal from the United Kingdom is imminent."

It further goes on, "This decision has been reached on the basis of the following factors", namely that the claimant had not "produced satisfactory evidence of you identity, nationality or lawful basis to be in the UK."

8. On 4th December 2006, the same date as the detention, the claimant's solicitors sent faxes to the Secretary of State. The first enclosed 66 pages, including the letters of the 14th April 2006 and 15th June 2006 already referred to, together with documents, copies of which they say had been enclosed with the original letters. The fax asserts that the application for a fresh asylum claim was outstanding, and he could not be removed from the UK before this application is resolved. It then says a little later that:

> "... our client's fresh asylum application should be considered in combination of his human rights in terms of his self employed business and he should be released immediately pending consideration of his claim."

Further to that fax, on 4th December 2006, a further fax was sent, enclosing a sworn witness statement of Sultan Korkmaz Salman dated 4th December 2006. She is the claimant's sister. That document, of course, from its date, had not been enclosed with either the 14th April 2006 letter or the 15th June 2006 letter, but plainly was sent to the Secretary of State on 4th December 2006.

9. On 6th December 2006 a further fax was sent, enclosing three pages of medical certificates and a letter from the North Middlesex Hospital, and asserting that:

> "... our client has been suffering from a spinal code problem and melting bones for which he has been hospitalised for over 2 months last year. He is sick and sensitive. We believe he should not be detained on medical grounds."

Those documents comprise a medical certificate dated 28th April 2006, certifying the claimant as unfit for work for a period of 3 months on the grounds of chronic low back

pain. It includes an outpatient physiotherapy request to the North Middlesex Hospital NHS Trust, giving the reason for the referral as sciatica, indicating that transport was not required. There is then an MRI scan request which also refers to sciatica and low back pain.

10. On 7th December 2006 a further fax was sent, attaching a handwritten medical report said to confirm his sickness, and asking for the removal directions to be deferred and their client to be released. The report is from a GP, the one who had referred the claimant to the North Middlesex Hospital. It certifies that he is known to suffer from chronic low back aches. He is disabled, walking awkwardly. It then identifies certain medical treatments in the form of medicine. It says that he is awaiting an MRI scan on his spine. It then asserts, it would appear based on instructions given by his solicitors, that he was a victim of torture by being beaten badly, and expresses the opinion that he is disabled and is awaiting further investigations and treatment. At this point it must be stated that nowhere in the asylum claim was it ever asserted by the claimant that he had been the subject of torture.

11. The Secretary of State, on 8th December 2006, wrote his response to the representations. He considered the medical report but appears, at any rate in this letter, to have considered the medical report as being a document intended to support the fresh asylum claim and, understandably in the light of the history of the matter, rejected it on the grounds that it made the assertion that the claimant had been a victim of torture. He then went on further to consider the availability of medical services in Turkey for the types of ailment reported in the medical reports, and in paragraphs 7 and 8 concluded that his human rights would not be infringed by his return to Turkey by reason of the availability of sufficient medical facilities. That passage appears to be a response to what was said in the fax of 6th December 2006, that he was advancing, amongst other things, a human rights claim.

12. There is no direct evidence from either the claimant, through his solicitors, or from any official in the Home Office, either to confirm that the letters of 14th April 2006 and 15th June 2006 were posted, or that the letters were never received. It seems to me, looking at the history of the matter, on the balance of probabilities, that the letters were certainly sent, but equally it seems to me, from the history of the matter, that the letters were not brought to the attention of those who were taking decisions in relation to the removal of the claimant or his detention pending such removal. It may be that they arrived within the Home Office, but were not placed on the appropriate file. It seems from the history of the matter that as soon as the last outstanding judicial review application was withdrawn on 30th November 2006, the Secretary of State applied his mind to the question of removal and a decision was taken very shortly after, on 4th December 2006, that directions for removal should be issued.

13. In my judgment, that would not have been the case had the Secretary of State been aware in any meaningful sense of the outstanding representations and fresh asylum claim. However, it is common ground that within a few hours of his detention the Secretary of State was aware that fresh representations were being made, and that the claimant could not be removed until a determination had been made whether those fresh representations amounted to a fresh asylum claim.

14. There is no dispute but that the Secretary of State does have power to detain pending removal. Section 77 of the Nationality, Immigration and Asylum Act 2002 provides by subsection (1) that:

> "(1) While a person's claim for asylum is pending he may not be --
>
> "(a) removed from the United Kingdom in accordance with [any statutory provision]."

However, subsection (4) provides that:

> "(4) Nothing in this section shall prevent any of the following while a claim for asylum is pending --
>
> "(a) the giving of a direction for the claimant's removal from the United Kingdom...
>
> "(c) the taking of any other interim or preparatory action."

The statutory power to detain is provided for by paragraph 16 of Schedule 2 to the Immigration Act 1971 which, insofar as it is relevant, reads as follows:

> "(2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any of paragraphs 8 to 10A or 12 to 14, that person may be detained under the authority of an immigration officer pending --
>
> "(a) a decision whether or not to give such directions;
>
> "(b) his removal in pursuance of such directions."

I remind myself that the removal direction was indeed issued under paragraphs 9 and 10 of Schedule 2.

15. The existence of such powers, and their limitation based on principles by reference to which the powers should be exercised, has been the subject of a decision by the higher courts in the case of **R (Khadir) v Secretary of State for the Home Department** [2005] UKHL 39. Lord Brown of Eaton-under-Heywood said that the power exists:

> "32... So long as the Secretary of State remains intent upon removing the person and there is some prospect of achieving this, paragraph 16 authorises detention meanwhile."

He recognised that the regime was a harsh one, but:

> "34... that harshness has been sanctioned by Parliament and cannot affect the true construction and application of paragraphs 16(2) and 21 of Schedule 2."

16. In the case of **R (A Somalia) v Secretary of State for the Home Department** [2007] EWCA Civ 804, Toulson LJ, after a review of the relevant authorities on the exercise of this discretion, stated at paragraphs 43-45 that the exercise of the power is limited in two fundamental respects. The first, derived from earlier authority, is that it must be exercised only for the purpose for which the power exists. Woolf J (as he then was) in the **R v Governor of Durham Prison ex parte Hardial Singh** [1984] 1 WLR 704 at page 706 said that the party detained:

> "... can only authorise detention if the [claimant] is being detained... pending... his removal. It [cannot] be used for any other purpose."

17. The second principle identified by Toulson LJ, also derived from that case, was that the power to detain may be exercised only during such period as is reasonably necessary for the purpose of removal.

18. Unsurprisingly, given the importance of such a power of detention and the limitations which must necessarily attend its exercise, the Secretary of State has issued operational guidance which has changed from time to time. The relevant part of that guidance is Part 38. The policy is set out at 38.1. Amongst other things it says:

> "In all cases detention must be used sparingly, and for the shortest period necessary."

Then a little further on:

> "A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable."

At paragraph 38.3 guidance is given on the factors influencing a decision to detain. That includes:

> "3) All reasonable alteratives to detention must be considered before detention is authorised."

It then goes on to say that the following factors must be taken into account when considering the need for initial or continued detention. That includes:

> "what is the likelihood of the person being removed and, if so, after what timescale?"

And in addition:

> "what are the individual's expectations about the outcome of the case? Are there factors such as an outstanding appeal, an application for judicial review or representations which afford incentive to keep in touch?"

19. The exercise by the Secretary of State of his powers to detain in the context of impending removal has been the subject of a number of first instance decisions. In the

case of **R ((1)Predrag Karas (2) Stanislava Miladinovic) v Secretary of State for the Home Department** [2006] EWHC 747 (Admin), Munby J struck down a decision to detain in particular circumstances where the family concerned had been detained at 8.30 pm on 11th October 2004 with a view to their being removed on a flight leaving the following morning and, apparently, in circumstances where they had not been given any notice of the decision to remove them in that way. In those circumstances, the judge described that exercise of the power as "oppressive, unreasonable and unnecessary".

20. In the case of **R (E and Ors) v Secretary of State for the Home Department** [2006] EWHC 3208 (Admin), Black J also struck down an exercise by the Secretary of State of his power to detain. She emphasised in her judgment the policy statement in Chapter 38 that detention must be used sparingly and for the shortest period necessary. That was a case in which, again, a family was detained, where one of them, however, had an extant claim and therefore could not be removed for some significant period of time. In paragraph 45 of her judgment she said, amongst other things, as follows:

> "Turning to the usual grounds for detention set out in Chapter 38, only detention to effect removal might in fact be applicable. Detention on this basis can only lawfully be exercised where there is a realistic prospect of removal within a reasonable period. I am not convinced that this was so on these facts. Even if it was, there were a number of factors identified in the policy which were material to whether the family were actually detained. I have already referred to the question of an incentive to comply with restrictions as an alternative to detention. A further consideration is that given that the son could not have been detained, detention of H, W and the daughter would have meant splitting the family up, interfering with the family life of the whole family. The question would also have arisen as to who would ensure the welfare of the son during the detention given that H and W would not be able to do so. A question expressly posed in Chapter 38 is 'Does anyone rely on the person for support?'"

In that judgment, at paragraph 49, she referred to a change of policy less than a month after the removal of the family in question, which included a requirement that a minimum of 48 hours must be allowed between notification of removal directions and the removal itself. I am told by counsel for the Secretary of State that the 48-hour period is in fact now 72 hours.

21. The third case which has been decided in this area is the case of **R (WM) v Secretary of State for the Home Department** [2007] EWHC 2562 (Admin). This is the decision of Beatson J. The underlying facts of that case appear to be not dissimilar to the present case. The first period of detention, the legality of which was in question, was between 8th November 2004 and 24th November 2004. A removal direction had been issued on 8th November 2004 with a view to a removal on 25th November 2004. On 4th November 2004, prior to the decision to issue removal directions and to detain, representations had been sent by the claimant's then representatives by recorded delivery, which were delivered to the defendant on 4th November 2004, but had not found their way on to the claimant's file by 8th November 2004, when the detention

took place. Very shortly after 8th November 2004, the defendant became aware of the representations which had been made, but nonetheless decided to maintain the detention pending the consideration of the representations as constituting a fresh asylum claim.

22. Beatson J, in those circumstances, concluded that there was nothing unlawful in the initial detention, nor in the continued detention. At paragraph 48 of his decision he says as follows:

> "It is, to say the least, unfortunate that the letters sent by the claimant's former representatives by recorded delivery and which appear to have been delivered to the defendant on 4 November had not been matched to the claimant's file by 7 November when the ISGIR was completed or by 8 November when he was detained. That does not, however, render the decision to detain him unlawful. In any event, very soon after he was detained on 8 November the defendant became aware of the representations. The defendant was entitled to take the view that the representations received did not preclude removal from being imminent. It is clear that those reviewing the claimant's case were confident that the representations would be considered before 25 November, the date then scheduled for him to be removed. This belief [has] turned out to be justified. The defendant did not list the claimant's immigration history as one of the factors justifying detention on form ISG1R. This did not, however, disable her, once she knew of the representations, from concluding that, in the light of that history, the numerous previous attempts to remove him, and the previous representations, the further representations did not mean removal was no longer imminent."

The Secretary of State relies on this decision as supporting her proposition that the detention was not only initially lawful but continued to be lawful until 8th December 2004. Certain it is that Beatson J was well aware not only of the statutory scheme but also the Secretary of State's policy on detention as set out in Chapter 38 of the guidance document to which I have already referred.

23. In my judgment, whether or not the detention pending removal, in the context of representations being made which, it is said, amount to a fresh claim for asylum, is unlawful is a very fact-sensitive issue. I reject the claimant's contention that, where the Secretary of State is aware of representations being made, whether before or after the detention, as a matter of law that precludes his exercise of the power to detain. The statutory power is not thus hedged in. On the other hand, it is plain that it is not sufficient just for the Secretary of State to assert that, in his judgment, removal is imminent. Once he becomes aware of representations being made, plainly a decision has to be taken whether or not to release or continue detention.

24. In the cases of **Karas** and **E** the court, perfectly understandably, characterised the conduct of the Secretary of State as being oppressive and unreasonable for the reasons stated in those decisions, and on the basis of the particular facts of those cases. In the present case, however, in my judgment, the facts are very different from the facts in

those cases and much more akin to the facts in **WM**. The Secretary of State has taken steps, since those earlier cases, to ensure that the issue of removal directions concerns removal at a time which is relatively soon, but not so soon that it renders inaccessible access to further avenues of representation or judicial review. It is clear that the change of policy has, in some respects, been influenced by criticisms made in cases such as **Karas** and **E**.

25. In my judgment, it cannot be said that the issue of a removal direction to take place 11 days from the issue of the direction means that the Secretary of State is precluded from concluding that removal is imminent. It seems to me a matter of common sense that the Secretary of State may, and indeed may routinely, decide to detain when removal directions are issued to take effect within a relatively short period of time, in order to secure the attendance of the person being removed, particularly in circumstances where they have fought long and hard and in various ways to resist being removed from this country, and at the time had no legal right to remain.

26. In that context, I entirely agree with Beatson J that the existence of representations, whether known to the Secretary of State or as yet unknown to the Secretary of State, does not preclude her detaining or continuing detention. Furthermore, in the light of the history of this particular case, it seems to me that the decision of the Secretary of State to continue detention once she was aware of the representations being made cannot be characterised as an unreasonable exercise of her powers. It is, of course, the case that she did in fact address the question of the representations well within the period before 15th November, when the removal directions were to take effect. Accordingly, in my judgment, this element of the claim fails.

27. As far as the decision to refuse to accept the representations as constituting a fresh asylum claim is concerned, it is important to note the terms of the adjudicator's decision. The adjudicator accepted as credible the evidence and the case of the claimant. She summarised his case at some length in paragraphs 8-10 of the determination. She said this:

> "8. The basis of the appellant's claim for asylum is fear of persecution by the authorities on grounds of religion, ethnicity and political opinion. He gave the following account: At all material times he lived in Gaziantep to which the family moved following the closure of the village school in Adiayan and harassment arising from brothers' involvement with the PKK. A brother was a member of the PKK as was a female cousin who was murdered by the authorities. Another brother was also involved with the PKK. His father was formerly a village mukhtar and the family came under pressure from the authorities on account of family links with the PKK. His two brothers have refugee status in Germany, one sister is entitled to live in Switzerland and the other sisters are entitled to live in the UK. The appellant was frequently stopped by the police and questioned about the whereabouts of his brothers, who were both involved with the PKK, and his sisters all of whom had left the country. He was detained briefly overnight in July 1998 and slapped. He told the authorities that his brothers were abroad and was released on condition

that he furnished their addresses. When the appellant was eleven years old his father became liable to sign on weekly at the police station and continues to do so and to [be] questioned about the whereabouts of the appellant. The appellant was eligible for conscription, had reported for a medical in 1999 and was pronounced fit to serve. At interview, he stated that he had no contentious objection to national service but did not wish to undertake it as men of Kurdish origin were pressurised during service. The appellant sympathised with the PKK and Hadep but was not a member, his activities, if any, being confined to cheering Hadep candidates at election time.

9. I find there is a reasonable degree of likelihood that the appellant is an Alevi Kurd and accord him the benefit of the doubt that some siblings were involved, and there are family links with, the PKK, (even though he has failed to provide any specific details or instances as to the nature and extent of the family's involvement with PKK) and that he was a non-active PKK sympathiser.

10. I find there is reasonable degree of likelihood that he is liable to conscription and is a draft evader. I find there is a reasonable degree of likelihood that he has been stopped and questioned by the authorities. However, apart from one brief incident of arrest and detention when he was slapped and then released, I find there is nothing in his evidence that cumulatively suggests harassment, intimidation and discrimination amounting to persecution. I find it is not unreasonable for the authorities to seek to question those whose siblings/associates are suspected of involvement in separatist or terrorist activities. The appellant is unspecific as to the nature and extent of his siblings involvement in the PKK and there is no evidence that they were arrested or detained. I accept there is a reasonable degree of likelihood that a female cousin was a PKK guerrilla and was killed in a clash with the authorities. Whilst there is a reasonable degree of likelihood that the appellant's father may once have been required to sign on weekly at the police station on account of, and was questioned about, his children's suspected involvement with the PKK, I find it is unlikely that this obligation and questioning is currently on-going in view of the changed political situation, the lifting of the emergency in all provinces in the south-east and the renunciation of violence by the PKK. The 1998 news extract purporting to be an interview with an internally displaced family with the same surname as the appellant regarding the circumstances that allegedly brought them from a village to the town of Gaziantep, even supposing it relates directly to the appellant's family, does not mirror the situation as at the date of the hearing and I attach little weight thereto."

28. The adjudicator then went on to summarise the effect of certain objective material. One of them, the CIPU report, records that:

"The families of prominent PKK supporters... were probably always

> under intense surveillance by the authorities and lived under a certain degree of pressure, but they were not actually persecuted for their relationship with the PKK leaders..."

She went on to conclude that:

> "There is no reason to suppose that the appellant be treated any differently. The same applies to relatives of members of left wing or Islamic militant groups."

29. She then considered the risk of persecution upon return to Turkey as a failed asylum seeker, as a Kurd, as an undocumented traveller, and as a draft evader. In paragraphs 13 and 14, and then in summary she says as follows:

> "15... I find it is reasonably likely that upon return to Turkey without any papers, the appellant would be detained and interrogated; it would be established that he had left the country, did not have any papers, was a Kurd and wished to avoid conscription. I am satisfied that the authorities would not conclude that his passive sympathy for PKK and Hadep posed a threat to them or that he came within the suspected separatist category."

On that basis she concluded that he had failed to discharge the burden upon him to establish a well-founded fear of persecution and that his Article 3 rights would be breached if he were returned to Turkey.

30. The documentation which was enclosed with the letters of 14th April 2006 and 15th December were referred to by the Secretary of State in the 8th December 2006 letter, and the conclusion which the Secretary of State reached was that they did not substantially add to his claim. This was on the basis that none of the documents specifically named him nor were proof that the authorities were looking for him. Most of them were available at the time of the asylum appeal and they were very general in nature, making no specific mention of the claimant. Reference was also made to the issue of the military draft, which had also been referred to by the adjudicator. In those circumstances, the conclusion was, applying the paragraph 353 test, set out in paragraph 4 of the letter, that the representations did not amount to a fresh claim.

31. In the detailed acknowledgment of service, and also in the skeleton argument, the Secretary of State has made a document-by-document submission in respect of those 16 documents and, in my judgment, correctly has indicated that none of them do anything other than provide confirmation of the factual account given by the claimant before the adjudicator, which she accepted, and against the background of which she came to her conclusions. The one document which the Secretary of State does not refer to in the letter of 8th December 2006 is the statement of the claimant's sister dated 4th December 2006, which was annexed to one of the faxes of 4th December 2006, nor is there any reference to that document in a further decision letter dated 31st March 2008, which seeks to deal with certain issues raised for the first time in the skeleton argument submitted on behalf of the claimant.

32. Plainly the Secretary of State did have before her that statement of the claimant's sister, and plainly has failed to deal with it. Therefore, to that extent it may be rightly said that the decision letter of 8th December 2006 is one which fails to have regard to a relevant matter, namely the material included in that witness statement. However, even though there may technically be a failure to have regard to a relevant matter and to give a full response to the entirety of representations made, it is apparent that the contents of that witness statement amount to no more than a corroboration by his sister of the full account which he had given to the adjudicator (which I have already read), and which she had very much in mind in rejecting the claim for asylum.

33. In those circumstances, in my judgment, that document, had it been considered by the Secretary of State, could not realistically have changed the assessment that the Secretary of State made, namely that there was nothing attached to the letters of 14th April 2006 and 15th June 2006 which gave rise to any real prospect that a different adjudicator, confronted with that material as well as the material which was placed before the original adjudicator, would come to any different conclusion. In fact, all that the material did was simply to underscore the basis upon which the adjudicator came to that initial adverse conclusion. Therefore, whilst technically there is a point which the claimant is entitled to make in respect of the letter of 8th December 2006, in my judgment it is not a point of any sufficient weight to persuade me to grant the judicial review sought. Accordingly that limb of the application for judicial review also fails.

34. MR PAYNE: My Lord, there is an application for costs.

35. MS MALLICK: There has been no schedule provided.

36. MR PAYNE: There has not, my Lord, no, but that does not disentitle me to make an application for costs. My understanding is that this is a claimant who is privately funded.

37. MR JUSTICE WILKIE: Yes.

38. MR PAYNE: So, the application has been brought, the claimant has been unsuccessful: I am entitled to my costs.

39. MS MALLICK: The claimant is privately funded, there is no schedule for costs, we have been unsuccessful, but nevertheless, my Lord, we got permission for judicial review and the claimant was in detention for some time. There was a fresh claim that has been put forward.

40. MR JUSTICE WILKIE: Certainly the terms of the permission were not such as to encourage you greatly to pursue the second limb of your argument, although certainly the first limb was said to be manifestly arguable.

41. MS MALLICK: Yes, my Lord, but nevertheless we were given permission on all grounds --

42. MR JUSTICE WILKIE: Yes.

43. MS MALLICK: -- and we brought judicial review on all grounds and unfortunately we have not been successful.

44. MR PAYNE: My Lord, whenever the Secretary of State loses a judicial review, there is hardly ever a schedule, and there is always an application for costs. I am not sure why, just because permission has been granted --

45. MR JUSTICE WILKIE: Well, I think the schedule is really to do with an application for summary assessment of costs and I do not understand you are making any such application.

46. MR PAYNE: No, I am not, but in terms of the ordinary principle, I am entitled to my costs.

47. MR JUSTICE WILKIE: What do you say about the fact that there was a deficiency of the 8th December letter which I have identified, but which in the end did not matter?

48. MR PAYNE: My Lord, what I would say is this, that deficiency was not actually raised in the grounds of challenge; it was raised for the first time today. It is, in any event, a completely technical point. If this claimant felt that she was prejudiced by the Secretary of State not having taken into account that document, you would have expected to have been taken, in the original grounds, to correspondence at some point prior to today. It was raised for the first time today and, although you said it in your judgment, my Lord, it did not actually relate to a document that was attached in the June letter.

49. MR JUSTICE WILKIE: No, but it was --

50. MR PAYNE: It was faxed for the first time on 4th December.

51. MR JUSTICE WILKIE: 4th December so it was --

52. MR PAYNE: My Lord, perhaps on reflection -- I was listening to your judgment -- I do not think that the Secretary of State is actually required to expressly refer to every document that has ever been put forward.

53. MR JUSTICE WILKIE: No, I would agree with that.

54. MR PAYNE: Obviously the Secretary of State runs the risk, if he does not refer to a document, of being accused of not having taken it into account, but if the document does not actually matter, and that is your finding, my Lord, then the Secretary of State should not be criticised for that. Most of the preparation, my skeleton argument, everything has really focussed on the issue detention. We have won on that, my Lord, and I think we are entitled to our costs.

55. MR JUSTICE WILKIE: Thank you.

56. MS MALLICK: My Lord, there was nevertheless this point, that a letter is provided by the Secretary of State on one of the grounds that we raised -- the fresh claim. Despite

the fact that leave has been granted for some time, that letter has only been provided on 2nd April to my instructing solicitors. It is dated 31st March. It goes on and deals with the documents that have been put forward. It deals with the fresh claim, the reliance that is placed on **IK**. It could have been provided much earlier than it has. It could have led us not to pursue the fresh claim before you.

57. MR JUSTICE WILKIE: I do not think that that really is realistic.

58. MS MALLICK: We did not have much opportunity, my Lord, to actually consider that letter.

59. MR JUSTICE WILKIE: I am not so much concerned with the 31st March letter, though I understand. Yes, I have your point. I think what I am going to say is that the Secretary of State should have 85 per cent of her costs. It is plain that there were one or two deficiencies which had to be put right or which I concluded were not, in the end, material.

60. MR PAYNE: My Lord, if I can just get it off my chest, the 31st March letter relates to the arguments that my learned friend raised in her skeleton argument.

61. MR JUSTICE WILKIE: Yes. Thank you both for your assistance.