Neutral Citation Number: [2003] EWCA Civ 1768

Case Nos: 2002/2697 and 2003/1115

IN THE SUPREME COURT OF JUDICATURE
COURT OF APPEAL (DIVISION)
ON APPEAL FROM HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
The Hon Mr Justice Stanley Burnton
Mr Rabinder Singh, QC

Royal Courts of Justice
Strand,
London, WC2A 2LL

8 December 2003

B e f o r e :

LORD PHILLIPS OF WORTH MATRAVERS, MR
LADY JUSTICE ARDEN
and
LORD JUSTICE DYSON

Between:

Kalaichelvan Nadarajah	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**
Edward Kennedy Amirhanathan	**Respondent**
- and -	
Secretary of State for the Home Department	**Appellant**

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

Raza Husain (instructed by Irving & Co) for Nadarajah
Ashley Underwood QC and Elisabeth Laing (instructed by Treasury Solicitor) for the Secretary of State for the Home Department
Manjit Singh Gill QC and Shivani Jegarajah (instructed by M.K. Sri & Co) for Amirthanathan

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HTML VERSION OF JUDGMENT

Lord Phillips, MR :

This is the judgment of the court.

1. These two appeals have been heard together because they raise a common issue. Each concerns an asylum seeker from Sri Lanka. We shall refer to them for convenience as N and A. N and A were each detained for a period by the Secretary of State, on the ground that their removal from the United Kingdom was imminent. Each had, however, through his lawyers, notified the Secretary of State of his intention to initiate proceedings to challenge the decision to remove him. The common issue is whether, in these circumstances, the detention of the asylum seeker was lawful, having regard to the policy that the Secretary of State purported to follow and to the requirements of the Human Rights Act 1998. In the case of N, Stanley Burnton J, in a decision dated 3 December 2002, ruled that the detention was not lawful. In the case of A, Mr Rabinder Singh QC, sitting as a deputy judge of the High Court, in a decision dated 2 May 2003, made a similar ruling. The Secretary of State appeals against both decisions. The extent of his power to detain asylum seekers is a matter of general importance. Before considering this question we propose to summarise the material facts in each case. We shall do so succinctly, omitting details of other issues raised by these cases which are not before this court.

The facts giving rise to the appeal in N

2. N is a Tamil. In 1995 he left Sri Lanka and made his way to Germany, where he claimed asylum. His claim was rejected, but this decision was subject to a right of appeal. On 21 August 1998 he entered England clandestinely. He claimed asylum. He did not disclose that he had already sought, and been refused, asylum in Germany, but this fact was discovered by the immigration authorities. N's case now is that he returned to Sri Lanka from Germany and was imprisoned and tortured, before fleeing to England. The Secretary of State does not accept that version of events. It is his case that N went to ground in Germany, until he came from there to England.

3. Germany accepted responsibility for N's asylum claim. The Secretary of State thereupon refused N's claim on the ground that it fell to be resolved in Germany pursuant to section 2 of the Asylum and Immigration Act 1996. N initiated proceedings for judicial review, contending that Germany was not a safe third country. His claim was held in abeyance, pending the resolution of *Adan and Aitsegeur v Secretary of State* [2001] 2 AC 477 and *R (Yogathas and Thangarasa) v Secretary of State* [2002] UKHL 41; [2002] 4 All ER 75, lead cases in which the status of Germany as a safe third country was in issue.

4. Following the enactment and entry into force of section 11 of the Immigration and Asylum Act 1999, the Secretary of State, on 20 November 2001, certified N's case under that section. He also invited N's solicitors to withdraw his claim for judicial review, having regard to the decisions referred to above. This they did on 23 January 2002.

5. On 21 February 2002 N's solicitors wrote to the Secretary of State advancing further arguments as to why N should not be sent to Germany, but should have his claim for asylum resolved in this country. They relied on medical evidence that sending N to Germany would exacerbate psychiatric injury consequent upon the torture inflicted on

him in Sri Lanka, contending that to send him to Germany would violate Articles 3 and 8 of the European Convention on Human Rights. They also relied upon the fact that N's wife was in England. She had come to this country in August 2001 and claimed asylum. Her claim had been refused, but she had appealed against that refusal and her appeal was yet to be heard. N's solicitors argued that to separate N from his wife by sending her to Germany would violate Article 8 of the Human Rights Convention. Subsequently an issue arose as to whether to send N to Germany in these circumstances would infringe the Secretary of State's own policy.

6. The Home Office replied on behalf of the Secretary of State on 25 February, stating that he had concluded that the allegation that N's return to Germany would breach his human rights was 'manifestly unfounded' and that he certified to that effect pursuant to section 72(2)(a) of the Immigration and Asylum Act 1999.

7. N's solicitors responded on the same day. They stated that they were instructed to seek judicial review of the Secretary of State's decision and sought confirmation that they would be given five working days to submit the claim. They referred to the fact that N was required to attend the Immigration Service on 27 February and sought confirmation that he would not be taken into custody. They added that N had every reason to cooperate as they had advised him that he had a reasonable prospect of succeeding on the review and that there was no reason to suspect that he was at risk of absconding.

8. N's solicitors sent a copy of this letter to the Immigration Service at Dover, asking them to confirm that they did not propose to detain N. The Service replied that the question of detention could only be decided on the day of the interview with N. When he attended for interview on 27 February he was interviewed and then detained. The reason given for his detention was that "your removal from the United Kingdom is imminent". This was the only box ticked on the form IS 91 R (as to which see below). Mr Taylor, a Senior Executive Officer in the Immigration Service, confirmed in a witness statement that N was detained for the sole purpose of effecting his removal to Germany.

9. Mr Kittle, the Chief Immigration Officer who gave authority for N to be detained, stated in his witness statement that other boxes in form IS 91 R should have been ticked, but by an oversight were not. The boxes in question were box (2), indicating that he had previously failed to comply with conditions of temporary admission and box (3) indicating that he had used or attempted to use deception in a way that gave reason to believe that he might continue to use deception. Mr Kittle emphasised, however, that the primary reason for N's detention was to effect his proper removal to Germany.

10. On 28 February N's solicitors lodged his application for permission to seek judicial review. On the same day Richards J gave directions and granted N bail. On 15 March he was given permission to seek judicial review.

11. N's application for judicial review was heard by Stanley Burnton J. N sought orders quashing:

    (a) the Secretary of State's decision to refuse to consider his application for asylum in this country;

    (b) the Secretary of State's certificate under section 72(a) of the 1999 Act; and

    (c) the decision made on 27 February 2002 to detain him.

12. Stanley Burnton J (a) declined to quash the Secretary of State's decision that N's claim to asylum should be dealt with in Germany rather than in this country; (b) declined to quash the certificate issued under section 72(2)(a); (c) quashed the decision to detain N and ruled that his detention was unlawful. He gave permission to N to appeal against his decision under (a) and (b) and to the Secretary of State to appeal against his decision under (c).

13. N's appeal against the decision in respect of the certificate under section 72(a) was heard by this court, pursuant to an order of Laws LJ, dated 11 February 2003, separately from the other issues raised in the appeal, and together with two other appeals, which raised similar issues and judgment was given on 19 June 2003 [2003] EWCA Civ 840. In each appeal the certificate was quashed on the ground that it was not possible to be sure that if there was an appeal to the adjudicator it would be bound to fail.

14. The consequence of this decision was that it was open to N to appeal to the adjudicator against the Secretary of State's decision to send him to Germany as a safe third country. However he has pursued his appeal to this court, in respect of the other grounds of objection to that decision. This raises what has been referred to as "the family links" issue, which I can summarise as follows. N contended before Stanley Burnton J that, having regard to the presence of N's wife in this country as an asylum seeker it was contrary to the Secretary of State's policy to send N to Germany. The judge accepted this submission, but ruled that the Secretary of State had since changed his policy and that it was open to him to send N to Germany under the new policy. N challenges this reasoning. It is a challenge that raises quite a difficult question of law, and one that could not have been dealt with adequately in the time allowed for this hearing. The Secretary of State has, through Mr Underwood QC, undertaken not to remove N until his wife's asylum appeal has been determined. If that appeal succeeds, N will almost certainly be permitted to remain in this country with his wife and the small child who has been born to them since she arrived. In these circumstances we directed that N's appeal on the family links issue shall stand adjourned until his wife's asylum appeal had been determined.

15. Thus we are only concerned with the Secretary of State's appeal against the finding that N's detention was unlawful. If this finding is not reversed, N will be entitled to an award of damages in respect of his detention.

The facts giving rise to the appeal in A

16. A is also a Tamil. He left Sri Lanka and arrived in the United Kingdom on 17 August 1999 and claimed asylum. He was granted temporary admission. On 2 May 2000 his asylum application was refused and he was refused leave to enter. He appealed to an adjudicator and his appeal was dismissed on 3 October 2000. On 31 October the Immigration Appeal Tribunal refused him permission to appeal.

17. On 12 March 2001 the solicitors acting for A made a fresh claim for asylum. On 5 June 2001 they added to this a claim that it would infringe A's human rights if he were sent back to Sri Lanka. On 31 October A's solicitors were faxed a letter granting him further temporary admission subject to conditions which included a requirement to report to the Immigration Service at Waterloo for a 'decision interview' on 6 November. A's solicitors replied on 1 November by a letter which included a reminder that should the Secretary of State reject A's appeal under the Human Rights Act, A would have a right of appeal.

18. A attended the Immigration Service at Waterloo on 6 November. He was there given a decision letter on behalf of the Secretary of State, which was dated 31 January 2002. The letter rejected the claim for asylum on the ground that it was not sufficiently different from

the original claim to be treated as a fresh application. The human rights claim was also rejected. The letter ended by referring to A's right to appeal pursuant to section 65 of the 1999 Act. That section gives a right of appeal to an adjudicator on human rights grounds. A was detained.

19. Later on the same day A's solicitors telephoned the Immigration Service and informed them that A wished to exercise his right to appeal. They asked why he had been detained and were informed that this was because A was going to be removed. They confirmed this conversation in a letter, sent on the same day in which they also contended that A's detention was unlawful.

20. On 7 November the Immigration Service sent to A's solicitors the documents that needed to be completed to initiate his appeal. Later the same day they faxed a letter in the following terms:

> "You have asked for the reasons why your client named above has been detained. Your client's asylum application has been refused, as has his HRA claim. It is noted that you intend on his behalf to exercise his right of appeal against this decision. However, we are currently pursuing the matter of arranging a Travel Document for your client, to be used if the appeal you propose fails. To this end, he will be interviewed on 14.11.02 by an officer of the Sri Lankan High Commission. I am not satisfied in the current circumstances that he would voluntarily attend the Sri Lankan High Commission for this interview. When this is done, and the appeal your client wishes to make is set in motion by your returning the documents sent to you, further consideration will be given to the situation of your client. Please be assured that his detention will be reviewed by senior officers on a regular basis."

In a subsequent telephone conversation the Immigration Service confirmed that they were detaining A in order to facilitate an interview between A and an officer of the Sri Lankan High Commission. The object of this interview was to obtain travel documents for A's return to Sri Lanka.

21. On the following day, 8 November, the Immigration Service wrote a letter which summarised the reasons for A's detention as follows

> "Were we to grant your client temporary admission, it would be on the basis that he attended for a documentation interview with the Sri Lankan High Commission. He has intimated to us, and you have confirmed this in your fax, that your client would refuse to speak to the Sri Lankan High Commission. You and he have stated that your client would not comply with the terms of temporary admission, and detention is the only avenue left open to us, in order to effect removal. I accept that an appeal will take place in due course, however your client has been unsuccessful in the past, failed to attend a previous interview on the 31st of October and has suggested that he will not assist in the documentation process unless compelled to do so. Maintaining detention is, in our view, therefore justified."

22. On 10 November an application for permission to seek judicial review of the decision to detain A was issued. This was refused on the papers by Sullivan J on the following day. On 12 November an appeal against the refusal of A's human rights claim was lodged under section 65 of the 1999 Act. On 13 November Richards J adjourned the oral application for permission to seek judicial review but granted an injunction restraining the Secretary of State from requiring A to attend a documentation interview with the Sri

Lankan High Commission. On 13 October the duty Casework Chief Immigration Officer at Waterloo reviewed A's case and faxed a letter to his solicitors stating that the immigration service would consider an application for bail. On 14 November A's solicitors wrote saying that he would not apply for bail as he considered that he should never have been detained in the first place and should be granted temporary admission. On the next review, which took place on the 15 November, the duty Chief Immigration Officer decided that it would be appropriate to grant A temporary admission, and he was released from detention.

23. A contemporary record was kept at Waterloo in relation to A's detention. On 7 November 2002 the following entry was made by way of 'review summary:

> "Although technically removable [A] will exercise his HRA appeal. However a documentation interview with the High Commission is set for 14/11/02. We will need to review again after that interview but I think it unlikely that he will present himself for this willingly."

Statutory power to detain

24. Paragraph 2 of Schedule 2 to the Immigration Act 1971 gives an immigration officer power to examine a person who has arrived in this country to determine whether or not he should be given leave to enter. Paragraphs 8 and 9 of Schedule 2 give an immigration officer power to give directions for the removal of an immigrant who has been refused, or who has not been given, leave to enter the United Kingdom. Paragraph 16 of Schedule 2 provides, in so far as material:

> 16(1) A person who may be required to submit to examination under paragraph 2 above may be detained under the authority of an immigration officer pending his examination and pending a decision to give or refuse him leave to enter.
>
> (2) If there are reasonable grounds for suspecting that a person is someone in respect of whom directions may be given under any paragraphs 8 to 10 or 12 or 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."

25. Paragraph 21(1) of Schedule 2 provides, in so far as material:

> 21(1) A person liable to detention or detained under paragraph 16 above may, under the written authority of an immigration officer, be temporarily admitted to the United Kingdom without being detained or be released from detention; but this shall not prejudice a later exercise of the power to detain him.
>
> (2) So long as a person is at large in the United Kingdom by virtue of this paragraph, he shall be subject to such restrictions as to residence, [as to his employment or occupation] and as to reporting to the police or an immigration officer as may from time to time be notified to him in writing by an immigration officer.

The Secretary of State's policy in relation to detention

26. The Secretary of State publishes, and from time to time revises, in Chapter 38 of the Operations Enforcement Manual ('Chapter 38'), a policy in relation to detention of immigrants. During the period in which N and A were detained, its material provisions included the following:

"Chapter 38 - Detention/Temporary Release

38.1 Policy

General

In the White Paper "Fairer, Faster and Firmer - A modern Approach to Immigration and Asylum" published in July 1998 the Government made it clear the power to detain must be retained in the interests of maintaining effective immigration control. However, the White Paper confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention (see 38.19 and chapter 39). The White Paper went on to say that detention would most usually be appropriate:

- to effect removal
- initially to establish a person's identity or basis of claim; or
- where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release

…

Use of detention

In all cases detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. However, 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

38.3 Factors influencing a decision to detain

1. There is a presumption in favour of temporary admission or temporary release

2. There must be strong grounds for believing that a person will not comply with conditions of temporary admission or temporary release for detention to be justified.

3. All reasonable alternatives to detention must be considered before detention is authorised.

4. Once detention has been authorised, it must be kept under close review to ensure that it continues to be justified.

5. There are no statutory criteria for detention, and each case must be considered on its individual merits.

6. The following factors must be taken into account when considering the need for initial or continued detention.

For detention

- what is the likelihood of the person being removed and, if so, after what timescale?;
- is there any evidence of previous absconding?;
- is there any evidence of a previous failure to comply with conditions of temporary release or bail?;
- has the subject taken part in a determined attempt to breach the immigration laws? (e.g. entry in breach of a deportation order, attempted or actual clandestine entry);
- is there a previous history of complying with the requirements of immigration control? (e.g. by applying for a visa, further leave, etc);
- what are the person's ties with the United Kingdom? Are there close relatives (including dependants) here? Does anyone rely on the person for support? Does the person have a settled address/employment?
- 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?

Against detention:

- Is the subject under 18?
- Has the subject a history of torture?
- Has the subject a history of physical or mental ill health?"

27. At the material time, an Immigration Officer who ordered the detention of an immigrant was required under Chapter 38.5 to fill in a form IS 91 R by ticking all the boxes applicable, in order to inform the immigrant of the reasons for his detention. The material part of the form was as follows:

You are likely to abscond if given temporary admission or release.
There is insufficient reliable information to decide on whether to grant you temporary admission or release.
Your removal from the United Kingdom is imminent.
You need to be detained whilst alternative arrangements are made for your care.
Your release is not considered conducive to the public good.

This decision has been reached on the basis of the following factors (tick all boxes that apply):

You do not have enough close ties (eg. family or friends) to make it likely that you will stay in one place.
You have previously failed to comply with conditions of your stay, temporary admission or release.
You have previously absconded or escaped.
You have used or attempted to use deception in a way that leads us to consider you may continue to deceive.
You have failed to give satisfactory or reliable answers to an Immigration Officer's enquiries.
You have not produced satisfactory evidence of your identity, nationality or lawful basis to be in

the UK.
You have previously failed or refused to leave the UK when required to do so.
You are a young person without the care of a parent or guardian.
Your health gives serious cause for concern on grounds of your well-being and/or public health or safety.
You are excluded from the UK at the personal direction of the Secretary of State.
You are detained for reasons of national security, the reasons are/will be set out in another letter.
Your unacceptable character, conduct or associations.
I consider this reasonably necessary in order to take your fingerprints because you have failed to provide them voluntarily.

28. Where proceedings have been initiated which challenge the right to remove an immigrant, it is not the policy of the Secretary of State to detain an immigrant on the ground that his removal is imminent. Normally, in such circumstances he will be granted temporary admission pending the result of those proceedings.

29. The judgment of Stanley Burnton J in ***Nadarajah*** referred to aspects of the Secretary of State's policy that apply where it is proposed to remove an asylum seeker to a safe third country pursuant to the Dublin Convention. He first referred to a statement in relation to review applications, published in 1998. We shall set this out in full:

> "This note relates to cases in which the Home Office proposes to return an asylum claimant to a Member State of the European Union under the Dublin Convention. Particular difficulties arise in this type of case as a result of the time constraints placed on the Home Office by the terms of that Convention.
>
> Once the relevant Member State has indicated that it is prepared to accept responsibility for consideration of the Applicant's asylum claim the Home office has one month from the date of that acceptance to transfer the asylum claimant unless, inter alia, judicial review proceedings are instituted (the commencement of proceedings stops the clock for the purpose of the time limit). Within the period of one month referred to above the receiving Member State will be setting up reception arrangements which may involve transport and accommodation.
>
> In these circumstances it is most important that, if a judicial review application is to be instituted, it should be done quickly. Successive representations and threats of judicial review which do not materialise until the last minute cannot be easily accommodated in the context of the Dublin Convention. Therefore, having consulted the Crown Office, the Home Office wishes to indicate that it will normally require judicial review proceedings in such cases to be instituted within 5 working days of the Applicant being notified of the proposal to return him to another Member State. The Home office will not normally, in the absence of a direction by the court in a particular case, be prepared to defer removal directions where proceedings are threatened or instituted after that time."

He also referred to a gloss on this policy, described in Mr Taylor's witness statement. We shall set this out in its context when dealing with the judge's reasoning.

30. Chapter 38 also drew attention to the importance of complying with the Human Rights Act 1998.

The Human Rights Act 1998

31. Section 6(1) of the Human Rights Act makes it unlawful for the Secretary of State to act in a way which is incompatible with specified Articles of the European Convention on Human Rights. These include Articles 5 and 8. Article 5 provides:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
>
> (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
>
> 2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.
>
> 3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
>
> 4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.
>
> 5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

32. Article 8 provides qualified protection for the right to respect for private and family life. This right may be relevant when deciding whether to remove an immigrant. Where, however, a decision has lawfully been taken to remove him, Article 8 is unlikely to prove an impediment to his detention pending imminent removal. We do not see that it is relevant to the issues before us in either of the appeals.

Why Stanley Burnton J held that N's detention was unlawful

33. We have set out at paragraph 29 the policy of the Secretary of State, as summarised by Stanley Burnton J. The judge went on to set out the evidence of Mr Taylor in relation to what we have described as the gloss on this policy:

> "The Home office note stipulates that 5 working days be allowed from when the prospective Claimant is served with the notification of the Defendant's decision to remove him or her to the third country. This grace period of 5 days is triggered by the service of the initial decision and therefore can clearly only apply to an initial application for permission to bring a judicial challenge.
>
> The Defendant would reasonably expect all relevant matters to be raised in the course of one judicial review application. It is, nevertheless, the Defendant's normal practice not to remove a Claimant if a second, or subsequent, judicial review application has been lodged in proper form with the Administrative Court Office. However, he takes the view that he is under no obligation to give successive 5 working day periods to permit Claimant's solicitors to make such repeat applications; nor is he constrained to cease his proper and lawful actions to remove a Claimants merely because the Claimant's solicitors have intimated their intention to lodge a further judicial challenge. Indeed, where such a serial application is, in his view, a clear abuse of process, he may decline to halt the removal in the absence of an Order or Direction from the Court. In those circumstances, he makes it clear to the Claimant's representatives (or the Claimant himself if unrepresented) that he taking that stance, and they are fully aware that a Court order is required if removal is to be halted."

34. The judgment then continued as follows:

> "65. The restriction of the published policy to the first judicial review proceedings is reasonable: judges are only too well aware that there may be repeated unmeritorious applications for judicial review that differ little from earlier proceedings. It is also a possible interpretation of the policy; although it would be greatly preferable if the restriction were published.
>
> 66. For the same reason, I would also accept the reasonableness of a policy that normally refused to delay the return of a person whose first application for judicial review had failed unless there were a court order prohibiting his return to the third country. It would also be reasonable to refuse to delay implementation of a third country removal unless and until the Home Office had sight of the claim form and had considered it and concluded that there was an arguable case. But that is not the Home Office's policy. Mr Taylor states:
>
> > "in the event that the Claimant's solicitors had lodged a second application for JR with the Administrative Court Office then any removal directions then in place would have been cancelled. The Claimant's removal would no longer be imminent and his continued detention would, in all circumstances, no longer have been justified. This action would have been fully compliant with the guidelines set out in Chapter 38 of the Operational Enforcement Manual.
> >
> > …

> Immigration solicitors are also well aware that an application for judicial review suspends the removal of the Claimant and that it would be most unlikely that detention would be maintained throughout protracted judicial review proceedings".
>
> 67. I read this to mean that in the normal case, the institution of judicial review proceedings for the second time in a third country case will automatically lead to a suspension of removal; in which case, removal not being imminent, detention for the purposes of removal alone is not justified. This practice means that a genuine statement by the applicant's solicitors that judicial review proceedings are to be instituted is ignored, as it was in the present case."

This last sentence is not easy to understand. A little later the judge went on to hold that, "in these circumstances, N's removal was not imminent when he was detained", and that, if the Secretary of State's policy had been applied, N would not have been detained. It followed that his detention was unlawful.

35. The judge's reasoning appears to have been that, because it was the Secretary of State's policy not to detain once a second set of judicial review proceedings was commenced, it conflicted with his policy to detain a claimant once his solicitors had made a genuine statement that judicial review proceedings were to be instituted.

36. This reasoning was based on the application of our domestic public law. The decision to detain was held to be unlawful because it was, in the view of the judge, in conflict with the Secretary of State's policy.

Why Mr Rabinder Singh QC held that A's detention was unlawful

37. The judge started by observing that it was common ground that a failure by the Secretary of State to follow his own policy on detention would constitute an error in public law entitling the court to interfere with his decision. Stanley Burnton J had endorsed that concession in ***Nadarajah*** and he also endorsed it. The judge purported to follow the approach of Stanley Burnton J in ***Nadarajah***. His reasoning appears in the following passage from his judgment:

> "My reasons are in essence the following. First the claimant's solicitors had given notice, albeit informally, that they would appeal against the decision once it was served on him. There was an indication of that as early as 1st November 2002, but it was certainly made clear on 6th November 2002 after they had learned that the claimant had in fact been detained. Secondly, it is accepted by the Secretary of State that removal was not imminent up to the point at which the decision was served on the claimant on 6th November, and also after the point at which a formal notice of appeal had been lodged. Accordingly, it is also accepted that (absent other factors) it would have been contrary to the policy to detain him before 6th November or, as I understand it, after the notice of appeal was formally lodged. That indeed appears to be consistent with what the evidence on behalf of the Home Office was, as summarised in paragraph 67 of the judgment of Stanley Burnton J in the **Nadarajah**. Further, it was accepted at the oral hearing before me that once an appeal had been lodged, it is inappropriate to require a person to give an interview to the authorities of the state to which he will be removed in order to facilitate the obtaining of a travel document. This is no doubt for the sound reason that such an interview might lead to information begin provided which might put the claimant or his family, who in the present case are

still in Sri Lanka, at risk on the hypothesis that his appeal on human rights grounds may succeed

40 However, it is said on behalf of the Secretary of State that in the interim period removal was imminent. In my view, that is to take an excessively formalistic approach to the question, and one which is not in keeping with the spirit with which English law regards personal liberty. I have already mentioned the "jealous care" to which Lord Scarman referred in Khawaja. Thirdly, the fact is that there is always going to be some delay in lodging papers against a refusal decision. That is why a certain period is allowed for an appeal of ten working days, as it was in the present case. Even if the claimant's representatives are able to lodge the papers within a day or two, the Secretary of State's submission would mean that the claimant could be detained for that period for apparently no good reason at all. It was submitted by Ms Laing that on the facts of the present case, the immigration officer was entitled to take the view that once a refusal decision has been taken a person is more likely to "do a runner", as she put it, than before, even if they have a good record of compliance in the past. That again seems to me to invite a formalistic approach.

41. The policy to which I have referred itself recognises in a number of passages that a person who has an appeal pending is going to have an incentive to comply with conditions and so will tend not to need to be detained. If that person has already indicated that he wishes to appeal but has not yet lodged the papers, it seems to me that the same considerations are likely to apply.

42. It was also submitted by Ms Laing that the requirement that there should be a formal notice of appeal provided certainty so that immigration officers know where they stand. Certainty is, of course, a virtue in public administration; but justice is even more important. In order to avoid the risk that threats of appeals will be used in an abusive way or to string things out, it seems to me that the relatively short time limit for appealing should cater for that. It is better, in my opinion, if the state has to wait ten working days before deciding to detain a person than for a person to be detained only because he has not yet taken the formal step of lodging the notice of appeal even though he has informally given notice that he would like to appeal. Even if I were wrong about this in general, the Secretary of State appears to have no answer to the point that once the formal appeal had been lodged in 12th November 2002, the claimant should have been released even on his own understanding of his own policy. That was not done in the present case and it seems to me that the claimant was detained needlessly, in any event, for approximately three days."

Article 5

38. The judge went on to deal with an argument raised before him which had not been advanced before Stanley Burnton J. This was that A's detention violated his rights under Article 5 of the Human Rights Convention. He observed that it followed from his finding of a breach of domestic public law that Article 5 was also violated because detention under that Article cannot be lawful unless at least it is in conformity with domestic law. But he proceeded to consider the application of Article 5 on the premise that, contrary to his decision, A's detention was lawful as a matter of domestic law.

39. The judge considered a number of authorities and reached conclusions, which we can summarise as follows. Personal liberty is a right of high constitutional importance in which relatively slight deference to the executive is appropriate. The requirement in Article 5 that any interference with the right to liberty must be lawful and in accordance with a

procedure prescribed by law is designed to provide protection against arbitrary conduct. While there is no requirement for detention to be necessary in order to achieve the aim for which it is imposed, it must nonetheless be proportionate to that aim.

40. Applying these principles to the facts of the case, the judge reached the following conclusion:

> "60. Applying the principles which I have identified as being relevant under the Human Rights Act and in particular the principle of proportionality, in my judgment the decision to detain the claimant in the present case was unlawful as being contrary to Article 5(1). This is essentially for the reasons I have given above in relation to domestic law. Putting it in terms more shortly of Convention language, the state has a legitimate aim of ensuring compliance with its immigration controls. However, there was on the facts of this case no reasonable relationship of proportionality between the means chosen, in other words detention, and the legitimate aim in view. This is because it was accepted that (absent other factors) the claimant should not be detained once a formal notice of appeal had been lodged. The only reason he was detained in reality was that he was theoretically removable in that short interim period when an informal notice of intention to appeal had been given, but no formal notice had yet been lodged. Having regard in particular to the principle that Convention rights should be practical and effective, not theoretical and illusory, and also to the fact that one is dealing with the bedrock principle of personal liberty, in my view that was to take an excessively formalistic approach, even giving due deference to the judgment of the executive, which I do. Accordingly, the detention of the claimant in November 2002 was unlawful under Section 6(1) of the Human Rights Act."

Contentions of the Secretary of State in respect of his policy

41. Separate skeleton arguments were filed on behalf of the Secretary of State in relation to each appeal. The skeleton argument in N stated that "the Secretary of State's relevant policy" was that referred to by Stanley Burnton J, which we have set out in paragraphs 29 and 33. It had been our understanding that the relevance of this policy was that it was one whereby asylum seekers facing removal to a safe third country were given a period of grace of five working days, during which period they would not be at risk of detention and could make a suspensive application for judicial review. In his reply, however, Mr Underwood stated that while this policy was one whereby the Secretary of State would defer removing an asylum seeker for a period of five working days from notification of the decision to remove him to a safe third country, this did not inhibit the Secretary of State from detaining him during that five day period on the ground that his removal was imminent.

42. Mr Underwood expanded on the Secretary of State's policy, as follows. A ground of detention under published criteria is imminence of removal. As a working practice the Secretary of State does not treat removal as imminent if proceedings have been commenced which suspend the right to remove. Nothing in his policy suggests, however, that removal will not be treated as imminent merely because there has been an intimation that suspensive proceedings will be commenced. This said, the fact that removal is imminent will not automatically result in detention. Nor can the Secretary of State lawfully detain some but not others, in a manner that is arbitrary. There must be some additional reason, which amounts to a rational ground for detention. It is neither practicable, nor necessary, to publish all such possible reasons. One such reason is that detention will assist in procuring the documentation necessary for removal – see the case of A. Another is that the detainee is to be removed to a safe third country – see the case of N.

43. It thus became apparent that the relevance of the policy set out in paragraphs 29 and 33 above was said to be, not that it allowed a period of grace in which detention would not be imposed, but that it identified a category of pending removal where time was of the essence and that this urgency was capable of constituting a reason for detention.

Contentions of the Secretary of State in relation to Article 5

44. Mr Underwood submitted that Article 5 added nothing to the position under our domestic law. Under Article 5 a person who had been refused entry and whom it had been decided to remove could be detained, pending removal, provided that the detention was not arbitrary, not unduly long and was in accordance with domestic law. Our domestic law did not permit either arbitrary detention or detention that was unduly long.

Contentions of N and A in relation to the Secretary of State's policy

45. Mr Gill QC on behalf of A and Mr Husain on behalf of N shared our surprise at Mr Underwood's explanation of the nature of the relevance of the policy set out in paragraphs 29 and 33. They accepted that imminence of removal was a published ground of detention, but contended that there was no published policy to treat removal as imminent where it was clear that a suspensive procedure was about to be initiated. They relied on the policy published in Chapter 38 as demonstrating that detention could only be used, as a last resort, where necessary in order to procure removal. Mr Husain also relied on factors that weighed against detention under the policy, namely a history of torture and mental ill health.

Contentions of N and A in relation to Article 5

46. Mr Gill and Mr Husain's submissions were to the effect that, under Article 5(1)(f), detention "with a view to deportation" could only be imposed in order to facilitate deportation and had to be proportionate to the assistance with deportation that it afforded.

Discussion

Article 5

47. In *R (Saadi and others) v Secretary of State for the Home Department* [2001] EWCA Civ 1512; [2002] 1 WLR 356 this court considered the impact of Article 5(1)(f) in the context of the Secretary of State's policy to detain asylum seekers for a period of about 7 days at Oakington in order to facilitate the processing of their claims. The court considered that the same principles were applicable to detention to prevent a person effecting unauthorised entry as applied to detention with a view to deportation. The court rejected the contention that, under Article 5(1)(f) a general test of proportionality fell to be applied, so that it was necessary to balance the benefit that detention made to the processing of an asylum seeker, or the deportation of an illegal immigrant, against the infringement of the right to personal liberty. The court held:

> "65. … . It seems to us that the [ECtHR] is considering as lawful detention pending the consideration of an application for leave to enter or the making of arrangements for deportation and not applying a test of whether the detention is necessary in order to carry out those processes. The inroad that we believe that the European Court of Human Rights has made into the right of immigration authorities to detain aliens pending consideration of their applications for leave to enter, or their deportation, is that these processes must not be unduly prolonged.

> It is in relation to the duration of detention that the question of proportionality arises. …"

48. Mr Gill and Mr Husain submitted that this clear statement of principle was implicitly reversed when *Saadi* reached the House of Lords [2002] UKHL 31; [2002] 1 WLR 3131, albeit that the decision itself was upheld. They relied on the following passage from the speech of Lord Slynn, with which the other members of the House agreed, as supporting this submission:

> "44. There remains the issue whether, even if detention to achieve speedy asylum decision-making does fall within Article 5(1)(f), "detention was unlawful on grounds of being a disproportionate response to the reasonable requirements of immigration control".
>
> 45. In *Chahal* the Court of human Rights said that the lawfulness of detention had to be seen against the substantive and procedural rules of national law "but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness". I do not see that either the methods of selection of these cases (are they suitable for speedy decision?) or the objective (speedy decision) or the way in which people are held for a short period (i.e. short in relation to the procedures to be gone through) and in reasonable physical conditions even if involving compulsory detention can be said to be arbitrary or disproportionate. The evidence of Mr Martin gives strong support to the view that it was appropriate, in the light of the Secretary of State's experience, for the Secretary of State to adopt the Oakington policy and that other alternative methods would practically not be effective. "

49. Mr Gill and Mr Husain also relied upon a general principle that asylum seekers should not be detained, as set out in the UNHCR *Guidelines on the applicable Criteria and Standard relating to the Detention of Asylum Seekers – February 1999* and on views recently expressed in a number of Australian cases by the Human Rights Committee under the Optional Protocol to the International Covenant on Civil and Political Rights. Thus, for instance, in *B v Australia* (Communication No 1014/2001. Australia 18/09/2003), a case involving detention of an unsuccessful asylum seeker, at paragraph 7.2 the Committee held that the State had failed to demonstrate that "there were not less invasive means of achieving the same ends, that is to say compliance with the State's immigration policies by, for example, imposition of reporting obligations, sureties or other conditions".

50. Article 5(1)(f) does not itself import the test of proportionality asserted by Mr Gill and Mr Husain. That is clear from the decision in *Chahal v United Kingdom* (1996) 23 EHRR 413, recently followed in *Conka v Belgium* (51564/99 – 5 February 2002). In *Chahal* at paragraph 112 the ECtHR said :

> "112. … Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c).
>
> Indeed, all that is required under this provision is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law."

51. Article 5(1)(f) does not merely apply to asylum seekers. It applies to illegal immigrants of all descriptions. It applies equally to those who are being removed having been refused leave to enter and to aliens being deported by order of the court at the conclusion (of service) of a sentence of imprisonment. Article 5(1)(f) does not impose an obligation on States to give those whom they are in the process of removing a right to roam freely pending their removal whenever detention is not necessary to achieve ultimate removal. That is not to say that there may not be powerful humanitarian reasons for not detaining such persons where this is not necessary.

52. Furthermore, as the ECtHR held in *Chahal* at paragraph 118:

> " … Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness."

53. The number of those who seek asylum in this country is currently so great that it is not possible to process all applications swiftly. Nor are there sufficient facilities to detain those seeking asylum, or those who have been refused asylum pending their removal, even if this were considered desirable. In selecting some, but not others, for detention the Secretary of State must not act in an arbitrary fashion. He must justify the selection that he makes. In *Saadi* there was an issue as to whether he could justify his policy of selecting for detention at Oakington asylum seekers who could be processed swiftly, notwithstanding that they were not at risk of absconding. It was, we believe, in the context of this question that Lord Slynn made reference to proportionality.

54. Thus the relevance of Article 5 is that the domestic law must not provide for, or permit, detention for reasons that are arbitrary. Our domestic law comprehends both the provisions of Schedule 2 to the Immigration Act 1971 and the Secretary of State's published policy, which, under principles of public law, he is obliged to follow. These appeals raise the following questions:

    (1) What is the Secretary of State's policy?

    (2) Is that policy lawful?

    (3) Is that policy accessible?

    (4) Having regard to the answers to the above questions, were N and A lawfully detained?

    What is the Secretary of State's policy?

55. The Secretary of State's published policy is set out in Chapter 38, the relevant parts of which we have set out in paragraph 27. Form IS 91 R, which we have set out at paragraph 27 above, is referred to in Chapter 38 and is an important part of the published policy. It sets out 5 *reasons* for detention and 13 *factors*, which can form the basis of detention. Most of the *factors* are relevant to the question of whether a particular *reason* exists. Thus *factors* 1, 2 and 3 are relevant to whether *reason* a exists, 4,5 and 6 to whether *reason* b exists, 8 and 9 to whether *reason* d exists and 10, 11 and 12 to whether *reason* e exists. *Factor* 13 is, however, an independent reason for detention.

56. *Factor* 7, "you have previously failed or refused to leave the UK when required to do so", has relevance to *reason* c, "your removal from the UK is imminent". Its relevance is, however, not that it demonstrates that *reason* c exists, but why, having regard to the fact that *reason* c exists, detention is justified. This exemplifies the fact, as explained to us by Mr Underwood, that it is not the Secretary of State's policy to detain whenever detention is imminent, but only where there is some additional reason for detaining.

57. We refer to Mr Kittle's evidence, which we have summarised at paragraph 9. It seems to us that this discloses a degree of confusion on his part between *reasons* and *factors,* confusion which is, perhaps, not surprising. The evidence, and Mr Underwood's submissions, suggest something that one would naturally infer. When deciding whether or not to detain someone whose removal is imminent, an immigration officer will have regard to the degree of likelihood that the individual in question will fail to provide the co-operation necessary for an orderly removal, if not detained. Many of the factors listed in IS 91 R will have relevance to this question. There may well, however, in the individual case, be other relevant factors which are not listed and which it would not be reasonable to attempt to list.

58. There are two further important aspects of the Secretary of State's policy in respect of detention where removal is imminent: (i) removal will not be treated as imminent once proceedings which challenge the right to remove have been initiated and (ii) when deciding whether removal is imminent the immigration service will pay no regard to a statement by the immigrant, or those representing the immigrant, that proceedings challenging the right to remove the immigrant will be initiated.

59. There was confusion at the hearing as to the relevance of the published policy relating to removal to a safe third country. Our initial impression had been that this was relevant because it was the policy of the Secretary of State not to detain an asylum seeker until five working days had elapsed from notification of the intention to remove him to another Member State. On reviewing the policy as published in the light of Mr Underwood's submissions in relation to it, we are satisfied that it does not, and is not intended, to give this reassurance. Its purpose is to emphasise the urgent need for prompt action on the part of an immigrant who intends to seek judicial review of a decision to remove him pursuant to the Dublin Convention. It gives the limited reassurance that the immigrant will not be removed during the period of 5 working days from the notification of intention to remove, but no reassurance that he will not be detained. The urgency of removal where the Dublin Convention is invoked is of itself a relevant factor when deciding whether to detain on the ground that removal is imminent.

Is the policy lawful?

60. The Secretary of State's policy restricts detention of those who have no right to enter this jurisdiction to a far greater degree than the provisions of Article 5(1)(f) require. So far as the legality of the policy is concerned, the only question is whether it provides for or permits arbitrary treatment, and we would include within that phrase treatment which is irrational.

61. We can see nothing arbitrary or irrational about a policy under which members of the immigration service will detain a person whom they are about to remove, in circumstances where they have reason to doubt whether that person will provide the co-operation necessary for an orderly removal. We can see nothing arbitrary or irrational about a policy of not normally detaining an individual whom they would wish to remove, in circumstances where that person's removal is not imminent. The automatic presumption that removal is not imminent that applies as soon as judicial proceedings challenging removal are commenced will not always reflect reality. It is a pragmatic rule of thumb,

which favours the immigrant. It avoids the necessity for immigration officials to attempt to evaluate the merits of each application for permission to seek judicial review.

62. Is it arbitrary or irrational, as a matter of policy, not to have regard, when considering whether removal is imminent, to the fact that the immigration service has been put on notice that the immigrant intends to commence proceedings that will challenge the right to remove? This question needs to be considered having regard to the alternatives to this policy. It would either be necessary to treat removal as no longer being imminent upon any intimation of an intention to bring judicial proceedings, or the immigration service would have to attempt to evaluate each such intimation in order to decide whether it was made in good faith and with reasonable prospects of success, rather than merely in order to buy time. The former policy would encourage tactical threats to bring judicial proceedings; the latter would place a very considerable burden on the immigration service and involve an appraisal which would be difficult to perform and uncertain in result. Quite apart from these considerations, the present policy encourages expedition in appealing or applying for judicial review, which is a legitimate end in itself.

63. For these reasons, we regard as neither arbitrary nor irrational the policy not to have regard to mere intimations of intention to bring proceedings challenging removal, when considering whether removal is imminent.

Is the policy accessible?

64. We shall approach this question on the basis of the evidence relating to the appeals before us. In *The Sunday Times v The United Kingdom* (1979) 2 EHRR 245, a case dealing with Article 10 rights, the ECtHR held at paragraph 49 that the phrase "prescribed by law" in Article 10 (2) required that

> "the law must be adequately accessible: the citizen must have an indication which is adequate in the legal circumstances of the legal rules which are applicable to the given case"

65. Another requirement recognised in that decision was that the law should enable those affected by it reasonably to foresee the consequences of their actions. Of course, if the law is not accessible, this requirement will also not be satisfied. In our judgment, these principles apply to the question of whether detention of N and A was lawful in the present case.

66. It was known, because it was published, that imminent removal was one of the reasons for detaining an asylum seeker. The evidence is not clear as to how widely it was known that it was the policy of the immigration service not normally to treat removal as imminent once proceedings challenging the right to remove had been instituted, but those acting for both N and A appear to have proceeded on the basis that this was axiomatic, and it is reasonable to infer that this practice was generally known to solicitors specialising in immigration work. What, on the evidence, was not known was that it was the policy of the immigration service, when considering the imminence of removal, to disregard information from those acting for asylum seekers that proceedings were about to be initiated, however credible that information might be.

67. In this respect we conclude that the Secretary of State's policy was not accessible, nor was the effect of failure to commence proceedings, of which notice had been given to the immigration service, foreseeable.

Was N lawfully detained?

68. When N was detained, his removal was not imminent, as events have proved. He was in a position to bring a viable claim for judicial review of the Secretary of State's decision to issue a certificate under section 72(2)(a) of the 1999 Act. In the event that claim was successful. He had arguable claims for judicial review of the decision to remove him to Germany, based on the family links policy. Those claims did not succeed, but are the subject of appeal. His solicitors had given notice to the Home Office and to the Immigration Service of his intention to seek judicial review. It has not been suggested by the Secretary of State that there was any reason to doubt that this intention was genuine and would be implemented. Those acting for N could reasonably expect, having regard to those aspects of the Secretary of State's policy that had been made public, that N would not be detained on the ground that his removal was imminent. The only basis upon which the Immigration Service could treat his removal as imminent was by applying that aspect of the Secretary of State's policy which had not been made public, namely that no regard would be paid to an intimation that judicial review proceedings would be instituted. The Secretary of State cannot rely upon this aspect of his policy as rendering lawful that which was, on the face of it, at odds with his policy, as made public.

69. For these reasons, which are not precisely the same as those of Stanley Burnton J, we conclude that he was correct to hold that the detention of N was unlawful. Stanley Burnton J remarked that there was substance in Mr Husain's submission that N's detention was a penalty for his solicitor's failure to initiate judicial review proceedings before the interview at which he was detained. The evidence suggests that, had she been aware of the unpublished aspect of the Secretary of State's policy, N's solicitor would have instituted proceedings before the interview. N suffered because his solicitor could not foresee the consequences of her conduct. N's detention did not satisfy the requirement of lawfulness imposed by Article 5 (1)(f).

Was A's detention lawful?

70. A's case is, in our view, even stronger than N's. Initially the Immigration Service were not expressly informed prior to detaining A that he would exercise his right of appeal if the Secretary of State should refuse his application based on the Human Rights Act 1998. That was, nonetheless, the natural inference of the reference to the fact that he would have a right of appeal made, by his solicitors in their letter of 1 November. Moreover, on 6 November the Immigration Service were told unequivocally that A would exercise his right of appeal, and recorded in the 'review summary' that A "will exercise his HRA appeal".

71. It is clear, on the evidence, that the reason why A was detained was in the hope that, by ensuring that he had an interview with the Sri Lanka High Commission, the documentation would be obtained that would enable his prompt removal to Sri Lanka if and when his appeal failed. This did not fall within the Secretary of State's policy, as made known to A and his solicitors.

72. Had the Secretary of State included in his policy, as a reason for detention, 'to facilitate documentation needed for removal' we do not believe that any objection could have been made under Article 5. Equally, had he published his policy to disregard an intimation that proceedings would be initiated, for the purposes of deciding when removal is imminent, he would have been in a position lawfully to detain A for that reason and the additional reason that detention was necessary for documentation purposes. In the event, however, the detention was unlawful for the same reason that N's detention was unlawful. It was at odds with the Secretary of State's policy, as made public.

73. For these reasons we would reject the appeal of the Secretary of State in the case of both N and A.

Order:

(Nadarajah)

1. The Secretary of State's appeal against the order of Stanley Burnton J declaring that the detention of N unlawful be dismissed.

2. N's claim for judicial review concerning his detention be transferred to the Queen's Bench Division for the damages to be assessed.

3. Secretary of State to pay N's costs

4. Detailed assessment of N's publicly funded costs

(Amirthanathan)

1. Secretary of State's appeal against the order of Mr Ravinder Singh QC declaring that the detention of the respondent was unlawful be dismissed.

2. The Respondent's claim for judicial review be transferred to the Queen's Bench Division of the High Court for damages to be assessed.

3. Secretary of State to pay the respondent's costs, such costs to be subject of detailed assessment if not agreed.

4. The respondent's costs to be assessed in accordance with Community Service Regulations 2002

5. Application for permission to appeal to the House of Lords refused.

(Order does not form part of the approved judgment)