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Case No: CO/1444/2005

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2008

Before :

MR JUSTICE CRANSTON

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Between :

R on the application of MT	**Claimant**
- v -	
Secretary of State for the Home Department	**First Defendant**
GSL UK Ltd	**Second Defendant**
Nestor Healthcare Services plc	**Third Defendant**

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Ms Stephanie Harrison (instructed by **Bhatt Murphy Solicitors**) for the **Claimant**
Miss Jenni Richards (instructed by **Treasury Solicitors**) for the **Defendant**

Hearing dates: 19, 20 June 2008

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Judgment

Mr Justice Cranston :

Introductory

1. Two important issues of principle arise in this judicial review. The first is the extent to which a public authority has a duty to inquire to obtain information relevant to its decision-making. It is trite law that public authorities must take into account relevant considerations but when does a public authority have a duty to be proactive in acquiring knowledge of those relevant considerations? To put it another way, when is being reactive not good enough for a public authority, simply assuming relevant information will be presented to it? The second issue of principle concerns the responsibility of a public authority when third parties perform statutory functions, acting under a contract or sub-contract with the public authority. If the third party is an agent of the public authority, in what circumstances is the public authority liable for its failings?

2. The issues arise in the context of an asylum claim. The claimant is a national of the Democratic Republic of Congo (DRC). She arrived in this country on 16 November 2005 and claimed asylum. Just under ten months later, in early September 2006, she was given refugee status. She had said that she was a victim of recent torture –

including sexual violence in the form of rape whilst detained in prison – as a result of her and her husband's political activities. No doubt it was on this basis that her claim to asylum was granted. So at the end of the day the system worked. However, in this litigation the issues arise because the claimant was detained from 17 November, the day after her arrival, until 23 November. Her detention was under the fast track procedure for determining asylum claims, at the Oakington Detention Centre, near Cambridge ("Oakington"). Not only does she contend that this was deeply distressing at a personal level but she says that it was unlawful. In essence her claim is that the Secretary of State for the Home Department ("the Secretary of State") acted unlawfully in detaining her in the first place. That should not have been done because she did not meet the criteria for fast track detention. In particular, she had been tortured and the Secretary of State should have had in place a screening process to obtain information about that. In the absence of proactive inquiries the Secretary of State could not give effect to the terms of his own stated policy not to detain those who may be victims of torture, and to Article 5 of the European Convention on Human Rights and its requirement to avoid the arbitrary deprivation of liberty.

3. The claimant also contends that even if she were lawfully detained under the fast track procedure on 17 November, her continued detention became unlawful well before her release on 23 November. That was because the third defendant had failed to comply with the statutory requirements for medical examinations laid down in secondary legislation. The Secretary of State was responsible for those failings even though the third defendant was a sub-contractor, providing medical services at Oakington. Once the secondary legislation was breached detention, in the claimant's submission, became unlawful. Alternatively, detention became unlawful once the claimant had notified the Secretary of State of her torture and ill-treatment on 20 November.

Background

4. The claimant arrived at the Secretary of State's immigration office in Croydon on the 16 November 2005, claiming asylum. She told the Asylum Screening Unit there that she had entered the United Kingdom that day at an unknown port on a passport supplied by an agent. The brief screening pro-forma questionnaire for all nationalities was completed. This had seventy-seven questions, designed to elicit basic information such as identity, entry details, health problems, basis of claim, housing and financial needs and legal representation. The claimant said she was from the Democratic Republic of the Congo ("the DRC"). As to entry she said she did not have a valid passport. In relation to the health questions the claimant indicated that she was diabetic and in response to the question "any medication taken" the answer was "No-traditional medication." The basis of her claim was "political" and in response to the question "If political, which groups/parties involved?" she responded "UDPS" (the Union for Democracy and Social Progress).

5. At the screening interview conducted the same day, the claimant was told at the outset that the questions related to identity, background and travel route to the United Kingdom, not to details of her asylum claim. She said in response to being asked whether she was fit and well to be interviewed: "I'm not well but let's carry on." As to the health questions she said she was not in good health, was diabetic, had "headache, stomach ache, painful periods" and was currently taking "traditional medicine". She reiterated her reasons for coming to the UK as "political reasons". There is a dispute about whether the claimant mentioned the rape and torture. The

officer who conducted the interview with a colleague has said that if they had been mentioned they would have been recorded. That being the case the claimant conceded that for the present litigation the rape and torture were not mentioned until later. The claimant was placed in a hotel overnight and asked to return the following day.

6. On 17 November the decision was made to consider the claimant's asylum claim through the fast track procedure and to detain her at Oakington. The National Intake Unit, which decides whether an asylum claimant is to be detained, noted "medical" under special needs, the claim about diabetes and herbal medicine and added "checked with Medical Centre [at Oakington] states OK to accept into Oakington". The Oakington Referral Sheet under Special Conditions had a more extensive note: "Diabetic. Headache. Stomach ache. Painful periods. Traditional herbal medicine."

7. The claimant was served the standard form, Reasons for Detention and Bail Rights IS 91R. On it the official indicated that the reason for detention was because he was satisfied that the application might be decided quickly using the fast track procedure. That reason was chosen in preference to the other five reasons printed on the form – likelihood of absconding, insufficient reliable information, imminent removal, alternative arrangements being made for care, and release not being conducive to the public good. The official then ticked four of the fourteen bases supporting the decision – an absence of close ties making it unlikely that the person would stay in one place; on initial consideration it appeared that the application might be one able to be decided quickly; because the claimant had attempted to use deception in a way leading to the conclusion that she might continue to do so; and because she had not produced satisfactory evidence of identity, nationality or lawful basis to be in the UK. As to the standard risk factors set out the official indicated that there were no psychiatric disorders, but there were "medical problems/concerns", and a note was added: "Subject claims to have diabetes and to be treating this herself with traditional medication" but that there was no proper medical proof of this. The claimant was also served a form IS151A as a person liable to removal as an illegal entrant. Under mitigating circumstances the medical conditions recorded elsewhere were noted and the following was added: "[T]here are no known compassionate or compelling circumstance and the subject is not known to be an exceptional risk."

8. When the claimant arrived at Oakington late on 17 November, the Reception Report noted her diabetes claim, her lack of English and that there was no obvious injury, no visible marks and no non-visible marks. When asked she said she wanted to speak to a nurse or doctor and that her medical problem was urgent. At the 24 Hour Review on 18 November, it was noted that she met the criteria and so further detention was authorised.

9. On the afternoon of 19 November the claimant saw the Refugee Legal Centre, at its office based at Oakington. Those arriving at the centre are referred to on site legal representation provided at the Refugee Legal Centre, unless they wish to use their own outside lawyers. One result of the interview at the Refugee Legal Centre was that she was seen by a nurse at 4.35pm, accompanied by a Refugee Legal Centre worker who acted as an interpreter. The nurse's notes are about the claimant's diabetes and its treatment. They record that she was diagnosed as diabetic in 2001, that she used to take insulin but that she was advised to stop taking it in 2002. She had had no medication since 2002. Her last check up had been in 2004 and there had

been no recommendation for medication. The claimant's blood sugar levels were measured, some dietary advice was given and a diet request sheet completed, and arrangements made for the claimant to see a doctor the following day.

10. It is on the following day, 20 November, that the claimant's account of rape and torture is first raised. In the morning she was seen by a doctor but no interpreter was available and the "language line" facility had to be used. This is a telephone translation service, but the disadvantage is that the translator at the other end of the line is an unknown quantity. The claimant's blood sugar levels were high so the doctor telephoned the on-call specialist registrar who advised what medication to give. Later, at 11.30am, an interpreter was available, and she was seen by a nurse who explained about the diabetes, medication and diet. The claimant complained of lower abdominal pain. The nurse's notes record that the claimant stated that she had been raped in prison. The nurse referred her back to the doctor. Meanwhile, just after 10.30am the Refugee Legal Centre had faxed the duty chief immigration officer at Oakington that as a result of their interview with her the previous day it was apparent that she was a victim of recent rape and torture and had not been medically examined as the law required.

11. Then, at 11.45am, the claimant began her substantive asylum interview. Although she said she was not feeling well, she stated that she was "OK to be interviewed". The interview was a lengthy process, with breaks. During it the claimant was recorded at various points as being distressed. There is no need to recall the details but during the interview she told of how she had been badly beaten on several occasions by soldiers and how she had been raped a number of times.

12. The next day, 21 November, the claimant was seen by the doctor, who reviewed her diabetes. He also recorded that she had been raped about three weeks ago and since then had had pain in her lower abdomen and some vaginal discharge. The doctor referred her to the genito-urinary clinic on the basis she may have a sexually transmitted disease. There was another consultation with the nurse that day to complete her diabetic assessment and further advice was given. It appears from a letter dated 21 November 2005 that an appointment with a registered mental nurse was offered to discuss what were referred to as "other more sensitive issues". On 22 November the claimant saw another nurse for monitoring her diabetes.

13. The decision to release the claimant from the fast track process was taken on 22 November, after the Secretary of State was notified that she had been given an appointment with the Medical Foundation for the Care of Victims of Torture ("the Medical Foundation"). On 23 November 2005 she was released from detention once accommodation had been arranged for her and she was given temporary immigration admission subject to reporting and residence conditions.

14. To complete the story the claimant was examined at the Medical Foundation on 30 November and 13 December by Dr Elizabeth Scott. Dr Scott's report, dated 13 December, set out that on examining the claimant Dr Scott found a 21.5cm scar on her left leg which the claimant said resulted from a knife wound in prison, and another 6.5cm scar, which she did not remember how she received. There was also a 2cm scar on her upper lip and a 1cm scar on her forehead, which the claimant attributed to being beaten by a rifle butt. There was hyperpigmentation on her hands which she said was caused through hot water being poured over them. Dr Scott concluded with

her opinion that the claimant had symptoms of depression and post traumatic stress disorder, which was to be expected following her experiences. Her abdominal pain may have been caused by sexually transmitted infection or another explanation may be the rape. A scar on her left leg was "consistent" with an incision of the skin with a sharp object and the scar on her face "consistent" with being hit with a blunt object. (In the standard terminology, derived from the so-called Istanbul Protocol recognised by the United Nations, a physician will use the term "consistent" to mean that the lesion could have been caused by the trauma described – in this case the beatings – but it is non-specific and there are other possible causes. The term "highly consistent" means a lesion could have been caused by the trauma to which it is attributed and there are few other possible causes). Finally, Dr Scott noted that the area of discoloration on the hand may have been caused by the scalding she described in prison but may also have been normal variation in pigmentation.

15. This claim for judicial review was brought in February 2006. It was stayed awaiting the outcome of the linked claims of R (D and K) v Secretary of State for the Home Department [2006] EWHC 980 (Admin). K appealed to the Court of Appeal and the stay remained until the judgment of the Court of Appeal in December 2006: HK Turkey v Secretary of State for the Home Department [2007] EWCA 1357.

Fast track detention: policy and legal framework

(1) Policy

16. The claimant was detained at Oakington as part of the Secretary of State's fast track procedure for handling asylum claims. The policy of detaining asylum claimants is based on the 1998 White Paper, Fairer, Faster and Firmer, Cm 4018, which said that the power to detain had to be retained in the interests of maintaining effective immigration control. The White Paper laid down that detention would most usually be appropriate to effect removal; initially to establish a person's identity or basis of claim; or where there was reason to believe that the person would fail to comply with any conditions attached to the grant of temporary admission or release. In 2000 an additional criterion was announced as a basis for detaining claimants, "where it appears that their application can be decided quickly, including those who may be certified as manifestly unfounded": Parl. Deb., HC, 16 March 2000, 263W. The policy was restated in 2004. The original seven to ten day period was extended, and the aim became to make decisions within ten to fourteen days: Parl. Deb. HC, 16 September 2004, 157-158WS. Moreover, it was said that when deciding whom to accept into the fast track, "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 times scales, however flexibly applied": ibid.

17. At the time Chapter 38 of the Operational Enforcement Manual for immigration officers explained that:

> "Any claim may be referred to the detained fast track where it appears after screening to be one that may be decided quickly, whatever the nationality or country of origin of the applicant. To assist staff in making referrals, the 'Fast Track Suitability List' includes a list of countries which may well give rise to claims which may be decided quickly, within the indicative

> timescales for the detained fast track. It also included advice as to which claims are unsuitable for referral" (para. 38.4).

18. The Fast Track Suitability List provides specific guidance as to cases which may be suitable for the fast track process. The applicable list at the time of the decision under challenge was dated May 2005. The list recorded that "any claim may be fast tracked where it appears after screening to be one that may be decided quickly, whatever the nationality of the claimant, subject to the qualifications set out below." The List then identified, by reference to country, specific types of case which were to be regarded as unsuitable (e.g. female genital mutilation claims from Nigeria), or specific countries in respect of which claims were not currently accepted for the fast track process (for example, at that time, Iraq and Zimbabwe). It listed countries in respect of which cases would prima facie be regarded as suitable. The DRC was not included. The List also identified as cases which were regarded as unsuitable for the fast track process pregnant females of 24 weeks and above, persons with a medical condition requiring 24 hour nursing or medical intervention, disabled applicants except the most easily manageable, anybody identified as having an infectious or contagious disease, anybody presenting with acute psychosis, anybody presenting with physical or learning disabilities requiring 24 hour nursing care, unaccompanied minors, age dispute cases where the applicant's appearance did not strongly suggest that he or she was over 18 and any case which did not appear to be one in which a quick decision could be made.

19. As to torture victims the Secretary of State's policy in this regard was set out by Lord Filkin, the responsible Minister at the time, in a statement in the House of Lords on 15 July 2002:

> "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. … There will be other cases in which the particular circumstances 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."

Lord Filkin went on to say that such evidence might emerge only after the person was detained and if that happened "the evidence will be considered to see whether it is appropriate for the detention to continue." Lord Filkin's statement was reflected in the Operational Enforcement Manual. Among a number of factors to be considered torture was listed as one factor "against" detention (paragraph 38.3). Paragraph 38.10 contained more particulars of those considered unsuitable for detention, including those "where there is independent evidence that they have been tortured." In evidence before this court the Secretary of State explained that in his view a very large number of asylum applications include allegations of ill-treatment, many of which were untrue. Moreover, not all kinds of ill-treatment were necessarily torture. If an allegation of torture alone were sufficient to prevent detention in all but a very exceptional case, the Secretary of State was of the view that many claimants would make false allegations of torture for the purpose of avoiding detention. Independent

evidence of torture, however, tipped the balance and detention was then used in only exceptional circumstances.

20. In further evidence before the court the Secretary of State explained that asylum claimants were taken out of the fast track when they were given a Medical Foundation appointment for a medical examination. That was not because the appointment itself was independent evidence of torture but because, with the delays in Medical Foundation examinations, it was not generally possible to meet the target timetables for determining asylum claims in the fast track. Ultimately, of course, a Medical Foundation examination might provide independent evidence of torture.

(2) Lawfulness of detention

21. There can be no question but that detention of asylum applicants at Oakington, for the short period to process their claims, is in principle lawful. In Saadi's case Lord Slynn (with whom the other law lords agreed) held that the methods of selection of the cases (suitability for speedy decision), the objective (speedy decision) and the way applicants were held for a short period (short in relation to the procedures to be gone through) and in reasonable conditions could not be said to be arbitrary or disproportionate under Article 5 of the European Convention on Human Rights: R (Saadi) v Secretary of State for the Home Department [2002] UKHL 41, [2002] 1 WLR 3131 [45]. When Saadi was considered by the European Court of Human Rights, and later its Grand Chamber, that approach was reaffirmed: Saadi v United Kingdom (2007) 44 EHRR 50; The Times 4 February 2008. The Grand Chamber said that it was a necessary adjunct of the right of states to control an alien's entry into, and residence in, their territory that they were permitted to detain would-be immigrants who had applied for permission to enter, whether by way of asylum or not: at [64]. It did not accept that, as soon as an asylum seeker had surrendered himself to the immigration authorities, he was seeking to effect an "authorised" entry, with the result that detention could not be justified under the first limb of Article 5 (1)(f): at [65]. The Grand Chamber said:

> "74. To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country" (see Amuur, [Amuur v France (1996) 22 EHRR 533], [43]); and the length of the detention should not exceed that reasonably required for the purpose pursued."

22. While Saadi's case establishes that it is lawful to detain asylum seekers for a short period to process their claims, analytically it is a separate issue in particular cases whether this is properly done, the procedure is fair, or there is compliance with the rules once the person is detained: see R (L) v Secretary of State for the Home Department [2003] 1 WLR 1230, at [33]. Each of these issues arises in the present case.

(3) The law of detention centres

23. Detention centres are authorised under Part VIII of the Immigration and Asylum Act 1999. The provision and running of the centres may be contracted out, with sub-contractors also being possible, although a centre must be operated in accordance with the statute: ss. 149 (1)-(2). Contracting out happened with Oakington, with the second defendant having the contract to run the centre and the third defendant being sub-contracted to provide the medical services. Where there is contracting out a contract monitor must be appointed, who has the status of Crown servant with the responsibility of overseeing compliance: s. 149 (4) (6) (b).

24. Under the legislation the Secretary of State must make rules for the regulation and management of a detention centre: s. 153. The manager of a centre has the functions conferred by the rules: s 148 (3). Pursuant to the legislation the Secretary of State has made the Detention Centre Rules 2001, SI 2001 No 238. Rule 3 (1) states that the purpose of detention centres is to provide for the secure and humane accommodation of detained persons in a relaxed regime. The rules provide that all detained persons are to be provided with written reasons for their detention, initially and then monthly: r. 9(1). Each detention centre must have a medical practitioner, vocationally trained as a general practitioner, and a health care team, including that general practitioner: r. 33 (1)-(2). All members of the health team must, as far as they are qualified to do so, pay special attention to the need to recognise medical conditions found among a diverse population and be culturally sensitive: r. 33 (3). Confidentiality applies: r. 33 (4). Detained persons are entitled, if they wish, to be examined by a medical practitioner of the same sex: r. 33 (10). Within 24 hours of admission detainees must be given a physical and mental examination by the medical practitioner: r. 34 (1). The medical practitioner must report to the manager of the centre on the case of any detained person whose health is likely to be injuriously affected by detention: r. 35 (1). Moreover, rule 35 provides:

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

Issue 1: Lawfulness of the Initial Detention

25. As the Court of Appeal noted in R (Refugee Legal Centre) v Secretary of State for the Home Department [2005] 1 WLR 2219, "the choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-round of asylum applications": at [8]. That, however, is not the end of the inquiry, for it may be that there are public law errors in the way the policy is implemented. In relation to the initial decision to detain the claimant Ms Harrison raises what she contends are public law flaws: first, that the Secretary of State failed to follow its policy in detaining the claimant and secondly, and more fundamentally, he fell short of his duty to be proactive in his inquiries of the claimant to determine whether it was appropriate to detain her.

(1) Failure to follow policy

26. Even in the absence of high authority such as R (Gillan) v Commissioner of the Police of the Metropolis [2006] 2 AC 307, at [31]-[34], it would seem obvious that the formulation, and distribution, of policies as to whom a public authority can detain is

essential to protect them from the arbitrary deprivation of liberty. For the same reason, to protect against the wrongful deprivation of liberty in the case of administrative detention by immigration officers, the courts have been careful to ensure "that immigration officers do not stray outside the four corners of those policies, when taking their decisions in individual cases": ID v Home Office [2005] EWCA 38; [2005] 1 WLR 278 at [132]. Detention inconsistent with the stated policy, as well as detention otherwise flawed in public law terms, may constitute false imprisonment: R (Nadarajah) v Secretary of State for the Home Department [2003] EWLA Civ 1768; [2004] INLR 139, at [53]-[54], [60].

27. The claimant's challenge under this head concentrated on her nationality. She came from the DRC. Ms Harrison submitted that for those coming from the DRC there was no presumption of fast tracking. She also referred to the country guidelines case on the DRC, AB and DM (Risk categories reviewed – Tutsis added) DRC CG [2005] UKIAT 00118, where the Tribunal accepted "that there is a real risk at present for UDPS activists": at [51 (iii)]. It will be recalled that as early as the screening pro-forma it was known that the claimant's asylum claim was based on her political activity with the UDPS. Ms Harrison submitted that the detained fast track country list identifies, as it always has done, cases which are expected to be simple to deal with on the basis of a judgment formed from objective country conditions. Many countries on the list are those where there is a statutory presumption that they are safe: Nationality, Immigration and Asylum Act 2002, s. 94. This approach is reflected in the composition of the Fast Track Suitability List. There is nothing in the decisions made or the explanation given which positively justified the claimant's selection for fast tracking. Reliance upon a generalised statement that the Secretary of State believes that most claims can be decided quickly does not provide an objective basis or provide clear criteria justifying why the claimant's case was suitable for fast tracking. In fact it was not, given that she came from the DRC and the political grounds she advanced.

28. In this respect there was no failure in my judgment on the Secretary of State's part. The claimant's asylum claim did not fall within any of the categories identified in the Fast Track Suitability List as unsuitable for fast tracking. The policy was that any claim might be fast tracked where it appeared after screening "to be one that may be decided quickly, whatever the nationality of the claimant." As mentioned earlier the Secretary of State's view was that most asylum claims are likely to be capable of being decided quickly. The generality of this approach cannot be impeached. In this case, despite the claimant's national origins, the DRC, and the nature of her claim, activity with the UDPS, it cannot be said that the policy on fast tracking was misapplied. Initially, at least, the decision was that the claimant's asylum claim could be dealt with expeditiously. The manner in which this decision was reached, and its basis, have been described earlier. There is nothing in the decision that the claimant fell within the policy criteria which, in my judgment, is open to challenge.

29. As to torture, the Secretary of State's policy is that torture of itself does not mean that an asylum applicant will not be detained in the fast track. Independent evidence of torture is ordinarily necessary. There was no such independent evidence until later in the year when Dr Scott's report was available. The claimant's health problems mentioned at the screening stage did not render her claim unsuitable for inclusion within the fast track process or render her detention unlawful. As described earlier

the Fast Track Suitability List excluded those with any medical condition which required 24 nursing or medical intervention, but the claimant did not fall into that category. It will be recalled that the official checked with the medical centre whether the claimant was suitable for detention at Oakington from a medical point of view. In my judgment those who authorised the claimant's detention were entitled to conclude that the issues likely to be raised by her application could be speedily resolved one way or another and that there was nothing in the policy adverse to fast track detention. There was no independent evidence of torture, indeed torture had not as yet been raised, so that was not a disqualification from fast tracking. That, however, leads to Ms Harrison's next submission.

(2) The duty to inquire

30. The claimant asserts that her detention was also unlawful from the outset because of a public law failure to ascertain all relevant information necessary for the Secretary of State to determine whether she was suitable for the fast track process. In particular, it is said that at no time prior to the decision to detain her was she specifically asked whether she was a victim of torture or had any evidence of her torture. It seems to me that in this regard Ms Harrison raises an important issue – what I characterise as the duty to inquire – which has implications for good administration beyond the present case.

(a) The duty to inquire

31. If there is any duty on a public authority to inquire one legal basis is a passage in Lord Diplock's speech in Secretary of State for Education and Science v Tameside Metropolitan Borough Council [1977] AC 1014: "[T]he question for the court 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": at [1106A] Perhaps a firmer jurisprudential basis for the duty to inquire would be the line of authority which demands fairness in the operation of an administrative process. While accepting that a public authority is entitled to choose the type of system it wants in terms of perceived political and other imperatives, the courts have said that they will intervene to ensure that the system provides a fair opportunity for individuals to put their case. There will be something justicially wrong with a system, it has been said, when those at the point of entry are at an unacceptable risk of being processed unfairly. In R (Refugee Legal Centre) v Home Secretary [2004] EWCA Civ 1481; [2005] 1 WLR 221 [6] – [9] Sedley LJ said:

> "The choice of an acceptable system is in the first instance a matter for the executive, and in making its choice it is entitled to take into account the perceived political and other imperatives for a speedy turn-around of asylum applications. But it is not entitled to sacrifice fairness on the altar of speed and convenience, much less of expediency; and whether it has done so is a question of law for the courts. Without reproducing the valuable discussion of the development of this branch of the law in Craig, Administrative Law, 5th ed (2003), ch13, we adopt Professor Craig's summary of the three factors which the court will weigh: the individual interest at issue, the benefits to be derived from added procedural safeguards, and

> the costs to the administration of compliance. Lord Woolf CJ stressed in R v Secretary of State for the Home Department, Ex p Fayed [1998] 1 WLR 763, 777, "administrative convenience cannot justify unfairness."

Applied in that case in the context of an individual seeking asylum the court said that given the weight to be attached to individual interest only the highest standards of fairness would suffice.

32. There have been a number of decisions where the courts have, without reference to authority, found a duty to inquire. R (Q) v Secretary of State for the Home Department [2003] EWCA Civ 364; [2004] QB 36 involved legislation denying asylum seekers welfare support if they had not claimed asylum as soon as reasonably practicable after arrival. The information for determining this was derived from an interview with claimants. The Court of Appeal held that the decision-making process was unfair because, inter alia, fairness demanded that the interviewing officers should try to ascertain the precise reason that claimants had not claimed asylum on arrival. Claimants should be told the purpose of the interview. Moreover, the questions had to be more extensive than they were and it was important for the interviewer "to probe the facts in each case in order to ensure that he has a reasonably full picture so that the Secretary of State's decision can be properly informed": at [89]. Interviewing skills were necessary and a more flexible approach was needed than simply completing a standard form questionnaire: at [90]. It was not for the court to say what questions needed to be asked in a particular case, although the court was not persuaded that the further questioning necessary to ensure the system was a fair one had to be extensive: at [96].

33. Subsequently, in R v Merton [2003] EWHC 1689 (Admin); [2003] 4 All ER 280, the issue concerned determining age. If the claimant was 17 years old, as he asserted, the duty the local authority owed him would have been different under the Children Act 1989 than if he was 18 years old, as the local authority decided he was. Stanley Burnton J said that the assessment of age in borderline cases was difficult, but not complex. Judicialisation was to be avoided and the matter could be decided informally, provided safeguards of minimum standards of inquiry and fairness were adhered to. He continued, at [37]:

> "It is apparent from the foregoing that, except in clear cases, the decision-maker cannot determine age solely on the basis of the appearance of the applicant. In general, the decision-maker must seek to elicit the general background of the applicant, including his family circumstances and history, his educational background, and his activities during the previous few years. Ethnic and cultural information may also be important. If there is reason to doubt the applicant's statement as to his age, the decision-maker will have to make an assessment of his credibility, and he will have to ask questions designed to test his credibility."

Fairness required an explanation to the person of the purpose of the interview, and giving the opportunity to address the basis of any provisional view of the decision-

maker that he was lying about his age. This was especially the case in the absence of an interpreter, when the applicant could not speak English: at [55].

34. Perhaps the most important authority is Patterson v London Borough of Greenwich (1993) 26 HLR 159, a decision of the Court of Appeal involving the duty on local housing authorities under the Housing Act 1985 to house those who were homeless. Here the claimant otherwise qualified but the local authority referred her application to another local authority, Birmingham, on the basis that they were responsible for fulfilling the statutory duty. The Housing Act 1985, section 67 (2) (c), provided expressly that one of the three conditions of referral of an application to another local authority was that the applicant would not run the risk of domestic violence in that other area. In fact the claimant, who had been living in Birmingham with her boyfriend, had been subjected to violent assaults over a three year period. At her interview she had been told that her case would be transferred to Birmingham. She was not asked whether she ran the risk of domestic violence there, and neither did she volunteer any information about her history. The authority relied on the fact that she said nothing. Evans LJ held that although there was no statutory duty to make inquiries prior to making a decision to refer, the statutory conditions justifying referral, three in number, were clear and concise. Without citing authority Evans LJ said:

> "If one was drawing up instructions as to how the statute should be implemented, one would certainly include a direct question in the terms of subsection (2) (c). More graphically, if a form was required to be filled in, it would certainly include a box which should be ticked, in order to show that the necessary information had at least been sought. Only a single direct question is required – what the learned deputy judge called "a simple question" – and it is easy to ask. Nor does a requirement that it should be asked place any great administrative burden on the authority. Rather, it would seem preferable in the interests of good administration that the question should be asked, so that the authority would have grounds for whatever decision it then made" at [164].

35. These authorities were considered in HK (Turkey) v Secretary of State for the Home Department [2007] EWCA Civ. 1357. An asylum claimant said in a lengthy interview that he had been tortured some years before and his argument was that a medical examination should have been arranged in the light of that. The claimant was placed on the fast track procedure but at the detention centre the doctor found scars consistent with burns inflicted with a hot iron and a swollen left leg. Latham LJ said that the statement of principle by Lord Diplock in Tameside, referred to earlier, had always to be placed in context. The questions which needed to be asked were to be determined in the light of the statutory or policy structure. R(Q) and Patterson were distinguished: at [24]. Here the context was quite different, said Latham LJ: it was whether a quick decision one way or the other could be reached during his fast track detention. At the time of the allegation of torture there was no independent evidence to support it and nothing to suggest the issue could not be resolved quickly: at [25].

36. Drawing these threads together it is possible to derive certain principles about the duty to inquire. Whether there is a duty to inquire or a duty to inquire further turns,

firstly, on an analysis of the statutory framework for the exercise of discretion. The statute may be such that it identifies a key factor in any decision to be made under it so that inquiry about that key factor is demanded. Secondly, regard must be had to the policy framework. There is a duty on decision-makers generally to follow their own policy. Given the centrality of a factor to the proper application of a policy a decision-maker may have to be proactive in eliciting information about it. Thirdly, despite the absence of a statutory or policy context which points to a duty to inquire, inquiry may be demanded by procedural fairness. The individual interests at stake may be such as to require a proactive approach by the decision-maker to obtaining relevant information for the decision. Such interests include liberty, basic sustenance and social care. However, there must always be a consideration of the costs and benefits of a more proactive process and this must be weighed in the balance with the individual interests at stake. Although the court will make its own assessment of whether the requirements of procedural fairness are met, it will defer to the decision-maker's judgment as to what the duty entails in terms, say, of the questions to be asked in a particular case.

(c) The duty to inquire in this case

37. The claimant submits that the decision to fast track her was taken without knowledge that she had been subject to torture and other abuse whilst in detention in the DRC. These details were plainly relevant to the decision to detain her in the fast track process and were capable of having a material impact on that decision. It was either irrational to make the decision to fast track her without that information being available, it is said, or procedurally unfair. Both rationality and fairness demanded, Ms Harrison submitted, that the claimant be asked for a basic outline of her claim and specific questions directed to the issue of torture.

38. The issue is whether, in the light of the principles identified earlier, a more proactive duty of inquiry was imposed on the Secretary of State. There was no statutory provision which suggested such a duty. Nor did policy impose a duty to inquire. Indeed, the Secretary of State's policy is to the contrary: he will not make inquiries about torture at the initial screening. The justification is that victims of torture will possibly only have just arrived in the United Kingdom. They may not be ready to talk about their past or be too traumatised to trust anyone, particularly at the initial stage of fast track detention, and particularly to someone who appears to them to be a figure of authority. If, however, a person discloses on detention that he or she has been a victim of torture – apparently a rare occurrence at initial screening – an appointment will be made for a medical examination.

39. By contrast with the Secretary of State's approach is the view of the Medical Foundation. Their approach is that the question "Have you ever been tortured?" should be asked as a means of facilitating disclosure. Facilitating disclosure at the earliest opportunity is, in its view, the lesser of the two evils – the distress and in rare cases the possibility of inducing flashbacks or causing retraumatisation on the one hand, and the risk of refoulement on the other. In its view there are inhibitions to disclosure if an asylum claimant is detained under the fast track regime. If in the Secretary of State's view torture victims may not disclose details at the screening interview, how can there be any confidence that disclosure will occur to their legal representative or to an interviewing officer at the fast track centre?

40. As with other aspects of the detention of asylum claimants, the issue of policy regarding inquiries about torture is fiercely contested. It is not for the court to decide whether one view rather than the other should be preferred. No objection can be taken to the Secretary of State's policy on public law grounds. That being the case it is evident that the policy framework does not impose any duty to inquire.

41. Does procedural fairness demand an inquiry as to torture if the statutory and policy frameworks do not? In my judgment because a claim about torture does not necessarily exclude asylum claimants from the fast track process no inquiry need be made. A claim about torture not generally bearing on the decision to detain, the duty of fairness does not impose as a corollary an obligation to inquire about it. Admittedly there is a possibility, albeit slight, that questioning about torture may also uncover independent evidence about it. Although independent evidence will generally militate against fast track detention it seems to me that procedural fairness cannot impose a duty on the Secretary of State to inquire about it at initial screening on the off-chance of it being revealed. Moreover, the backdrop is a policy that there should be no inquiry about torture at the initial screening. Given that this is a lawful policy procedural fairness, in this regard, has no application.

42. In any event it seems to me that I am bound by the decision in HK (Turkey), outlined earlier. Ms Harrison sought to distinguish that decision by confining it to its facts, a situation where the asylum applicant had disclosed his torture and ill-treatment at the screening stage of the process. In other words, HK (Turkey) was not, in her submission, a case where the duty to inquire was relevant but rather one where the argument was that the Secretary of State be under a duty to obtain a medical report providing independent evidence of his torture and ill-treatment. The claimant there fell within the category of those considered suitable for the fast track because of his nationality. Moreover, there was nothing to suggest that whether or not there was evidence of torture made the case unsuitable for a quick determination. In the present case, it was submitted, there was recent rape, where medical evidence would inevitably be required, and confirmation of recent ill-treatment would be supportive of her claim. The rape and ill-treatment presented issues which were not capable of quick resolution under the fast track because of the need for expert medical opinion which could not be obtained quickly. In my judgment, however, the Court of Appeal's decision is directly applicable: as Latham LJ said the Tameside dictum needs to be placed in its statutory and policy context and that context was, as in the present case, whether it appeared that the claimant's case could be quickly determined. Moreover, there is the additional policy context here that there be no inquiry at the initial screening about torture. For these reasons I am bound to conclude that the Secretary of State was entitled to adopt the approach he did.

Issue 2: Legality of continued detention

43. If initially the claimant was rightly detained in the fast track for the purposes of assessing her asylum claim the issue becomes at what point, if any, did her detention become unlawful? In broad outline the claimant contends that because of failures in compliance with the statutory provisions for medical examination the claimant was detained for too long a period and for that the Secretary of State is legally responsible. Had there been a medical examination, and consequent allegations of torture reports, the claimant may have been released because they may have been independent evidence of torture. As well as consideration of the provisions about medical

examinations the submissions on this issue mean that it is also necessary to address the responsibility of the Secretary of State for the behaviour of the third defendant, who was responsible for medical services at Oakington.

(1) The rules on medical examination

44. As we have seen earlier, rule 34 (1) of the Detention Centre Rules provides that every detained person shall be given a physical and mental examination by the medical practitioner within 24 hours of his admission to the detention centre. It was suggested at one point in the argument that this meant a "thorough examination". I would prefer to express the standard as being what a competent medical practitioner would decide is appropriate given the context of the examination – its purpose, that asylum claimants are involved and how detainees being examined present themselves. There was no formal contract between the second and third defendant as to the level of service to be provided but the third defendant says that the common understanding was that it was providing a reactive, not a proactive, service. The third defendant says that at the time, with the resources available, it was not possible to screen each new arrival within the twenty four hours. It is accepted that the claimant was not medically examined within the 24 hours required by rule 34 (1). A medical examination did not occur until 21 November.

45. There was a further breach of the Detention Centre Rules in that no allegation of torture (AOT) forms were completed for the claimant in compliance with rule 35 (3). As a matter of course the third defendant completed such forms. At the examination by the nurse on 20 November, however, the claimant alleged rape. Although, on the evidence, the third defendant's nurses are conscious that rape can amount to torture no AOT form was completed. Nor was an AOT form completed by the doctor after his examination on 21 November. He recorded the rape, the pain in the claimant's lower abdomen and vaginal discharge, and that she should have a Genito Urinary clinic follow up. Although the examining doctor on that occasion regularly completed AOT forms he did not do so in the claimant's case.

46. The third defendant cannot explain why AOT forms were not completed, but has suggested that its medical staff may have gained the impression that none of the claimant's medical concerns resulted from torture. It will be recalled that the focus was on her diabetes. Where rape is reported, on the third defendant's evidence it is rarely clear, without further investigation, whether this amounts to an allegation of torture. It is also not always clear whether the allegation is being made against other prisoners or prison guards, but the medical centre errs on the side of caution and, provided the person consents, an AOT form is completed. As far as the claimant's scars, injuries and hyperpigmentation on her hands were concerned, none of this was noted in the medical notes to suggest that they were related to wounds from torture. In my view allegation of torture forms should have been completed.

(2) The Secretary of State's responsibility for the contracted out services

47. There was a failure to comply with the Detention Centre Rules. To what extent is the Secretary of State liable for this? As with a number of public services the operation of the Oakington centre was contracted out to a private company, the second defendant. It is plain that the relationship between the Secretary of State and the second defendant was one of agency. That agency was such that the second

defendant managed the physical detention of the asylum applicants, on instructions from the Secretary of State: it had no independent power to detain or release an individual. In providing medical services at the centre, the third defendant did so under a contract with the second defendant. Under that contract its obligation was understood to be to provide general healthcare at the centre, a reactive type role comparable to the services provided by a general practitioner. It was under no contractual obligation to provide, and did not in fact provide, the 24 hour medical examination to every person as required by rule 34 once that rule was introduced in 2001. Not only was it not contractually obliged to do that but 24 hour screening, a proactive type service, was more expensive and its resource levels and costings when entering the contract had been on the basis of offering only a reactive type service.

48. It has been held that the Detention Centre Rules do not bind the third defendant: its legal obligation is confined to fulfilling their contact with the second defendant: R (D and K) v Secretary of State for the Home Department [2006] EWHC 980 (Admin), [102]. As well it is not suggested that the third defendant itself is subject to judicial review. That being the case the obvious solution to avoid a lacuna in the law is that the Secretary of State should be liable for the failings of the third defendant. In a letter dated 19 April 2007 to Lord Hylton, the then Minister of State at the Home Office, Baroness Scotland QC, described those in the position of the third defendant as an agent of the Secretary of State. That, in my judgment, is a reflection of the legal position, although it is more accurate to describe the third defendant as a sub-agent. The real issue for present purposes is: for what was the Secretary of State responsible given that the third defendant was an agent?

49. At one point in the argument it was suggested that the Secretary of State was vicariously liable for the breaches of statutory duty. However, the principles of vicarious liability do not apply as they would if the third defendant was an employee. Given the position of the third defendant as a sub-contractor it seems to me that on general principles responsibility falls on the Secretary of State for acts or omissions which constitute a breach of a non-delegable duty or which constitute a wrongful act that he has specifically instigated, authorised or ratified. The Secretary of State's ECHR obligations would be, in my view, non-delegable, so he could not escape liability for them by contracting out their performance. It may be that particular statutory obligations are also, as a matter of interpretation, non-delegable. Again, the Secretary of State would remain liable for shortcomings. There are no relevant non-delegable ECHR duties or statutory duties imposed by the Detention Centre rules. The issue is therefore whether there was a wrongful act and whether the Secretary of State specifically instigated, authorised or ratified it. In the present case there were wrongful acts, the breach of the statutory duties to conduct a medical examination and to report the torture claims. In my judgment the breach of the medical examination rule can be said to have been authorised by the Secretary of State. On ordinary principles authorisation can be implicit. As mentioned earlier the arrangements for the third defendant to provide medical services were on the basis that a medical examination would not necessarily occur within twenty-four hours of a detainee's arrival and that the medical services offered were reactive only. However, the failure of the nurse and doctor to complete the Allegation of Torture forms can be less easily attributable to the Secretary of State. On the evidence these were at most mistakes which he did not instigate, authorise or ratify.

(3) Causation

50. Breach of the Detention Centre rules for which the Secretary of State is legally responsible do not, of themselves, render the claimant's detention unlawful. What the claimant must do is to demonstrate that the breach caused her continued detention. In her submission the Secretary of State was deprived of relevant material for decision-making as a result of the breach. If there had been a medical examination, it would have found, as did that eventually provided by the Medical Foundation, that her physical and mental condition was consistent with her account of torture and rape. That would have resulted in a decision to release her either because it was clear that the claim was not straightforward and could not be decided within the timetable, given the need for a medical report, or because a medical examination would have been capable of constituting independent evidence of torture.

51. The claimant invokes in support D and K [2006] EWHC 980 (Admin), where Davies J held that had there been a medical examination in accordance with rule 34 (1) and a rule 35 (3) report, D would have been released. D's account was of being beaten with a steel wire on her back and there were extensive linear scars, evident on examination. Davies J also took into account the subsequent report of the Medical Foundation. "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 …" [118]. Moreover, in R (PB) v Secretary of State for the Home Department [2008] EWHC 364 (Admin) it was accepted that there had been a failure to provide the medical examination required by rule 34 (1) and that the requirements of rule 35 (3) were not met in that the allegation of torture report to the centre manager had been completed by a registered nurse rather than a 'medical practitioner'. The detainee there had multiple scars on both legs and feet, attributed to kicks causing lacerations. It was held that the failure to comply with the rules was causative of unlawful detention. Had a thorough examination taken place it would probably have generated a report which on review by the Secretary of State would have resulted in the claimant being released. A subsequent medical examination by a doctor from the Medical Foundation had resulted in a report that the claimant's multiple scarring was highly consistent with her account of torture. The judge could see no reason that a proper report, completed under Rule 35 (3), would not have reached the same conclusion. It would therefore have constituted independent evidence of torture within the meaning of the detention policy: at [24] – [26].

52. Given the Istanbul Protocol, medical reporting on torture victims demands some expertise. The Detention Centre Rules require only that the centre have a general practitioner: r. 33 (1), who may not have that expertise. In both D and K and PB the findings were that the general practitioners at the centre, if they had examined the detainees as required by the rules would, having regard to the injuries, and the accounts given by the detainees, have reached the same conclusions as the Medical Foundation experts. Their accounts of torture would probably have been completed on a rule 35 (3) report and as a result the Secretary of State would probably have released the detainee. Those findings, however, turned on the particular facts in those cases. In D and K the linear scars were extensive and evident on D's back and arms and said by the Medical Foundation doctors to be "highly consistent" with D's account. In PB there were multiple scars on the legs and feet and again the Medical Foundation report said they were "highly consistent" with the claimant's attribution.

53. In the present case, when the claimant was properly examined by a doctor on 21 November he recorded the claims about the rape. It does not appear she mentioned any wounds or ill-treatment. Recall that until then the claimant had presented at Oakington to the nurses and doctors as someone with diabetes, and that was the focus of attention, although there had been mention at screening of the pain in the lower abdomen and the vaginal discharge. The Medical Foundation report by Dr Scott identified two visible injuries, the scar on the claimant's left leg and the scar on her face. In her opinion they were "consistent", but not "highly consistent" within the terms of the Istanbul Protocol, with the claimant's account of ill-treatment while in detention in the DRC. Neither provides me a basis for concluding that if a medical examination had taken place earlier, in accordance with the rules, it would probably have provided independent evidence of torture, leading to the claimant's release from detention. If the ordinary principles of causation are not to be unduly distorted in this type of case neither can I conclude that, if Allegation of Torture forms had been completed compliant with rule 35 (3), they would probably have led to the claimant's release. That requires me to make assumptions that the forms would have mentioned the scarring, taken the same view of the scarring as Dr Scott and, even if they had, that the Secretary of State would have taken this, without more, as independent evidence of torture justifying release. In all, I cannot conclude that, on the balance of possibilities, the failure to comply with the rules caused the claimant's continued detention.

Conclusion

54. The claimant has based her claim on some important principles in public law. The first is that a public authority may have a duty to inquire because of its statutory mandate, the policy set for it or the requirements of procedural fairness. The second is that where public services are contracted out a public authority may be liable for the failure to perform them if there can be said there is a breach of a non-delegable duty or if the breach has been specifically instigated, authorised or ratified by the public authority. However, on the facts of this case I have concluded there was no duty on the Secretary of State to inquire proactively as alleged by the claimant. The separate issue, that the Secretary of State did not apply his own policy with regard to fast tracking, also fails. Consequently the claimant fails in her claim that she should never have been detained in the fast track process. While I have concluded that the Secretary of State is responsible for a breach of statutory duty by the third defendant – the failure to conduct a medical examination – I am not persuaded that that breach caused the claimant's continued detention. Consequently, the Secretary of State is under no liability in that respect of this claimant's detention in the fast track process.