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Case No: CO/4400/2005 & CO/4403/2005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 22/05/2006

Before :

MR JUSTICE DAVIS

- -

Between :

The Queen on the Application of D	**Claimant**
- and -	
Secretary of State for the Home Department and others	**Defendants**
The Queen on the Application of K	**Claimant**
- and –	
Secretary of State for the Home Department and others	**Defendants**

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Mr Rabinder Singh QC and Ms Stephanie Harrison (instructed by Bhatt Murphy) for the Claimants
Ms Jenni Richards (instructed by Treasury Solicitors) for the First Defendant
Mr Richard Furniss (instructed by Berrymans Lace Mawer) for the Second Defendant
Mr Timothy Pitt-Payne (instructed by Michael Simkins LLP) for the Third Defendant

Hearing dates: 22nd, 23rd and 24th March 2006

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Approved Judgment

Davis J :

Introduction

1. The Claimants, who can be identified as D and K, are asylum seekers. They claim to have been tortured in their respective countries of origin. On entry (separately) into the United Kingdom, they were interviewed and then sent to Oakington Detention Centre, with a view to their respective claims being dealt with under the fast track procedure. D was transferred to Oakington on 12th May 2005 and released on 18th May 2005, being granted temporary admission. K was transferred to Oakington on 5th May 2005 and released on 11th May 2005, being granted temporary admission. Their claims for asylum still (as at the hearing in March 2006) have not been the subject of any decision. By these proceedings, commenced by Claim Forms issued on 30th June 2005, D and K each claim that their transfer to Oakington was unlawful or, in the alternative, that their continued detention while at Oakington was unlawful. They claim, among other things, that the Defendants have variously acted in breach of the Detention Centre Rules 2001 and contrary to the government's promulgated policy and to published standards relating to the handling of asylum cases. Extensive declaratory relief is sought. Damages are also sought for asserted breaches of the rights of D and K under the European Convention on Human Rights, in particular Articles 5,3 and 8.

2. The hearing before me lasted 3 days (a relatively long time for a judicial review matter). The materials and evidence lodged in advance were voluminous. An impression could be gained that the cases of D and K were being put forward as illustrative of what is asserted (by some) to be a generally flawed fast tracking process operated in the United Kingdom. Further, the Claim Forms as issued make a general allegation of what is asserted to be "the systemic failure by all three Defendants to ensure the provision of mandatory health care examinations for all immigration detainees held under the fast track procedure at Oakington and in particular to ensure that evidence is obtained to identify torture victims….." Yet further, there are a number of bodies and individuals who hold the view that the detention, pending determination of claim, of any asylum seeker is in principle inherently undesirable: see for example, the UNHRC guidelines issued in February 1999. Others (for example, the Medical Foundation) hold the view that at least those asylum seekers who claim to have been torture survivors should in principle not at any stage be detained, pending determination of their claims. These viewpoints find reflection in a number of the materials deployed at the hearing before me. On the other hand, others support, in general terms, the detention of asylum seekers pending determination of their claims.

3. It may well be that a consideration of the issues arising in this case may have a bearing on the treatment of asylum seekers hereafter who are detained in Oakington or comparable detention centres, such as Harmondsworth or Yarl's Wood. But it seems to me important to state at the outset that none of those competing wider viewpoints which I have outlined should operate as a distraction from the fact that these two claims required to be determined by reference to their own particular facts and by reference to the law and to government policies and published standards applicable to those facts; and I would record that Mr Rabinder Singh QC, leading counsel appearing (with Ms Harrison) for the Claimants, in the course of his scrupulously fair and restrained submissions, acknowledged that to be so. He further

stated that there was no "hidden agenda" in these claims. In particular, he expressly disavowed any claim that the making of an allegation of torture by an asylum seeker *of itself* rendered a transfer to, or continued detention in, Oakington under the fast track procedure unlawful.

The background facts

D

4. The background facts relating to D are these.

5. D was, as she has said, born in the Ivory Coast on 3rd July 1978. She arrived in the United Kingdom on the 1st May 2005 using a French passport to which she was not entitled. She claimed asylum at the Croydon Asylum Screening Unit on the 11th May 2005. On request, she returned the following day (the 12th May 2005). Later that day she was told that her claim would be fast tracked and that she would be detained. She was transferred to Oakington, arriving at around midnight.

6. At the ASU screening interview at Croydon, her answers had been to the effect that she was fit and well enough to be interviewed, was in good health and had no current medical condition. She claimed asylum on the ground that she had a well founded fear of persecution or that there was a real risk of torture or inhuman or degrading treatment if removed from the UK. She made no reference in that interview to having been tortured, although there is also no evidence to show that she was asked in terms whether she was making such a claim and indeed the standard form says she would not be asked to give any details about her asylum claim. She gave, however, her reason as coming to the UK as "To protect myself. I have been persecuted because the authorities suspected I collaborated with the rebels ..." She was served with a form 1S91R before her transfer to Oakington. That indicated that the Immigration Officer was "satisfied that your application may be decided quickly using the fast track procedure".

7. On reception at Oakington at around midnight on the 12th May 2005, D was provided with what was called a welcome pack (in French translation) and with information about having access to a doctor or nurse. She was seen by a nurse – in accordance with the usual practice operated at Oakington – and asked to complete a health questionnaire. There is no clear evidence as to precisely when this happened but overall I conclude that this was shortly after she arrived, and certainly within two hours. D said that she did wish to see a nurse or doctor urgently. The standard form of questionnaire (in French and English) asked three questions:

    1. Are you taking any medications for current health problems?

    2. Do you wish to speak to a nurse or doctor about any health problem?

    3. Is the health problem urgent?

D answered no to the first question and yes to the other two. The questionnaire also stated that should she need a nurse or doctor at any time she should ask a house

officer to make an appointment. A Detainee Reception Report recorded that D had no obvious illness, injury or visible marks.

8. During the 13th May D spoke to a representative of the Refugee Council (which has a permanent presence at Oakington). That body made a referral of D for medical inspection.

9. On the 14th May D saw a nurse. There was no interpreter present at that stage, but the nurse spoke some French. D said to the nurse that she had been detained and tortured in April 2005 in the Ivory Coast, had been diagnosed with Hepatitis B and had miscarried due to ill-treatment in prison and had had no medical assistance at that time. The notes made by the nurse at the time recorded among other things, the following:

> "[D] tells me she was imprisoned in April of this year for 4 days and was beaten. Showed me numerous linear scars now healed on her back. (To complete Allegation of Torture form when interpreter available)."

Although there is some conflict in the evidence on this, this note seems to bear out what is said elsewhere - for example, the witness statement of Mr Kelso dated 15th September 2005 – that no such form was put in (or, therefore, considered) at this time, just because an interpreter's involvement was awaited.

10. D was scheduled to have her asylum interview, under the fast-track process, in the afternoon of 15th May 2005. A representative of the Refugee Legal Council ("RLC") based at Oakington contacted the Home Office with a view to postponing that interview on the basis that D had, as it was alleged, been the subject of torture before coming to the UK. The Home Office had not at that stage received any other evidence of D having been tortured and was informed that there was no reason on medical grounds why the interview should not proceed. It declined to postpone the interview. The interview then took place that evening, the RLC maintaining its objection.

11. At the interview, at which an interpreter and a representative of the RLC was present, D said that she was fit and well and prepared to be interviewed, although complaining of pains and burns in her back. She said at the end of the interview that she felt fit and well but was "tired, that's all". In the course of her interview and as recorded in her Statement of Evidence Form and Interview, D among other things said this:

> "They walked on me, they beat me on my back and my sides. They hit me with steel wire on my back. They spat on me and insulted me. They didn't stop walking on me. They didn't cease hitting me."

She confirmed at the end that she had understood all the questions.

12. D saw a doctor on 16th May 2005. The doctor – a general practitioner – recorded in his notes D's account of being beaten. He recorded the presence of scars on her back, doing so in these terms:

> "Had been beaten in prison since then back pains, multiple scars on back."

He also noted abdominal pains and noted other medical comments.

13. A form called an Allegation of Torture (AOT) form – of a kind previously mentioned in the nurse's notes - was then completed. That form, dated 16th May 2005, was a standard typed form, with the Third Defendant's trading name (Primecare Forensic Medical) printed at the top. That read:

> "I have assessed the above named detainee today and she has informed me that she has been subjected to torture, by means of: [and the following words are then written in manuscript]:
>
> Severely beaten with iron wires, kicked, trodden on (was in crouching position in attempt to protect her unborn child) by police in Ivory Coast.
>
> The following wounds/scars were visible [and then in manuscript]:
>
> Multiple linear scars on back, arms and legs (attack resulted in miscarriage)."

That form was forwarded to the Oakington Centre Manager, D consenting to its release for that purpose, and "thence to IND" [that is, is the Immigration and Nationality Directorate].

14. However, also on the 16th May 2005 the Home Office had been informed, through the RLC, that D had been offered an appointment for an opinion from the Medical Foundation on 17th June 2005. It seems to be the Home Office's usual practice to release a detainee from the fast track process once a referral to the Medical Foundation is notified. Ms Richards, appearing for the First Defendant, told me, on instructions, that the principal reason for that was that such appointments almost invariably involved a time frame exceeding the time-frame (10-14 days) that was sought to be applied to fast-track detainees at Oakington. At all events, and apparently before the AOT form had been assessed, the decision was made that day to release D accordingly from the fast track process.

15. Efforts were then made to find other accommodation for D. NASS indicated that such accommodation would be secured for her on the 18th May. In the event, at the dispersal interview on the 18th May, she said that she had the private address of a friend where she could stay. She was granted temporary admission (with restrictions of residence at that address) and she left Oakington that day.

16. Upon D being examined subsequently by the Medical Foundation, on two occasions, a detailed report was prepared by Dr Granville-Chapman and submitted on 14th November 2005. That among other things noted the existence (also evident in photographs produced to the court) of fine linear scars on D's back and arms,

described as "highly consistent" with D's attribution of whipping with metal wire, which D had said had been inflicted on her by police whilst she was in detention. The report expressed a concluding opinion that "on examination she has physical findings which are highly consistent with her account".

17. It is common ground that D was detained, at Oakington, simply because she had been assessed as an appropriate case for the fast-track procedure. There is no suggestion that she could or would have been lawfully detained there or elsewhere for any other reason (risk of absconding etc).

18. As I have said, no decision has yet been made with regard to D's asylum application. Whether that was because of the existence of these proceedings was not stated to me. Such explanation as Ms Richards on behalf of the First Defendant could on instructions give me, on my query, would seem, to the extent that I understood it, in part to involve a disinclination on the part of the Home Office to make use of a photocopier.

K

19. The background facts relating to K are these.

20. K, an Alevi Kurd, was, as he says, born in Turkey on 8th March 1968. K arrived in the United Kingdom on 13th April 2005 clandestinely concealed in a lorry. On 20th April 2005 he claimed asylum at the Croydon Screening Unit and was interviewed.

21. Manuscript notes of interview of K that day record him as saying that he had been tortured in Turkey and that he had "proof on my body". He told the Immigration Officer that he had swollen legs from beatings and hot iron marks on his shoulders. He indicated that he had had these problems since 1997. He had seen a doctor in Turkey but had no medical report with him. He said that he last saw a doctor 5 to 6 years before. He repeated allegations of this nature at a further interview on 30th April 2005. When asked whether he was in good health his recorded answer was: "No (swollen right leg due to torture)". He also referred to "nightmares of his tortures". On 4th May 2005 he was given notice of illegal entry and told that a decision to fast track his claim, and detain him in the meantime, had been made. He was served with a form 1S91R which (as in the case of D) indicated that the Immigration Officer was satisfied that his application may be one which could be decided quickly under the fast track procedure.

22. K arrived at Oakington at around 3am on 5th May 2005. He asked, speaking with the assistance of some other Turkish inmates, to see a doctor because he was unwell: in his witness statement he claims that he suggested it was urgent. It is probable that he was given a "welcome pack" similar to that provided to D. He shortly after his arrival saw a nurse and was given a screening questionnaire, translated into Turkish. The times are not clear but I consider it likely that it was shortly after, and at all events well within two hours of, his arrival. The form of typed questionnaire was similar to that given to D. He answered the first question no, the second yes and the third no (thereby indicating the health problem was not urgent). A Detainee Reception Report in respect of K recorded that he had no obvious injury, illness or visible marks.

23. On the day of his arrival K saw a representative of the RLC at Oakington and alleged that he had been tortured and complained of his medical condition. He also claims in his witness statement that he raised his medical problems twice with detention officers. At all events, he saw a nurse on the 6th May (an interpreter also being present) at around 10am. The notes of the nurse read as follows:

> "Rt leg pain intermittently since Oct 1999[sic]. Claims he was tortured in police custody. His right leg was beaten with batons over period of a week. Since then his leg has been swollen nearly the full length of the leg. Has numerous varicose veins of his Rt leg which may be causing the swelling? Painful to walk any distance. Given Paracetamol. AOT form completed. T/S doctor for review."

The nurse completed the AOT form on that day and, with the consent of K, passed it to the Centre Manager for onward submission to IND. The AOT form recorded the following:

> "Claims whilst in police custody in Turkey Oct 1999 for a period of 1 week was tortured. Hot irons applied to his neck and top of his head. Blind folded and kicked on the right leg and hit with batons."

The following scars were noted as visible: "Several round small scars, back of neck and top of head. Scars front fore –leg Rt and Lt (small and round)."

24. Later that day he was seen by a doctor. The doctor's notes, which are not altogether easy to decipher, record the following:

> "Evidence of torture: scars on back of head and neck consistent with burns inflicted with a hot iron and [?] symmetrical therefore most likely done deliberately."

The notes also record a swollen right leg, with extensive varicose veins, and records: "this occurred after having been beaten severely [?] to his legs about six years ago". It was suggested that a referral to a vascular surgeon was needed. No further or revised AOT form was submitted by the doctor.

25. Also on the 6th May 2005 the RLC wrote to the Home Office stating that K was claiming to be a torture victim and had prominent scarring; suggesting that he was not suitable for detention; and inviting the Home Office to make its own physical assessment of K's scars.

26. On the 7th May the asylum interview of K took place, notwithstanding objections of the RLC. An interpreter was present. K was asked if he felt fit enough to be interviewed and he indicated eventually that he was, although alluding to psychological problems because, as he claimed, he had been tortured. In the course of his interview, K gave an account of past detention in Turkey and of ill treatment. For example, he said this:

> "They blindfolded me, handcuffed me – I don't know where they took me, it carried on for 1 1/2 hours.
>
> We carried on until they started torturing me."

He said that he was held for seven days, and that his detainees had a "hot rod" and kept touching his head and shoulders, burning him.

27. Further representations with regard to K were made by the RLC on 8th May 2005, supported by a witness statement of K. An answer was given by the Home Office, among other things saying this: "Thank you for your letter regarding the above. In line with policy I will not be making a physical examination of your client in an attempt to assess whether his injury is the result of torture; should you obtain a Medical Foundation appointment your client will be taken out of the process". On 10th May 2005, an appointment with the Medical Foundation, scheduled for 7th June 2005, was notified to the Home Office which then, in line with its usual practice, released K from the fast track process on that day. K was actually released from Oakington the following day (11th May 2005) to an address nominated by K, with temporary admission to K being granted.

28. K presumably was subsequently examined by a doctor from the Medical Foundation. My attention, however, was not drawn to a report in his case.

29. As in the case of D, it is common ground that K was detained at Oakington because he had been assessed as appropriate for the fast track procedure; and there is no suggestion that he could or would have been detained, there or elsewhere, for any other reason. Also as in the case of D, no decision has yet been made with regard to his asylum application.

The Litigation history

30. The Claim Forms were issued against the three Defendants on 30th June 2005. The Claimants were, by their solicitors, pressing for an early hearing: but in the event matters have moved relatively slowly. Permission was granted on 28th July 2005. Further delay occurred: in part because detailed evidence was being gathered. A hearing was fixed for 12th December 2005, in advance of which draft Amended Grounds of Claim were submitted. In the event, that hearing was adjourned by Collins J on 8th December 2005, Collins J making an interim order pending the final hearing (in effect not opposed by the First Defendant). I will revert to some of the terms of that interim order in due course.

31. The relief as now sought by D and K is extensive. Although the declaratory relief sought is not in identical terms in each amended Claim Form, the wide ranging nature of the declaratory relief sought can be taken from the Claim Form in the case of K.

> "The Claimant seeks the following declarations, namely that:
>
> a) The decision by the first Defendant to attempt to seek to process his asylum claim under the Oakington fast-track procedure, subsequent to him raising an allegation that he had been tortured and stating that he

bore physical torture injuries, was unlawful as it was outwith prescribed rules and stated policy;

b) the failure by the first Defendant to ascertain whether he may be a victim of torture before authorising his detention (and at all times thereafter) was unlawful as it was outwith prescribed Rules and stated policy and/or was irrational;

c) the failure by all Defendants to ensure that he was medically screened and assessed within 2 hours of his arrival at Oakington was unlawful as it was outwith stated policy;

d) the failure by all Defendants to ensure that he was medically examined him (sic) within 24 hours of his arrival at Oakington was unlawful as it was outwith stated policy;

e) the failure by all Defendants to take steps, by way of medical examination, to ascertain whether he may be a victim of torture was unlawful as it was outwith prescribed Rules and stated policy and/or was irrational;

f) that in such circumstances his detention at Oakington from 4 May 2005 to 11 May 2005 was unlawful

g) Policy No 25 of the Third Defendant prohibiting a documentation of opinion of how wounds were sustained is unlawful as it is outwith prescribed Rules and stated policy and/or was irrational."

In each case, compensation and/or damages for unlawful detention and treatment in breach of Articles 3,5 and 8 of the Convention are also sought.

The law and published policy relating to fast-track detention.

32. The power to detain asylum seekers is conferred, in wide terms, on the First Defendant by the provisions of the Immigration Act 1971 and, in particular, the provisions of Schedule 2 of that Act. The width of the primary statutory provisions has, however, been limited by pronouncements of policy by the Government and by secondary legislation, in the form of the Detention Centre Rules 2001. The pronouncements of policy relate both to the detention of asylum seekers who are the victims of torture and to cases in which the fast-track procedure (with accompanying detention) generally may be inappropriate. In this regard, Mr Rabinder Singh QC acknowledged that there was a balancing process which was appropriately undertaken by the Government. As I see it, this among other things needed to balance the interests and treatment of the "genuine" asylum seeker against the need for speedy disposition in appropriate cases in a field where the "bogus" claim is acknowledged to be wide-spread. Furthermore, not all kinds of ill-treatment amount to torture nor are physical or mental injuries observable in some asylum seekers necessarily attributable to torture.

33. In 1998 the Government published a White Paper entitled "Fairer, Faster and Firmer". In paragraph 12 this, among other things, is said with regard to asylum seekers who were torture victims.

> "12.3 It is regrettable that detention is necessary to ensure the integrity of our immigration control. The Government has decided that, whilst there is a presumption in favour of temporary admission or release, detention is normally justified in the following circumstances …..
>
> 12.4 The Government also recognises the need to exercise particular care in the consideration of physical and mental health when deciding to detain. Evidence of a history of torture should weigh strongly in favour of temporary admission or temporary release whilst an individual's asylum claim is being considered."

34. Pronouncements were made in the House of Lords on behalf of the Government by Lord Filkin in 2002. Amongst other things he said this:

> "We made it clear in our 1998 White Paper, Fairer, Faster and Firmer, that evidence of a history of torture should weigh strongly in favour of temporary admission or temporary release when deciding whether to detain while an individual's asylum claim is being considered. That remains the case.
>
> The instructions to staff authorising detention are clear on that. Independent evidence that a person has a history of torture is one of the factors that must be taken into account when deciding whether to detain and would normally render the person concerned unsuitable for detention other than in exceptional circumstances. Such evidence may emerge only after the detention has been authorised. That may be one of the circumstances referred to by the noble Lord, Lord Hylton. If that happens, the evidence will be considered to see whether it is appropriate for the detention to continue.
>
> We reinforced that in the Detention Centre Rules 2001. Rule 35(3) specifically provides for the medical practitioner at the removal centre to report on the case of any detained person who he is concerned may have been the victim of torture. There are systems in place to ensure that such information is passed to those responsible for deciding whether to maintain detention and to those responsible for considering the individual's asylum application.
>
> However, unfortunately, there cannot be a blanket and total exclusion for anyone who claims that they have been tortured. There may be cases in which it would be appropriate to detain

> somebody who has a history of torture. For example, the person concerned might be a persistent absconder who is being returned to a third country. It might be necessary to detain such a person to effect removal. There will be other cases in which the particular circumstance of the person justifies such an action. There will be yet other cases in which we do not accept that the person concerned has been the victim of torture. Despite that, I repeat my earlier comments about the importance of seeking to interpret these cases with the utmost care and not lightly using the exceptions to which I referred."

35. It thus is clear from all this that the making of a claim of torture does not of itself mean that the applicant will not be detained. Independent evidence ordinarily is called for. Conversely, if there is sufficient independent evidence then ordinarily, and absent exceptional circumstances, an applicant will not be detained: and in consequence will not be the subject of the fast-track procedure at Oakington (which necessarily involves detention). The rationale for this general approach is also conveniently set out in the witness statement of Simon Barrett, Head of Detention Services Policy Unit within the IND, dated 4th October 2005, made for the purpose of these proceedings. It is acknowledged by the First Defendant that this stance on the part of the Government does not accord with the views of those organisations which object in principle to the policy requirement of independent evidence of torture (and indeed to the policy of fast-tracking). But the Government has not agreed with those views. It is, in turn, acknowledged on behalf of the Claimants that the First Defendant was lawfully entitled to pronounce such a policy.

36. This policy is also reflected in Chapter 38 of the Operating Enforcement Manual (as updated), which is intended to guide workers in this field. It is emphasised that the policy is that applicants may be detained at Oakington where "it appears that the claim is straightforward and capable of being decided quickly". This is later said (with regard to factors influencing a decision to detain, excluding pre-decision fast track cases):

> "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. 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 …"

The factors said to weigh against detention include "has the subject a history of torture?" In paragraph 38.4, there is set out a description of those who will usually be unsuitable for fast track. That includes cases "where detention would be contrary to published criteria". In paragraph 38.10 this is said:

"38.10 Persons considered unsuitable for detention

Certain persons are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS accommodation or elsewhere. Others are unsuitable for IS detention accommodation, because their detention requires particular security, care and control.

The following are normally considered suitable for detention in only very exceptional circumstances, whether in dedicated IS detention accommodation or elsewhere:

¨ unaccompanied children and persons under the age of 18 (but see 38.7.3 above);

¨ the elderly, especially where supervision is required;

¨ pregnant women, unless there is the clear prospect of early removal and medical advice suggests no question of confinement prior to this;

¨ those suffering from serious medical conditions or the mentally ill;

> ¨ those where there is independent evidence that they have been tortured;
>
> ¨ people with serious disabilities;"

37. In addition, with regard to the policy of fast-tracking, there was a ministerial statement by Barbara Roche (then Minister of Immigration) on 16 March 2000. This to some extent reflects a paper published by the Home Office entitled "Secure Borders, Safe Haven." She said this:

> "Oakington Reception Centre will strengthen our ability to deal quickly with asylum applications, many of which prove to be unfounded. In addition to the existing detention criteria, applicants will be detained at Oakington where it appears that their application can be decided quickly, including those which may be certified as manifestly unfounded. Oakington will consider applications from adults and families with children, for whom separate accommodation is being provided, but not from unaccompanied minors. Detention will initially be for a period of about seven days to enable applicants to be interviewed and an initial decision to be made. Legal advice will be available on site.
>
> If the claim cannot be decided in that period, the applicant will be granted temporary admission or, if necessary in line with existing criteria, moved to another place of detention….."

38. A further ministerial statement was issued by Des Browne (the then Minister) on 16th September 2004. Amongst other things, this was said:

> "A key element in the Government's strategy to speed up the processing of asylum claims has been the introduction of the fast track asylum processes operated initially at the Oakington reception centre and now also at Harmondsworth removal centre and other locations. The use of detention to fast track suitable claims under these processes is necessary to achieve the objective of delivering decisions quickly. This ensures, among other things, that those whose claims can be quickly decided can be removed as quickly as possible in the event that the claim is unsuccessful… When deciding whom to accept into fast-track processes account is taken of any particular individual circumstances known to us which might make the claim particularly complex or unlikely to be resolved in the timescales however flexibly applied……"

That statement also repeated that decisions should ordinarily be made within 10-14 days.

39. All this supports the view that complex claims – which in the ordinary way would not be capable of being dealt with in 10-14 days –would normally not be suitable for the fast-track procedure. This is also reflected in a document entitled "the Oakington Process Document " (issued in February 2000) which provides this, among other things, as representing unsuitable cases for Oakington:

> "~ any case which does not appear to be one in which a quick decision can be reached.
>
> ~ any case which has complicating factors, or issues, which are unlikely to be resolved within the constraints of the Oakington, process model."

40. As to guidance given to Immigration Officers in deciding whether, at the initial screening stage, an applicant should or should not be assessed as appropriate for the Oakington fast track procedure, there were certain guidance criteria. By those criteria, applicants from the Ivory Coast and certain categories of Kurds from Turkey are included in a list of those identified as potentially suitable for fast-track processing. By reference to that list neither D nor K on the face of it came within the category of those deemed unsuitable for the fast track procedure. It may be noted, however, that the criteria provided to Immigration Officers (as at November 2004) do indicate as unsuitable "any case which does not appear to be one in which a quick decision can be made".

41. Reference should also be made in this regard to Chapter 38 of the Operations Enforcement Manual, which says this (in para 38.4):

> " When officers come across a person who makes an application for asylum, they should consider whether he or she meets the Fast Track suitability criteria. All potentially suitable applicants must be referred to the Oakington co-ordinator who will confirm if they are accepted into either the process at Oakington, Harmondsworth or and Yarl's Wood. The use of detention to fast track suitable claims under these processes is necessary to achieve the objective of delivering decisions quickly."

42. It is to be noted that the lawfulness, and compatibility with Article 5, of detaining asylum claimants for the purpose of deciding their claims quickly under a fast-track procedure has been confirmed by the House of Lords in R (Saadi) v Secretary of State for the Home Department [2002] 1 WLR 3131, [2002] UKHL 41 (I was told, in fact, that that issue raised in that decision has been declared admissible in an application to the European Court of Justice). In the course of the delivered speeches, extensive reference is made to statements made in a witness statement of Mr Ian Martin, then

Oakington Project Manager and deputy director of the IND, as to the safeguards and protective measures in place which were designed to help ensure that only appropriate cases were dealt with under the fast track procedure. One point made was that "the speed with which a decision can be taken is the primary consideration in assessing cases for Oakington". It was also said by Mr Martin in that witness statement that the initial screening of those cases suitable for Oakington was of paramount importance and designed to weed out unsuitable or complicated cases at the outset. It may also be noted that the House of Lords placed weight on the provisions of Chapter 38 of the Operation Enforcements Manual: see para 15 of Lord Slynn's speech.

The Detention Centre Rules and Operating Standards

43. There are applicable to Oakington, as to other detention centres, the Detention Centre Rules 2001, SI 2001/238, made pursuant to the provisions of s.153 of the Immigration and Asylum Act 1999 and which came into effect on the 2nd April 2001.

44. The Detention Centre Rules (in the respects relevant to these proceedings) provide as follows:

> "Rule 2 - Interpretation
>
> 2. In these Rules, where the context so admits, the expression -
>
> "manager" means, in relation to any detention centre, the person appointed under section 148(1) of the Immigration and Asylum Act 1999;
>
> "officer" means an officer of a detention centre (whether a Crown servant or an employee of the contractor or otherwise) and, for the purposes of rule 8(2), includes a detainee custody officer who is authorised to perform escort functions in accordance with section 154 of the Immigration and Asylum Act 1999 or a prison officer or prisoner custody officer performing those functions under that section.
>
> . . . .
>
> Rule 33 – Medical Practitioner and Health Care Team
>
> (1) Every detention centre shall have a medical practitioner who shall be vocationally trained as a general practitioner …
>
> (2) Every detention centre shall have a healthcare team (of which the medical practitioner will be a member), which shall be responsible for the care of the physical and mental health of the detained persons at the centre.
>
> . . . .
>
> Rule 34 - Medical examination upon admission and thereafter

34. - (1) Every detained person shall be given a physical and mental examination by the medical practitioner (or another registered medical practitioner in accordance with rules 33(7) or (10)) within 24 hours of his admission to the detention centre.

(2) Nothing in paragraph (1) shall allow an examination to be given in any case where the detained person does not consent to it.

(3) If a detained person does not consent to an examination under paragraph (1), he shall be entitled to the examination at any subsequent time upon request.

. . . .

Rule 35 - Special illnesses and conditions (including torture claims)

35. - (1) The medical practitioner shall report to the manager on the case of any detained person whose health is likely to be injuriously affected by continued detention or any conditions of detention.

(2) The medical practitioner shall report to the manager on the case of any detained person he suspects of having suicidal intentions, and the detained person shall be placed under special observation for so long as those suspicions remain, and a record of his treatment and condition shall be kept throughout that time in a manner to be determined by the Secretary of State.

(3) The medical practitioner shall report to the manager on the case of any detained person who he is concerned may have been the victim of torture.

(4) The manager shall send a copy of any report under paragraphs (1), (2) or (3) to the Secretary of State without delay.

(5) The medical practitioner shall pay special attention to any detained person whose mental condition appears to require it, and make any special arrangements (including counselling arrangements) which appear necessary for his supervision or care.

. . . .

Rule 45 - General duty of officers

> 45. -(1) It shall be the duty of every officer to conform to these Rules and the rules and regulations of the detention centre, to assist and support the manager in their maintenance and to obey his lawful instructions.
>
> (2) An officer shall inform the manager and the Secretary of State promptly of any abuse or impropriety which comes to his knowledge.
>
> (3) Detainee custody officers exercising custodial functions shall pay special attention to their duty under paragraph 2(3)(d) of Schedule 11 to the Immigration and Asylum Act 1999 to attend to the well-being of detained persons.
>
> (4) Detainee custody officers shall notify the health care team of any concern they have about the physical or mental health of a detainee.
>
> (5) In managing detained persons, all officers shall seek by their own example and leadership to enlist their willing co-operation.
>
> (6) At all times the treatment of detained persons shall be such as to encourage their self-respect, a sense of personal responsibility and tolerance towards others.
>
> . . . .
>
> Rule 49 – Contractors Staff
>
> 49. All contractors' staff employed at the detention centre shall facilitate the exercise by the contract monitor of his functions."

45. In addition, the Rules are supplemented by the Detention Services Operating Standards introduced from 2002. In the foreword to the consolidated Manual, the Director of Detention Services states that "the standards are designed to build on the Detention Centre Rules"; that "they are also a means of achieving a level of consistency"; and "they are also a public document and this makes transparent the way we expect detainees to be treated and how our centres operate more generally".

46. Paragraph 6 of the Standard relating to Admission and Discharge provides as follows:

> "The Centre must ensure that all detainees are medically screened (this must include an assessment for risk of self-harm/suicidal behaviour) within two hours of admission (see also the standards on Suicide and Self-Harm and Health Care)."

47. Paragraph 8 of the Standard relating to Case Progress requires that when information is received by the Immigration Service representative under Rule 35 of the Detention

Centre Rules it must be passed on to the relevant caseworker so that detention can be reviewed. It is also provided, in paragraph 9, that when the information received is in respect of torture under Rule 35 (3) and the detainee is an asylum applicant then that information must be passed to the relevant case worker considering the asylum application.

48. In the Standard relating to Healthcare, these provisions are included:

> "6. The Centre must ensure that all members of the healthcare team attend training relevant to the identification of those presenting with mental illness and those who may have been tortured. Details of relevant training including who attended and when must be retained by the Centre.
>
> . . . .
>
> 14. The Centre must ensure that all detainees are medically screened (this must include an assessment for risk of self-harm/suicidal behaviour) within two hours of admission (see also the standard on Suicide and Self-Harm).
>
> 15.As required by Rule 34 of the DC Rules, the centre must ensure that arrangements are in place for detainees to have a physical and mental examination by the medical practitioner within 24 hours of their arrival at the removal centre. The purpose of the initial health assessment is to identify any immediate and significant mental or physical health needs, the presence of a communicable disease and whether the individual may have been the victim of torture".

49. In the Standard relating to Suicide and Self-Harm Prevention, this provision is included:

> "The Centre must ensure that all detainees are first assessed for risk of self-harm/suicidal behaviour within two hours of admission (see also the minimum requirement in the healthcare standard)."

50. In my view the combined effect of the Detention Centre Rules, the statement of Lord Filkin, the provisions of Chapter 38 of the Operation Enforcement Manual and the relevant provisions of the Detention Services Operating Standards Manual all point in one direction: which is that the medical examination required under Rule 34 of the Detention Centre Rules is a part – an important part – of the safeguards provided to assess whether a person, once removed to Oakington, should continue to be detained there under the fast-track procedure. Further, it seems to me to be a necessary corollary of that that any such concerns as to torture as may be identified by the medical practitioner would at least be *capable* of constituting "independent evidence" for the purposes of the Government's announced policy. Indeed if that were not so, it is difficult to see why so much emphasis has consistently been placed on the

availability of – indeed, requirement for – such physical and mental examination. It is also to be noted that the structure of Rule 35 is such that the requirement under Rule 35(3) for the medical practitioners to report concerns as to torture is distinct from any requirement to report on grounds of injury to health by reason of detention (Rule 35(1)) and from any requirement to report concerns of suicide (Rule 35(2)).

51. In his Grounds of Defence, and in aspects of his evidence, the First Defendant at some stages (possibly) seems reluctant to have accepted that. However in her written argument Ms Richards did explain that (in her words):

> "Furthermore and contrary to the suggestion in the claimants' evidence, it is not the Secretary of State's position that a report of or expression of opinion from a GP is incapable of constituting independent evidence of torture."

She was prepared in oral argument to translate that rather grudging negative proposition into a positive proposition: viz that such an opinion was capable of constituting independent evidence of torture. In my view, that indeed is the case.

52. I would, however, agree with Ms Richards that there is a separate question as to the *weight* to be given to such evidence; and I would not agree with Mr Rabinder Singh's submissions to the extent that such submissions connoted that *any* expression of concern arising from medical screening (whether or not arising from a Rule 34 examination) would "inevitably" mean that the asylum application in question would then have sufficient complications to render it inappropriate for the fast-track procedure (and concomitant detention) to be maintained. Indeed I do not read Lord Filkin's statement as making so wide-ranging a concession even with regard to a report made under Rule 35(3). A concern as noted on an AOT form by, for instance, a relatively inexperienced nurse after an initial screening may be regarded as very different from a concern noted by an experienced doctor contained in a Rule 35(3) report in deciding whether to continue to detain. In any event, always relevant will be the way in which such concerns – whether or not by way of Rule 35(3) report - are reported and, to some extent, the strength with which such concerns are raised. In some cases the result may then be the removal forthwith of the asylum-seeker from the fast-track procedure. If so, whether the asylum-seeker should then be detained elsewhere will depend on whether there are sufficiently exceptional other circumstances to justify such detention.

53. I also here would record my view on two other matters. First, I consider that the existence of Rules 34 and 35 and the statement of Lord Filkin operate to displace any notion that in some way there is, as it were, an overriding burden on the detainee always himself to come up with the relevant "independent evidence". There may well be cases where an individual detainee can and should do that. But in other cases (whether for reasons of confusion, ignorance, language, lack of resources or otherwise) a detainee may be in no position to do so: at all events in the form of medical evidence. This in fact, as I see it, is precisely one of the reasons why Rules 34 and Rule 35 are framed as they are – the obligation being on the detaining authorities in this regard to provide the medical attendance which may in turn, in some cases, lead to a report capable of being independent evidence of torture.

54. Second, I do not think that the Home Office can use the active presence of the RLC, the Refugee Council, the Immigration Advisory Service and others at Oakington to justify departure from what is mandated by the Detention Centre Rules. Moreover, while it may be that in practice the concession of granting release on a reference to the Medical Foundation has over the years forestalled problems, this concession also does not in itself justify a departure from what is mandated by the Detention Centre Rules.

The health-care screening service provided at Oakington.

55. Oakington Detention Centre in Cambridgeshire, formerly an army barracks, was opened in March 2000 as a centre for deciding asylum applications under the announced fast track procedure (although to a relatively small extent it was and is also used as a detention centre for those waiting to be removed from the United Kingdom). There is freedom for detainees to move around the site. On-site legal advice is available from the RLC and Immigration Advisory Service and the Refugee Council also has a presence. Oakington is in fact due to close later in 2006.

56. A considerable amount of evidence has been put in by the First Defendant (perhaps fearing that a generalised attack was being made on conditions at Oakington) to the effect that the conditions in which detainees are kept are generally good and, in particular, that healthcare provision is available on a 24 hour basis and is of a good standard. Reference is made to reports of Her Majesty's Chief Inspector of Prisons which for the most part – albeit with some criticisms – have reported broadly favourably on healthcare provision at Oakington. Given the issues raised in these proceedings, however, I do not think it necessary to review that evidence further in this judgment.

57. As he was statutorily empowered to do, the First Defendant contracted out the running of Oakington to an independent contractor, previously known as Group 4 Total Security, now known as GSL UK Limited, the Second Defendant ("GSL"). The contract between the IND and GSL was dated 21st June 2000 – that is to say, before the Detention Centre Rules came into effect. For asserted reasons of confidentiality only parts of the contract were produced at the hearing before me. One provision of the contract requires GSL to provide a system meeting the standards of the National Health Service. Another provision of the contract (Clause 18.2) stipulates that the contractor should at all times operate the service in accordance with "all relevant statutory provisions including but not limited to the Immigration Act 1971"; and that it was the contractor's responsibility to "maintain awareness of Legislation". "Legislation" is so defined as to include subordinate legislation.

58. The Immigration and Asylum Act 1999, as well as conferring power to make rules such as the Detention Centre Rules, contains a number of other provisions relating to detention centres. For example by section 148 it is required that a manager must be appointed for every such centre. Section 149 (as amended) includes the following provisions:

> "149 Contracting out of certain removal centres
>
> (1) The Secretary of State may enter into a contract with another person for the provision or running (or the provision and running) by him, or (if the contract so provides) for the

> running by sub-contractors of his, of any removal centre or part of a removal centre.
>
> (2) While a removal centre contract for the running of a removal centre or part of a removal centre is in force—
>
> (a) the removal centre or part is to be run subject to and in accordance with the provisions of or made under this Part; and
>
> (b) in the case of a part, that part and the remaining part are to be treated for the purposes of those provisions as if they were separate removal centres.
>
> (3) ….
>
> (4) The Secretary of State must appoint a contract monitor for every contracted out removal centre.
>
> (5) A person may be appointed as the contract monitor for more than one removal centre.
>
> (6) The contract monitor is to have—
>
> (a) such functions as may be conferred on him by removal centre rules;
>
> (b) the status of a Crown servant.
>
> (7) The contract monitor must—
>
> (a) keep under review, and report to the Secretary of State on, the running of a removal centre for which he is appointed; and
>
> (b) investigate, and report to the Secretary of State on, any allegations made against any person performing custodial functions at that centre.
>
> (8) The contractor, and any sub-contractor of his, must do all that he reasonably can (whether by giving directions to the officers of the removal centre or otherwise) to facilitate the exercise by the contract monitor of his functions."

59. Mr Furniss, on behalf of GSL, accepts that GSL is as a matter of general law bound to comply with the provisions of the Detention Centre Rules 2001. He accepts that GSL, for this particular purpose, is to be regarded as a "functional" public body, amenable to judicial review (cf. Ashton Cantlow PCC v Wallbank [2004] 1AC 546; [2003] UKHL 37).

60. Mr Pitt-Payne, on behalf of the Third Defendant ("PCFM"), makes no such concession. He does not accept that PCFM is amenable to judicial review at the suit of a detainee at all.

61. PCFM is a limited company, specialising in the provision of medical services. GSL had sub-contracted out the provision of healthcare services at Oakington to a company called Forensic Medical Services Limited ("FMS"), a subsidiary of PCFM; and the nurses and doctors who examined D and K were engaged by FMS. No point is taken that PCFM has been joined as a party to these proceedings, rather than FMS; and for the purposes of these proceedings they have in effect been treated as one and the same.

62. Rather oddly, the contract between FMS and GSL was never reduced to a formal written contract. It is said that the main elements of it were evidenced in correspondence, although some of that correspondence is no longer extant. The medical health services provided by FMS at Oakington are summarised in a witness statement dated 21st September 2005 of Mr Izycki, the Healthcare Manager employed at the relevant time by FMS at Oakington.

63. Mr Izycki says in that statement that reception at Oakington is on a 24 hour basis, with reception staff employed by GSL and reception nurses employed by FMS. A welcome pack is provided to each arriving detainee, providing detailed information, including as to medical healthcare. The policy is that all detainees are seen on arrival and are dealt with consistently. A standard questionnaire – devised by PCFM in the form used in the case of D and K – is provided to each detainee, in the appropriate language, and completed in the presence of the nurse. If an urgent medical appointment is sought, then that is made within 24-48 hours. Regular GP clinics are held every day.

64. As to the reporting of torture, Mr Izycki states that it was standard practice to report claims of torture even before the introduction of the Detention Centre Rules. The AOT form was devised for that purpose and when completed by the nurse or doctor would be sent (with the detainee's consent) to the Centre Manager, with a copy kept in the medical files and also a copy sent to the Chief Immigration Officer at Oakington.

65. So far as the 24 hour medical examination required under Rule 34 (and paragraph 15 of the Health Care Standard) is concerned, Mr Izycki frankly accepts that such a medical examination has not been routinely provided by FMS and that such is only provided if recommended by a nurse or if a detainee has requested an urgent examination by a doctor. He points out that FMS was not contracted to provide a 24 hour examination in all cases and was not put in funds to do so. He agrees that the failure routinely to comply with Rule 34 was known, and indeed also had been noted by (for example) the Inspector of Prisons and by the Independent Monitoring Board. He says that the Refugee Council, with its permanent presence at Oakington, and other bodies also had noted the failure to comply with Rule 34. The view taken (including that of the Contract Compliance Manager) apparently was that no adverse medical consequences had been noted in respect of such failure to comply and that the risks of adverse consequences were, in medical terms, low.

66. It is clear on the evidence that FMS nevertheless, and rightly so, raised these points with the Oakington Contract Compliance Monitor and with GSL. In a witness statement dated 23rd November 2005, Mr Colin Hodgkins, the Centre Manager at Oakington employed by GSL, states that on the Detention Centre Rules coming into effect GSL itself informed the Home Office that the resources made available under the original contract were not sufficient to enable GSL to comply with Rule 34; and in due course, when the Operating Standards were published, GSL informed the Home Office that GSL could not comply with the corresponding health care standard in that regard either. Others too – for example, the RLC – have periodically drawn attention to the failure to comply with Rule 34 at Oakington. Detailed costing proposals, and a business plan, for this purpose were put in by GSL to the Home Office; but no agreement to provide extra resources was reached.

67. There is also an issue as to whether the medical screening arrangements provided by FMS of detainees on arrival comply with the provisions of the Operating Standards (see, in particular, paragraph 14 of the Health Care Standard). It is accepted by all Defendants that such screening as was on offer was not always provided within two hours: although the evidence of Mr Izycki and Ms Ward (the current Contract Compliance Monitor) would indicate that in the vast majority of cases it was; and any delay beyond two hours would be where there was a sudden large influx of detainees at the same time or where the nurse was required urgently elsewhere.

68. Whether that initial screening complied in other respects with the Standards is in dispute. The Claimants say that the standard form three question questionnaire does not comply with the published Standard: in particular in its failure to address the risk of self-harm or suicide (see paragraph 6 of the Admissions/Discharge Standard and paragraph 14 of the HealthCare Standard). The First Defendant disputes that. GSL and PCFM, while initially conceding the point, ultimately equivocated on the issue of "medical screening": Mr Rabinder Singh not objecting to their resiling from their previously stated position. The Defendants point out that the screening is with a nurse and involves more than the handing over of the questionnaire. In this regard, Ms Ward in her statement dated 28th September 2005, says there was 24 hour nursing cover for this purpose, with a minimum of two nurses on duty between 8am and 8pm and one at night-time. Further she explains that when the questionnaire is handed over this is done in a private room off the reception area where the nurse both sees and speaks to the detainee individually. (Nurses are told not to ask questions about torture at this stage, since for a new arrival this might be taken as very intrusive or upsetting. If an allegation of torture is voluntarily raised at that stage, an appointment with a doctor is arranged). Further, the Defendants say – in my view, rightly – that the (undefined) "medical screening" referred to in the Standards as being required within 2 hours must be taken to involve an examination significantly less detailed than that of the medical practitioner required under Rule 34 of the Detention Centre Rules.

69. There was, however, agreement by all the Defendants that the 24 hour medical examination, required by Rule 34 of the Detention Centre Rules and by paragraph 15 of the Healthcare Standard, was not provided at Oakington as a matter of course. The First Defendant does not accept responsibility for that: and he draws attention to the general terms of Clause 18 of the Contract; although this is to be contrasted with the specific terms of Clause 7.10.1 which only provides that detainees be "encouraged" to have a medical examination within 24 hours of arrival. The First Defendant in any

case disputes that GSL (and thence PCFM) were not provided with sufficient resources for that purpose. As I have said, I do not have full details of the relevant contracts or the sums stipulated to be paid. But, as I have also indicated, what is clear from the evidence is that at an early stage GSL (itself alerted by PCFM) and others were drawing the First Defendant's attention to this point and, notwithstanding protracted correspondence, this has never been resolved: and at all events the First Defendant has never supplied the additional funds requested to ensure compliance with Rule 34.

70. Be that as it may, the position of the First Defendant in the light of all this, reflecting what is said in the Grounds of Defence and evidence filed on his behalf, is summarised in paragraph 62 of the written skeleton argument on behalf of the First Defendant in this way:

> "It was the Secretary of State's view that the requirement for each detainee to be examined by a medical practitioner within 24 hours of their admission to a detention centre was neither necessary nor appropriate and that GP examination should be targeted at detainees in need rather than all detainees".

71. It may well be that, as the evidence filed before me might suggest, the failure to provide a standard 24 hour medical examination has not resulted, so far as is known, in any serious adverse consequences – at least in medical terms – to detainees. Even so, that stated position is, to say the least, a disconcerting proposition. In my view, it is not acceptable that the expressed parliamentary intention, reflected in the subordinate legislation comprising the Detention Centre Rules, can be blocked by an executive "decision" that compliance with such statutory requirement is "neither necessary nor appropriate". Further, to say, as the skeleton argument also does, that "active consideration" has been, and is being, given to amend the Detention Centre Rules (and presumably also Operating Standards) so that there is no longer any requirement for medical examination within 24 hours of arrival, is also no answer. In any event, deployment by the executive of the phrase "active consideration" usually induces a feeling of wariness: it certainly does in this case when it is seen that the failure has been the subject of discussion for several years now and when the same sentiment was also rolled out in the First Defendant's Grounds of Defence served as long ago as 25th October 2005. There has been no change to the Detention Centre Rules, or applicable published Standards, in the meantime. I am in no doubt, on the evidence before me, that it was this stance on the part of the First Defendant which caused GSL, and consequently PCFM, not to provide a 24 hour medical examination of all detainees in accordance with Rule 34. I accept that the arrangements put in place ordinarily sufficed to provide such an examination in case of specific request by a particular detainee or on assessment of such need by the nurse at reception; but that falls short of the requirements stipulated by Rule 34 of the Detention Centre Rules and by the related Health Care Standards.

72. In the present case, I might add, the position has since been modified by the interim Order of Collins J made after the hearing on the 8th December 2005. Having been addressed on the point by counsel for the Claimants and for the First Defendant Collins J amongst other things ordered, pending the adjourned hearing, that from the

13th December 2005 all subsequent arrivals at Oakington should be treated in accordance with Rule 34 (and also in accordance with paragraph 14 of the Health Care Standard) and that arrangements should be put in place for the First Defendant to be notified of any concerns that the person may be a victim of torture, in accordance with the requirements of Rule 35(3)(4). Since then, I gather, it is asserted that there has been due compliance by PCFM and GSL: although the question of the financing of such compliance remains to be resolved. In consequence also of that Order, the standard questionnaire supplied at the initial "two-hour" screening has been considerably expanded and now includes a question relating to self-harm and also a question as to whether torture is alleged.

73. The final point relating to the Rule 34 requirement which arises in this case is this. As the evidence filed on behalf of PCFM makes clear, it has always been its practice –both before and since the introduction of the Detention Centre Rules – to cause its medical staff (nurse or doctor) to record any claim of torture made by a detainee on an AOT form and then, with the detainee's consent, forward it to the Centre Manager and thence the IND. This practice would in fact seem to go beyond the requirement of Rule 35(3): which only requires a report from the "medical practitioner" making the examination, and further only requires such report where the medical practitioner is "concerned" that the detainee may have been the victim of torture.

74. However, it has also been – as has emerged in these proceedings – the established practice of PCFM that its staff do not comment or express opinions on the veracity of any such claims of torture.

75. In this regard, PCFM has for some time, both before and after the Detention Centre Rules came into effect, operated an internal policy known as No. 25. The actual terms of that policy, as such, had not been made known to the First Defendant. However, it is explained by Mr Izycki in his second witness statement dated 28th November 2005 that the general terms of such policy were discussed at a meeting with Mr Ian Martin of the IND – the same Mr Martin whose evidence is extensively quoted in the Saadi case – in the first few months after Oakington opened as a fast track detention centre. Others (including representatives of the RLC and the Refugee Council) were also present at that meeting. According to Mr Izycki, it was agreed that FMS would only give an opinion on fitness for detention based on "strict clinical evaluation" of a detainee. As to allegations of torture, Mr Izycki says that it was said by Mr Martin that "medical personnel should confine themselves to reporting the allegation and the injuries observed and to refrain from expressing any opinion as to the possible causes of any injuries or indeed whether or not they were consistent with the allegation of torture". The stated reason for this was that FMS personnel were not experts in the identification of torture and an expression of opinion (either way) might attract criticism in court, perhaps to the disadvantage of the detainee's claim for asylum.

76. In consequence, as Mr Izycki puts it, "we adopted a policy of reporting allegations of torture which explicitly asked medical practitioners not to express an opinion as to whether or not a detainee had, in fact, been the subject of torture." Mr Izycki suggests that subsequently this had been discussed on a number of occasions with representatives of the Medical Foundation (very experienced in this area) who did not, he says, disagree. However, in a witness statement by Dr Rhys-Jones dated 14th November 2005 it is said that enquiries within the Medical Foundation indicated no awareness of Policy No. 25 as a document. The evidence, I might add, does at all

events show a degree of liaison between FMS and the Medical Foundation with a view to giving FMS' medical personnel some guidance and experience with regard to torture cases.

77. The written Policy No. 25 of PCFM has as its stated aim: " to ensure that the Detention Centre Rules are adhered to in respect of allegations of torture …" It gives guidance to the "assessing nurse" as to when and how the AOT form is to be completed. It says: "However the assessing nurse must avoid documenting opinion as to how the wounds were sustained, i.e. don't state "The patient showed me ten stab wounds" or even "the patient showed me ten wounds which are consistent with being stabbed"."

78. It is not disputed that the First Defendant did not know of the existence of Policy No. 25 as such. But I do not think that very significant. For - and not just because of the discussions with Mr Martin before the Detention Centre Rules came into effect – the Home Office must, as it seems to me, over the passage of time on receipt of numerous AOT forms have well appreciated that FMS personnel in practice were not expressing any opinion as to the allegations of torture made. It is not in fact altogether clear on the evidence just how the Home Office treated such AOT forms. The answer may be that it varied from case to case (which after all may, in general terms, be a fair answer). But the impression one rather gets is that the AOT forms were not regarded by the Home Office as usually providing independent evidence in support of the allegation of torture – just because the AOT form was usually doing little more than recording the fact that torture had been alleged, coupled with such medical details as were given. Thus in the witness statement of Mr Moore of the IND dated 28th September 2005 this is said:

> "To this end Primecare Forensic Medical (PFM) produce "Allegation of Torture" forms (ATFs), these are sent by the Health Care Manager to the G.S.L. Centre Manager and copied to the CIO and Contract Monitor. PFM nurses are not trained or qualified to make assessments as to whether applicants are victims of torture, but are contracted to assist in identifying the needs for the care of those detainees who may have been subject to torture. The ATFs record the applicant's account of how they say they claim to have been tortured, together with any visible wounds/scars. AFTs will be considered, along with all other relevant information, when scheduled detention reviews take place. It is not usually considered that these forms provide independent evidence that the applicant has been tortured. This is because the forms usually record the detainee's allegation and sometimes the existence of visible wounds or scars but do not generally set out an opinion from someone with appropriate expertise as to whether or not these might be the result of torture."

79. The Claimants challenge the lawfulness of this and submit that Policy No. 25 has operated to defeat the purpose and requirements of Rule 35(3). In this regard Ms Richards, on behalf of the First Defendant, stated that the First Defendant did not

support this policy; and on the final day of the hearing before me Mr Pitt-Payne, on behalf of PCFM, told me that the policy was being revoked.

The Submissions

Decision to transfer to Oakington

80. Mr Rabinder Singh's first submission on behalf of D and K was that the decision to transfer D and K to Oakington was in each case unlawful as being contrary to published policy. In the case of K he says that it was also irrational.

81. In support of his argument on this aspect of the case, Mr Rabinder Singh relied heavily on a sentence culled from the speech of Lord Diplock in Secretary of State for Education and Science v Tameside MBC 1977 AC 1014 where, in a case having facts very different to the present, Lord Diplock said: "Or, put more compendiously, the question for the courts is, did the Secretary of State ask himself the right question and take reasonable steps to acquaint himself with the relevant information to enable him to answer it correctly?" Mr Rabinder Singh also emphasised "the paramount importance" which, according to the statement of Mr Martin filed in the Saadi case, was to be ascribed to the initial screening stage.

82. Mr Rabinder Singh further submitted that the question of detention where there is independent evidence of torture and the question of whether the case is too complicated to be suitable for the fast track procedure are not necessarily the same and should not be elided. I agree with that: although there clearly is the potentiality for overlap in some cases.

83. However, I have come to the conclusion, on the facts of these particular cases, that the initial decision to send each of D and K to Oakington under the fast track procedure was a proper and lawful one.

84. It is true that there is a presumption in favour of release. It is also true that cases with complicating factors will generally not be suitable for the Oakington fast track procedure. But it is also to be borne in mind that, as it is conceded, the making of an allegation of torture does not *of itself* mean that it is a case unsuitable for the fast track process.

85. So far as D was concerned she arrived from the Ivory Coast: a country on the list, at the time, of those who may be suitable for the fast track process. She identified no immediate health problems. Nor were any scars or marks visible from her (clothed) appearance. She made no allegation of torture at the time. In such circumstances, I can see no error or departure from policy in assessing her as someone who may be suitable for the fast track procedure. Mr Rabinder Singh objects that no questions were asked of her in the initial screening interview as to whether she was alleging torture or was otherwise unsuitable for the fast track process. But there are valid reasons why, at that stage, Immigration Officers will not necessarily ask if torture is being alleged – for example, sensitivity to a new arrival to a strange country in the presence of unknown immigration officers; and it remains the case that D had not raised such a point herself. In any case, even if she had, that would not of itself have made her claim unsuitable for the fast-track procedure. There was also nothing to show at that stage that her claim was complex and nothing to indicate that a detailed

medical examination at that stage was needed. In my view, the broad statement of Lord Diplock is not to be used in this context as always requiring an altogether more intrusive examination than was used in this case. The procedures generally adopted here are summarised in the witness statements of Mr Bowden, Ms Dolby, Mr Dunford and Mr Fisher, all of the IND: which in my view represent a generally acceptable position albeit, of course, that allowance always has to be made for the circumstances of each case.

86. The case of K, I would accept, is rather different. Here, K *was* alleging torture in the initial screening interview. Mr Rabinder Singh says that, at least in this case, the Home Office was on notice that his claim was not straightforward and needed more investigation; and so was not suitable for fast-tracking.

87. I do not agree. It is true that K was claiming to have been tortured. But, as is conceded, the claim of torture was not in itself enough to prevent fast-tracking, even though in his case the claim seems to have prompted further questions in interview. In substance Mr Rabinder Singh's submission that the case of K was too complex to be suitable for the fast track procedure really derives from the allegations of torture: nothing else. But in the light of the concession, it cannot be said that the allegation of torture ipso facto made the claim too complex or otherwise unsuitable for fast-tracking. Further, there was at that time no clear medical presentation or other evidence, so far as K – who had himself said that he had not seen a doctor for 6 or 7 years - was concerned, to indicate that the fast track procedure was inappropriate. Moreover, Immigration Officers could legitimately, in my view, in a case where torture is alleged bear in mind that if such claim is maintained, and an examination becomes desirable, then such should in any event be provided within 24 hours under Rule 34: an approach in line with Lord Filkin's statement. It seems to me that the Claimants' submissions here required altogether too great a degree of "pro-activity" at the initial screening stage, with a view to assessing whether the fast-track procedure may be appropriate, than was practicable or requisite.

Initial Medical Screening at Oakington

88. Each of D and K was, as I have found, examined by a nurse within two hours of arrival at Oakington. Each filled in the questionnaire, being seen by the nurse at that stage.

89. I have to say that although the materials deployed and submissions advanced to me on this aspect were very wide-ranging, I have some difficulty in seeing the true relevance of these matters to this particular case: unless it be to sustain a wholesale attack on or critique of the medical and other procedures deployed at Oakington, with a view to undermining the fast-track procedure generally.

90. I say that for these reasons. The Detention Centre Rules make no specific requirement of a two hour medical screening. That requirement derives not from legislation but (solely) from the Operating Standards. There is no definition in those Standards of the phrase "medical screening": nor do the Standards require that such "medical screening" be a physical examination undertaken by a doctor. But plainly it is at the least for the purpose of assessing whether the detainee has medical or psychological problems requiring immediate attention and also (and as made express) to assess the risk of self-harm and suicide. The essential purpose of that initial medical screening,

however, is not, as I see it, to assess the suitability for detention under the fast-track process or to identify torture cases (it might also be borne in mind that the Standards also apply to Detention Centres other than a fast-track centre such as Oakington). It may be that an allegation of torture will be volunteered at that stage or it may be that, for example, a serious physical or mental condition is identified at that stage, which might indeed immediately lead to a report causing the First Defendant to decide to release: but that is a different point. Besides, the initial medical screening can properly be conducted on the footing that a detainee can always – as is made clear – ask for an urgent appointment with a doctor. Indeed, if Rule 34 is – as it should be – being properly applied in a detention centre, the initial two hour medical screening can properly be conducted on the understanding that there should in any event be an examination by a doctor within 24 hours: and it is to be taken that the Standards will have been drafted with this in mind. In my view, the proposed detailed requirements for the two hour medical screening as put forward by Dr Angela Burnett in her witness statement of 14th November 2005 (and made very much from a Medical Foundation perspective) are, with respect, altogether too demanding and go much further than was contemplated by the Standards themselves.

91. It is true that neither in the case of D nor in the case of K is there positive evidence that, at this screening stage, they were assessed for the risk of self-harm or suicide (as the Standards require). That does not mean that they were not – a nurse in the course of seeing a detainee and of completing the questionnaire may be capable of assessing whether there is such a risk (e.g. from highly agitated behaviour, manifest and pronounced depression or the like). But be that as it may, there is no suggestion here of a risk of self-harm or suicide on the part of D or K such as to make them unsuitable for the fast-track process. That being so, and given my conclusion that there was no other relevant breach of the Standards at the two hour screening stage – let alone one causative of the continued detention of either D or K – the relevance of this aspect of the case falls away.

92. Accordingly, to the extent that declaratory relief is sought as to the two hour screening, there is nothing of substance to justify making such a declaration in this particular case; and in my discretion I decline to do so. I would, however, add that for the future the position so far as the risk of self-harm and suicide is concerned would in general terms seem to have been addressed in the aftermath of the hearing before Collins J on the 8th December 2005.

93. I would also add here that both GSL and PCFM in any event submitted – in the case of PCFM, as an additional argument to its wider argument that it was not amenable to judicial review at all - that neither of them was amenable to judicial review or should be liable to declaratory relief in respect of alleged breaches of the relevant Operating Standards. In my view, there is much force in those submissions. The Standards to my mind stand on a very different footing to the subordinate legislation enshrined in the Detention Centre Rules; and it is difficult to see how the unilateral promulgation of operating standards by the First Defendant (not even reflected in an express contractual obligation on GSL and PCFM) can of itself give rise to public law remedies against GSL and PCFM at the suit of an aggrieved detainee.

The Rule 34 Examination

94. The position with regard to the failure to provide a medical examination within 24 hours is different. Under Rule 34 D should have received a physical and mental examination within 24 hours of her arrival at Oakington at around midnight on the 12th May 2005. She did not have such an examination until the 16th May 2005. K should have received a physical and mental examination within 24 hours of his arrival in the early hours of 5th May 2005. He did not have one until around the afternoon of the 6th May 2005.

95. I have already set out the circumstances in which this happened. It was not a rare and regrettable lapse in the circumstances of these two cases. Rather it reflected the cross-the-board failure to give effect to the requirements of Rule 34 (and applicable Standards): the First Defendant regarding compliance as neither "necessary nor appropriate". I repeat what I have said earlier: that is not acceptable.

96. Ms Richards submits nevertheless that I should not, in my discretion, grant declaratory relief. She says that the First Defendant would propose to continue with the procedures put in place following the Order of Collins J of 8th December 2005 (subject to any amendment to the Detention Centre Rules and/or Operating Standards); and the primary objective of the proceedings has thereby been achieved.

97. I disagree. The Claimants' rights have been infringed and significantly so (I say this without regard to the issue of causation of damage to which I will come). Further, the failure here is the culmination of a long-standing state of affairs, known to all Defendants: and the position must be rectified. In particular, so far as the First Defendant is concerned, the disinclination to abide by the statutory Rules – Rules signed off at the time by the then Minister of State on behalf of the First Defendant – has to be set in the context of, for example, the pronouncements emphasising the value of those very Rules made by Lord Filkin in part with a view to justifying the whole fast-track procedure. In a context such as the present, where the Government has said one thing (and legislated accordingly) but done another, I think it eminently appropriate that the Court should publicly mark that with the grant of declaratory relief. Besides, the existence of such declaration might concentrate the minds of those said to be actively considering amendment of the relevant Detention Centre Rules and relevant Operating Standards.

98. However, I do think that the grant of declaratory relief suffices for this purpose. No order for mandatory injunctive relief is needed. In any event, the position so far as D and K are concerned is historic.

99. I consider that this declaration should extend also to GSL. While I accept and understand its point that it was never resourced under its contract to provide this level of service, GSL has known for a long time that Rule 34 has been not complied with. Further, GSL has its responsibilities as the person running Oakington. Mr Furniss – with a rather winning frankness – said that GSL did not seek so much to hide behind the terms of its contract with the First Defendant; rather, he said, it sought to hide behind the First Defendant altogether. He further said that if only the First Defendant would resource GSL to provide the required medical examination under Rule 34, as GSL has constantly been pressing him to do, it would be delighted to do so (just as it would with regard to the deficiencies, if any, in providing a proper two hour screening service). I bear all that in mind; but ultimately I think that GSL's responsibilities,

statutory and otherwise, are such that it should also be subject to declaratory relief in this regard.

100. That being so, there seems little need on the face of it to extend declaratory relief to PCFM which was the sub-contractor of GSL and which had neither been contractually required to ensure compliance with Rule 34 nor had been put in funds to do so. I have come to the conclusion , in my discretion, that it is not necessary to do so.

101. Having reached that conclusion with regard to PCFM I therefore only need briefly rehearse Mr Pitt-Payne's wider arguments that PCFM in any event was not amenable to judicial review at the suit of a detainee in respect of a want of compliance with Rule 34. His submissions were to this effect:

i) Rule 45 states that it is the duty of every "officer" to conform with the Detention Centre Rules.

ii) A sub-contractor such as PCFM is not an "officer" within the meaning of the definition contained in Rule 2.

iii) Accordingly PCFM is not liable to be subject to declaratory relief in respect of a failure to comply with Rule 34.

iv) Further, and in any event, PCFM exercises no regulatory, or comparable, function at all; it provides services at Oakington solely pursuant to a contract made with GSL; and appropriate public law relief is available against the First Defendant and GSL, on whom, by statute, the relevant obligations are imposed and powers are given.

102. I accept those submissions. The definition of "officer" in Rule 2 is awkwardly self-referential, including as it does that very word in the purported definition. I would agree, nevertheless, that the words "or otherwise", as contained in the brackets, have a potentially wide ambit. But even so, a corporate sub-contractor such as PCFM can hardly, in my view, be described as an officer (indeed Rule 2 seems to contemplate only individuals having such a status); and it is hard to conceive that individual doctors or nurses employed by PCFM – who are not themselves managers - can themselves be under a duty to conform with Rule 34 when they may, as individuals, have no knowledge of the Rule or, at all events, be under no contractual obligation or in any other position to do so. Besides, I do not think a nurse or doctor is properly to be described as an officer for the purposes of Rule 2: and the wording of Rule 49 indicates that "officers" are not necessarily the same as "contractors' staff". Such a conclusion, moreover, does not render Rule 34 toothless since, first, an individual claimant has, as this case illustrates, remedies against others; and, second, sub-contractors are required, under s.149(8) of the 1999 Act and Rule 49 of the Detention Centre Rules to do all they reasonably can to facilitate the exercise by the contract monitor of his functions. In my view, the obligations of PCFM in this context are delineated by its contractual obligations.

103. In his closing submissions in reply, Mr Rabinder Singh sought to place the Detention Centre Rules in the setting of the provisions of s.149 of the 1999 Act, as showing that PCFM was a body amenable to remedies by way of judicial review and was obliged to comply with the Detention Centre Rules as being "provisions made under this Part

[of the Act]" (s.149(2)(a)). The argument required that the phrase "part of a removal centre" for the purposes of s.149 extended not to, or at least not only to, a geographical part but also to what he called a "functional" part – which would include, he submitted, the provision of medical services (or, for that matter, as he accepted, cleaning or gardening or catering services) at a Detention Centre. That would be a possible reading and would make (some) sense. Nevertheless, I reject it. That construction seems to me to be a strained reading and it does not fit very well with the wording of s.149(2)(b); moreover, if it was intended that s.149(2) should extend to all sub-contractors of parts of services it could very easily have been expressly so stated: as it is in s.149(8).

104. Mr Rabinder Singh also cited to me the decision of Keith J in R (ex parte A) v Partnership in Care Limited [2002] 1WLR 2610; [2002] EWHC 529 Admin, as supporting (he said) a conclusion that for this purpose PCFM was a functional public body amenable to judicial review. But in my view that decision – which was in a context different from the present – lends him no real support: if only because in that case the Defendant both owned and ran the hospital in question: which is not a position comparable to PCFM in the present case. As Mr Pitt-Payne pointed out, PCFM was providing services contractually specified by GSL; PCFM was not itself determining what those services were to be.

105. I therefore will grant declaratory relief against the First Defendant and GSL in respect of the failure to comply with Rule 34. I will not grant declaratory relief against PCFM.

Unlawful Detention

106. I turn to the final aspects of these claims, the issues of unlawful detention and compensation.

107. Article 5 of the European Convention on Human Rights provides, among other things, that:

> "No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> …
>
> (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."

Article 5 (5) provides:

> "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".

Section 8 of the Human Rights Act 1998 confers a discretion on the court with regard to judicial remedies. For the purpose of these particular cases the Defendants do not

dispute that compensation should be awarded if the detention of D and/or K was unlawful. It also is agreed that, if that is the result, then the amount of that compensation should be assessed at a later hearing (if not previously agreed in the interim), the assessment to be reserved to myself.

108. It is common ground that the fact that D and K were wrongfully denied a medical examination within 24 hours of admission contrary to Rule 34 does not of itself mean that they were wrongfully detained. It is common ground that it is for each of D and K to show that had they received (as they should) such examination within 24 hours then they would have been released at an earlier time than in fact they were. It is common ground that this issue of causation is to be assessed on the balance of probabilities: these are not "loss of chance" cases.

109. An illustration of a case – on facts very different from the present - where damages were awarded for what was found to be unlawful continuing detention at Oakington is to be found in the decision in Johnson (Renford) [2004] EWHC Admin 1550. In that case it was found that by 17th June 2003 it should have been apparent that the detainee's claim was not going to be adjudicated upon within the time scale set out in the Oakington Policy. The detainee was not in fact released until 15th August 2003. He was awarded damages for his unlawful detention in that period.

110. The particular feature here, as I see it, is the existence of Policy No. 25 applied by PCFM.

111. As I have already indicated, I do not think that the initial two hour screening required by the Operating Standards had, as one of its purposes, the identification of torture cases (although such incidentally might arise on such screening in a particular case). Further, as I have concluded, the two hour screening undertaken – properly - in the case of each of D and K would not of itself have resulted in raising sufficient independent evidence of torture, or other complicating feature, sufficient to require the release of either from Oakington at that stage. So the questions are: what would (and should) have happened if they had received their Rule 34 examinations within the mandated 24 hours of admission? Would Rule 35(3) reports have resulted sufficient to bring about their release? (I add that no suggestion is made that a Rule 35(1) or Rule 35(2) report would have resulted).

112. In the case of K, the answer is, in my judgment, reasonably clear. The nurse when she eventually saw K on the 6th May noted his apparent injuries. She recorded the claims and completed the AOT form accordingly. But the doctor went further. In his notes the doctor not only recorded the evidence of scarring, he also expressed the view that it was "most likely done deliberately", and that the scars were "consistent with burns inflicted". But those views or concerns of the doctor were not reflected in any AOT form – just because, as it is to be inferred (and as Mr Pitt-Payne conceded), of the existence of Policy No. 25.

113. That the AOT form in fact supplied in the case of K might not suffice to secure his release may have been a tenable viewpoint in circumstances where the AOT form contained no opinion or expression of concern that there may have been torture. But it seems to me to illustrate how it is that the application of Policy No. 25 can operate to subvert the purpose of a Rule 34 examination and the purpose of a Rule 35 (3) report. As I have said, in one sense AOT forms in fact go further, under present

practice, than is required either by the Detention Centre Rules or by the Operating Standards: because they operate to draw to the attention of the Centre Manager and IND an allegation of torture even where no concerns are held by the examiner. Since torture is, in this context, so sensitive a matter I would not for myself wish to discourage the continuance of such a practice. But it remains the case that the Oakington practice with regard to AOT forms did *not* operate to meet the rationale of Rules 34 and 35. Rule 35 (3), in particular, requires a report where the medical practitioner is "concerned" that there may have been torture. That language connotes a viewpoint – albeit of course one founded on medical examination – on the part of the medical practitioner. Since such a concern, if held, would at least be capable of constituting independent evidence of the claim, it should not, in my judgment, positively be prevented from being drawn to the attention of the Home Office.

114. In my view, had there been an examination of K for the purposes of Rule 34, this would (particularly in the light of the doctor's notes) probably have resulted in a report expressing concern that there may have been torture for the purposes of Rule 35(3). Further, in my judgment such a report had it reflected the points made in the doctor's notes – as it probably would have done but for the existence of Policy No. 25 - should have caused the First Defendant, having regard also to all the other known circumstances of K's case, to direct K's release from detention forthwith (and it is also relevant that from the outset K had consistently been alleging torture of this kind). Since it is to be presumed for this purpose that the First Defendant would do as he should do, I find, on the balance of probabilities, that K would have been released from detention on receipt, after due consideration by the IND, of such report.

115. I find the case of D rather more difficult to assess.

116. In the case of D neither the AOT form (perhaps unsurprisingly, given the existence of Policy No. 25) nor (and this is a real distinction from the case of K) the medical notes give any real clue as to any opinion or concern on the part of the medical personnel as to whether D may have been tortured. The scars on her body were of course noted.

117. There is, however, no evidence from the doctor actually involved in the case of D as to what his view or concern (if any) was or how he would have completed any AOT form in the absence of Policy No. 25. A doctor will not necessarily have concerns that there may have been torture where a detainee is alleging torture or where scars or marks are visible. In some cases there may be no scars or marks. In others the doctor may, for example, form the view that such scars or marks have no obvious relation to the torture alleged. Or, for example, it may be that the detainee is alleging only recent torture but such marks as are visible are clearly longstanding. It may be also that such marks as are noted are trivial. But in other cases – and it is not to be overlooked that the examination is a mental examination as well as physical - that may not be so. That is not to say, where the doctor has concerns, that he or she necessarily is positively required to express a view that there may have been torture. Really it is a matter for the doctor involved; but as it seems to me the medical practitioner is not to be precluded, *if* he or she has concerns, from at least expressing a view that the scars or marks or other injury noted are consistent with the detainee's claims of torture (the approach adopted, for example, by Dr Granville-Chapman in her conclusions). If a report is put in, in accordance with Rule 35(3), then that is at least capable of constituting independent evidence. It is for the IND then to assess it in deciding, considering the case as a whole, whether to release; either on the basis that there is an

allegation of torture supported by independent evidence; or on the basis that the matter has become too complex to be suitable for the Oakington fast-track procedure; or both. What that decision will be will depend on the circumstances of each case.

118. In D's case, I have, on balance, formed the view that had a medical examination of D taken place in accordance with Rule 34, and had there been no Policy No. 25 in existence, it should and would have resulted both in a Rule 35(3) report and in her release from detention at Oakington. D made complaints of, among other things, having been beaten by the authorities with a steel wire on her back. Those scars ("multiple linear scars") are extensive and, on examination, evident. They were observed both by the nurse and by the doctor. Further, her version of events was, it may be noted, maintained in the interview at Oakington. I think also that I am entitled to bear in mind the subsequent report and conclusion of Dr Granville-Chapman, which has not been countered by a medical report to the contrary from the Defendants in these proceedings. In such circumstances, and bearing in mind also the general presumption in favour of release, I therefore conclude that a Rule 34 examination, if made, should and would have brought about D's release from Oakington.

Compensation

119. As I have said, it is conceded in these particular cases that damages are payable in the event of there having been unlawful detention.

120. The period of the unlawful detention thus needs to be assessed in the case of D and of K. Clearly allowance must be made for time to assess the putative AOT form by the relevant IND case-worker having knowledge of the details of the case; and (some) allowance must be made for such assessment being made within reasonable working hours: although of course appropriate expedition must always be given to such assessment. I also think that, in these two cases, damages in practice should fall to be assessed by reference to the time when D and K could actually be released from Oakington itself to alternative accommodation (as opposed to being formally released from the fast-track process as such). It is in this regard particularly relevant that it – not unreasonably – took 2 days to find NASS accommodation for D, who only on her dispersal interview then indicated an alternative address to which she could go.

121. In the case of D, she should have received a Rule 34 examination within 24 hours of her arrival in the early hours of 13th May 2005. In my view, she could then, after such examination and consequential report, have been assessed as someone to be released from the fast-track process no later than the end of the 14th May 2005 and could in practice then have been released, on accommodation being located for her, on 16th May 2005. I conclude that the period of her wrongful detention was 2 days. So far K was concerned he should have received a Rule 34 examination within 24 hours of his arrival in the early hours of 5th May 2005. I consider that he could then, after such examination and consequential report, have been assessed as someone to be released from the fast-track process by no later than the end of 6th May 2005; and could have been released from Oakington itself, on accommodation being identified by him, by the end of the 7th May 2005. The period of his wrongful detention thus was 4 days. Damages are to be assessed accordingly.

122. In my judgment, such damages are to be payable to the Claimants by the First Defendant, not by GSL or (a fortiori) by PCFM: both because, as I see it, the real

responsibility for the failure to comply with Rule 34, causative of the unlawful detention, rests primarily with the First Defendant and also because the actuality is that in cases such as these the decision to detain or release is that of the First Defendant: no one else. Whether or not the First Defendant can effectively seek contribution from GSL (or PCFM) is not the subject of any Part 20 contribution claims issued in these proceedings. Ms Richards reserved the right to make such a claim hereafter. Whether such a claim could prosper, if the First Defendant does see fit to claim contribution, can be left for decision on another occasion if the need arises.

123. I should add that the Claimants purported to reserve the right to put in further evidence to claim damages not only under Article 5 but also under Article 3 and/or Article 8. In my view that is not now open to them. The evidence thus far filed, in my judgment, falls a very long way short of showing a breach of Article 3: and given how long these proceedings have already taken to come to trial – which in substance has long since been marked as a trial on liability – and given that in the event there has been ample time to put in all evidence on liability, I do not think that the matter should be deferred for a yet further round of evidence on this. In addition, as to Article 8, if in point at all (which may be debateable), that in any case, as Mr Rabinder Singh frankly conceded, would not here realistically add anything significant in terms of quantum of compensation. So the award of damages is confined to the breaches of Article 5 in the case of both Claimants.

Conclusion

124. Although the Claimants have not succeeded in all respects against all three Defendants (and have not been obtained any relief as against PCFM) I do not think that they or their advisers can be criticised for joining all three Defendants to these proceedings and then continuing the claims against them. Quite apart from there being some legal uncertainties here, few concessions have been made by the First Defendant; and the fact is that the position of each of the Defendants has been fluid – and indeed remained so during the hearing. Besides, in courts rather less cerebral than the Administrative Court the respective defences advanced may to a significant extent be described as of the cut-throat variety.

125. Nothing in this judgment should be taken as expressing any view of mine on whether the actual asylum claims of D and K are well-founded or as to whether there is substance in their claims of having a present well-founded fear of persecution in their home countries. These are decisions for other to make.

126. If the outcome of this case leads to the view that the relevant Detention Centre Rules and relevant Operating Standards are too onerous in practice to be capable of satisfactory compliance under current resource constraints or are more demanding than now thought necessary, then the remedy would seem to lie in giving consideration – active or otherwise – to amendment of those Rules and Standards and restatement of the published policy.

127. Overall, I do not find it very uplifting that these Claimants can, by these very protracted proceedings, seek and recover not only declaratory relief but also damages for relatively short periods of detention: in circumstances moreover where GSL and PCFM were doing their best, within the constraints operating on them. But as against

that, this case has served publicly to highlight a persistent and sustained failure to give effect to important aspects of the Detention Centre Rules and publicly to highlight a departure from published policy. Besides, there is, I suppose, the reflection that unlawful detention is unlawful detention. Even so, I do not think that the decision in this case should be regarded as a charter for others seeking asylum in the United Kingdom to claim – or to seek to obtain legal aid for claiming – financial compensation for allegedly unlawful detention for short periods of time under the fast-track process. Each such case will depend on its own circumstances.

128. In the result there will be the grant of declaratory relief against the First Defendant and GSL, limited to the basis indicated. There will be an award of compensation in favour of each of D and K, payable by the First Defendant, such compensation to be assessed. I will hear counsel as to the form of order to be made and as to any other related matters, including as to costs.