Neutral Citation Number: [2008] EWHC 2596 (Admin)

CO/6471/2008

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

Royal Courts of Justice
Strand
London WC2A 2LL

Thursday, 9 October 2008

B e f o r e:

FRANCES PATTERSON QC
(Sitting as a Deputy High Court Judge)

Between:
THE QUEEN ON THE APPLICATION OF ISAAC OPPONG

Claimant

v

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Defendant

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(Official Shorthand Writers to the Court)

Mr R Scannell (instructed by Luqmani Thompson) appeared on behalf of the **Claimant**
Miss C Patry-Hoskins (instructed by Treasury Solicitors) appeared on behalf of the **Defendant**

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

1. THE DEPUTY JUDGE: This is an application for judicial review on the basis that the duration of the claimant's detention has now exceeded a period which is reasonable in all the circumstances, and/or that it should have become apparent to the defendant that she will not be able to deport the claimant within a reasonable period of time.

The facts

2. These are described by both sides as unusual and complex. It is necessary though to set them out in some detail.

3. The claimant was born on 22 April 1970. He says that he was born in Niger, where he lived until the age of 5. He was then taken from Niger to Liberia by his Ghanaian adoptive parents called Ama Srewaa and Sam Oppong. The claimant believed them to be his real parents until his adoptive father died. In 1993, because of the war in Liberia, the family moved from there to Ghana.

4. On 23 December 1998, the claimant arrived in the United Kingdom under the name of Thomas Aseri. He used a Ghanaian passport that had been obtained improperly. He had a six-month visitor visa and overstayed.

5. On 24 September 2003, the claimant married a Dutch citizen. On 24 February 2004, the claimant was arrested and served with a notice of a person liable to be removed. He was told that he did not need to report again. On 25 February 2004, the claimant applied to remain in the United Kingdom on the basis of his marriage. On 3 March 2004 that application was refused on the basis that it had been a marriage of convenience. The claimant appealed, was represented and submitted documents at that hearing. On 5 July 2004, the appeal was dismissed. A reconsideration of the appeal was ordered, which was also dismissed. The claimant was represented at both hearings by the Pan African Legal Advisory Services.

6. On 31 December 2006, the claimant was arrested and detained under immigration powers as an overstayer. The claimant had not reported since 28 February 2005. On 5 January 2007, the claimant was served with removal directions to Ghana, which were to take effect on 12 January 2007. On 12 January 2007, the claimant claimed asylum and the first set of removal directions were cancelled. In the personal details on the screening form, the claimant says that he was born in Niger and was of Ghanaian nationality. In the family details section, his natural parents and his godparents are recorded. Their nationality was recorded as Niger and Ghanaian respectively. No mention is made of any adoptive parents.

7. On 27 January 2007, the claimant's asylum claim was refused and certified as being clearly unfounded. On 2 February 2007, a second set of removal directions were served on the claimant to take effect on 6 February 2007. On 8 February 2007, a telephone interview was conducted in relation to the application that had been made by the defendant. There is a dispute about the contents of that interview as to which nationality the claimant says that he was. The Ghanaian High Commission, in a letter dated 11 June 2007, states that the claimant said that he was Nigerian and born in Niger, and indicated that he was educated in Liberia.

8. On 15 February 2007, in the screening interview, the claimant said that he knew that he was not Ghanaian, as the people who he thought were his parents told him that they had taken him from Niger to Liberia. On 13 March 2007, in an interview with Ghanaian authorities, the claimant stated that he had fraudulently acquired a Ghanaian passport. The Ghanaian authorities refused to issue travel documents. On 17 March 2007, removal directions were set for removal to Niger on 22 March 2007, but were subsequently cancelled as the airline would not accept the claimant's removal on an EU letter without supporting documentation.

9. On 23 March 2007, removal directions were set for 6 April 2007. They were cancelled on 5 April due to an administrative error. On 10 April 2007, removal directions were set for removal to Niger on 17 April. On 17 April 2007, the claimant was removed to Niger with escorts. All were detained, and the claimant was sent back to the United Kingdom. The defendant's escorts were advised that the claimant had been refused entry as he was from Ghana.

10. On 11 May 2007, the claimant wrote to the defendant seeking bail. On 13 May 2007, the defendant wrote to those acting for the claimant and explained that the claimant had been refused entry because details on his biodata were inconclusive, and that the claimant had advised the authorities that he was from the Democratic Republic of Congo. The Immigration Advisory Service on behalf of the claimant hotly disputed that any reference had been given by the claimant to the Democratic Republic of Congo.

11. On 2 July 2007, the claimant was refused bail by an immigration judge. On 9 July 2007, the claimant's solicitors wrote to the Border and Immigration Agency about the lawfulness of the continued detention when there was no realistic prospect of removal taking place. On 24 July 2007, a further bail hearing took place. Again, the claimant was refused bail. On 1 August 2007, the claimant's solicitors wrote to the Border and Immigration Agency, reiterating their concerns about the lawfulness of the detention of the claimant. On 2 August 2007, the claimant pleaded guilty to obtaining pecuniary advantage by deception, arising from the false declaration that he made to obtain his passport for entry into the United Kingdom.

12. On 2 October 2007, the claimant was sentenced to eight months' imprisonment and recommended for deportation. On 16 November 2007, the claimant was served with a notice of a decision to make a deportation order. On 30 November 2007, the claimant signed a disclaimer waiving his deportation appeal rights. On 1 December 2007, after the expiry of his sentence, the claimant was detained under immigration powers. On 6 December 2007, the deportation order was signed.

13. On 20 December 2007, the claimant provided a telephone number for his mother in Canada. On 28 December 2007, a detention monthly progress report was made, which states that arrangements were continuing to be made to obtain travel documents for the claimant for his removal from the United Kingdom. On 18 January 2008, biodata and photographs were obtained during an interview with the claimant. On 25 March 2008, the claimant was interviewed at the removal centre, and repeated that he had been born in Niger and brought up in Ghana and Liberia.

14. On 16 May 2008, the claimant was re-interviewed by the Ghanaian High Commission, who refused to accept that he was a Ghanaian national. On 18 May 2008, the claimant wrote to the Home Office caseworker asking what was planned next. On 27 May 2008, the claimant's file was passed to Her Majesty's Inspectorate with a request for advice as to how to proceed. They advised the setting up of an interview with the Liberian authorities.

15. On 29 May 2008, a further monthly detention report noted that: "We are continuing to make arrangements to obtain your travel documents for your removal from the United Kingdom". On 12 June 2008, the defendant wrote to Sarah Boateng, a Ghanaian national, who had previously stated that the claimant was her blood brother. She refused to get involved in the case. On 23 June 2008, there was an interview with the Liberian Embassy and with the claimant. They did not accept that the claimant was Liberian. On 14 July 2008, the application for judicial review was lodged. On 1 August 2008, the defendant wrote to the claimant asking for a contact in Ghana and contact details for his mother. The claimant gave a different telephone number for his mother to one that he had given previously, but said that the telephone number did not work when he had tried it a few months previously. It did not work when the defendant tried the telephone number.

16. On 12 August 2008, the defendant wrote to the claimant, saying that she had considered his request to be released from detention and dismissed his request. On 19 August 2008, the claimant was re-interviewed. The defendant wrote and enclosed a form asking for the claimant to set out his last address. On 26 August 2008, the claimant provided the name of his home town in Ghana. He provided the name also of a hospital where he had had a DNA test when he was there in 1995. The name was different to the one which he had given the detention centre staff earlier that week.

17. On 26 August 2008, a further detention review was carried out, and in that review progress was summarised since the last review. In that section of the report, it says:

> "The last review was signed off at the appropriate level on 29 July 2008, it was recommended that section 35 action was initiated as soon as possible."
>
> On 1 August 2008 a request was sent to CCD Ops to initiate section 35 action, however we have been advised that we cannot proceed with this until the judicial review is concluded.
>
> On 21 August 2008 a further letter was sent to Sarah Boateng asking if she has, or can obtain, contact details for the subject's (adopted) mother who apparently now lives in Canada. A letter was also sent to the subject asking him for his last address in Ghana and the hospital where the DNA test was carried out in 1995."

18. I should say that, earlier on in the brief case summary, there is a record about the prospect of a section 35 prosecution which reads as follows:

"On 11 July 2008 Ops team stated that a section 35 prosecution was not likely to succeed, but there was no preclusion on serving an IS35 even though there is no prospect of conviction."

19. On 12 September 2008, permission was granted to apply for judicial review. On 22 September 2008, the claimant confirmed his willingness to participate with language testing and fingerprint checks for Interpol. On 25 September 2008, a further detention review was carried out. The most relevant parts of that are these: under the heading "Likelihood of removal within a reasonable timescale" the reports reads as follows:

> "The current barriers to removal remain a valid ETD and the outstanding judicial review. We are currently making efforts to secure an ETD, however Mr Oppong's failure to provide sufficient proof of his identity or nationality has hindered our attempts."
>
> Under the "Proposal" section, it reads:
>
> "Mr Oppong's actions indicate that he would represent a high risk of absconding. He overstayed his permitted leave and failed to regularise his stay for a considerable period. He has repeatedly provided misleading information relating to his nationality and has failed to provide any evidence to support his claims despite numerous prompts. He has no known close ties in the United Kingdom and is also aware of our intention to remove him as soon as a travel document is made available. It is therefore suggested that he would have little incentive to remain in contact if released."

20. On 30 September 2008, there were comments from a Higher Executive Officer CCD in Leeds dealing with quality assurance so far as the claimant is concerned. Within that part of the report, the following is stated:

> "Following the expiration of his visitor's visa in 1999 and his detection in 2004 he made no effort to regularise his stay. This happened again following his unsuccessful appeal in November 2006 and December 2007. For these reasons, the subject is considered to pose an average risk of absconding and his continued detention is therefore in line with current criteria as outlined in the EIG.
>
> Despite this, we are no nearer to removing the subject and, although we are still pursuing avenues, we cannot gauge the timescales or prospects of success. The court may soon decide whether they believe his continued detention to be reasonable as an unlawful detention hearing is currently scheduled for 3 October 2008.

21. On 1 October 2008, the monthly progress report to detainees was sent to the claimant. Within that, the report says:

> "You are advised that your continued failure to co-operate with the Emergency Travel Documentation process is a factor in the decision to

> maintain detention. You should also be aware that continued failure to co-operate will remain a factor in deciding whether to maintain detention or grant bail in the future. While decisions will be considered on the basis of all known relevant factors, you should note that non-co-operation may result in a prolonged period of detention. In addition, there is an onus on you to leave the country once your appeal rights have been exhausted."

22. On 2 October 2008, Holly Teasdale signed a witness statement on behalf of the defendant. That concluded with the following paragraph under the sub-heading "Final Steps":

> "Now that the claimant has agreed to participate in language testing analysis and that Interpol are involved, we are confident that we shall soon be able to independently established the claimant's nationality without further recourse to him. Given the claimant's previous non-compliance and poor immigration history it is proposed detention should be maintained until we can establish his true nationality and arrange his removal from the United Kingdom. The claimant has stated he was born in Niger, but brought up in Ghana and Liberia. On previous occasions the claimant has stated that he is a national of Ghana and has claimed asylum as such. He is unable to provide any supporting evidence of any nationality or connection to any country. He has also provided contradictory information about his family relationships and history. The confusion over the subject's nationality is in part down to his previous deception and non-compliance. It is therefore considered that he would not comply with any conditions imposed upon him and that he imposes an absconder risk. We are satisfied that he can be deported within a reasonable time."

23. A second witness statement from the claimant is dated 1 October 2008, but commented upon the witness statement from Miss Teasdale. Within that, paragraph 11 deals with co-operation with the Immigration Service, and the claimant said this:

> "I have tried to co-operate throughout in the process, having also waived any appeal rights that may be open to me. I have attended every interview requested, have provided information when requested, and have not made contradictory statements regarding my complex family set up. I have agreed to undertake language testing and provided as much information as I can, having also served a term of imprisonment for accepting that a previous passport has been wrongly obtained by me. I do believe it is wrong to characterise my approach as anything other than co-operative."

The Legal framework

24. The legal framework is not controversial and therefore I do not set it out in extensive detail. Schedule 3, paragraph 2(3) of the Immigration Act 1971 provides:

"Where a deportation order is in force against any person, he may be detained under the authority of the Secretary of State pending his removal or departure from the United Kingdom (and if already detained by virtue of sub-paragraph (1) or (2) above when the order is made, shall continue to be detained unless he is released on bail or the Secretary of State directs otherwise)."

25. In the case of R(I) v Secretary of State for the Home Department [2002] EWCA Civ 888, Dyson LJ summarised the law as follows from paragraph 46:

"There is no dispute as to the principles that fall to be applied in the present case. They were stated by Woolf J in Re Hardial Singh [1984] 1 WLR 704, 706D in the passage quoted by Simon Brown LJ at paragraph 9 above. This statement was approved by Lord Browne-Wilkinson in Tan Te Lam v Tai A Chau Detention Centre [1997] AC 97, 111A-D in the passage quoted by Simon Brown LJ at paragraph 12 above. In my judgment, Mr Robb correctly submitted that the following four principles emerge:

i. The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;

ii. The deportee may only be detained for a period that is reasonable in all the circumstances;

iii. If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;

iv. The Secretary of State should act with the reasonable diligence and expedition to effect removal.

47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person 'pending removal' for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired.

48. It is not possible or desirable to produce an exhaustive list of all the circumstances that are or may be relevant to the question of how long it is reasonable for the Secretary of State to detain a person pending deportation pursuant to paragraph 2(3) of schedule 3 to the Immigration Act 1971. But in my view they include at least: the length of the period of

> detention; the nature of the obstacles which stand in the path of the Secretary of State preventing a deportation; the diligence, speed and effectiveness of the steps taken by the Secretary of State to surmount such obstacles; the conditions in which the detained person is being kept; the effect of detention on him and his family; the risk that if he is released from detention he will abscond; and the danger that, if released, he will commit criminal offences."

26. In the more recent case of R(A, MA, B, ME) v Secretary of State for the Home Department [2008] EWHC 142 Admin, Mitting J dealt with the issue of the tests which were to be applied in the circumstances as to the lawfulness of continued detention. In paragraph 16 he said:

> "In those circumstances, for continued detention to be lawful two questions have to be capable of being answered. First, by when does the Secretary of State expect to be able to deport A? Secondly, what is the basis for that expectation? Mr Patel, on instructions, is understandably unable to answer either of those questions, other than by the generality that the Secretary of State expects to be able to deport him within a reasonable time. Mr Patel realises that that begs the question. In my view, against the history that I have recited, there is simply no basis for concluding that A can be expected to be deported within the near future, nor can anybody, let alone the Secretary of State, give an answer to the first of those questions. An impasse has been reached in A's case. It has been reached after the lapse of many months of detention. His detention has now become unlawful."

27. There are two other factors which are material for consideration, although not identified expressly by Dyson LJ in the extract from his judgment which I have set out above. The first is the risk of absconding.

28. In the case of R(A) v Secretary of State for the Home Department [2007] EWCA Civ 804, at paragraph 54 the following is set out in the judgment of Toulson LJ:

> "I accept the submission on behalf of the Home Secretary that where there is a risk of absconding and a refusal to accept voluntary repatriation, those are bound to be very important factors, and likely often to be decisive factors, in determining the reasonableness of a person's detention, provided that deportation is the genuine purpose of the detention. The risk of absconding is important because it threatens to defeat the purpose for which the deportation order was made. The refusal of voluntary repatriation is important not only as evidence of the risk of absconding, but also because there is a big difference between administrative detention in circumstances where there is no immediate prospect of the detainee being able to return to his country of origin and detention in circumstances where he could return there at once. In the latter case the loss of liberty involved in the individual's continued detention is a product of his own making."

29. The second factor of importance is the factor of co-operation on the part of the detainee. In the case of Chen v the Secretary of State for the Home Department [2002] EWHC 2797, it was made clear that a refusal on the part of a person who is subject to a deportation order to provide necessary information or to co-operate with machinery of deportation is a highly significant factor.

30. I turn now to deal with submissions.

The claimant's submissions

31. The claimant submits that the period of detention has to be looked at in the round, namely from the commencement date of 31 December 2006. Initially, the claimant was detained under Schedule 2 of the Immigration Act 1971 under section 16(2); then he was detained in custody; lastly he has been detained since 1 December 2007 under Schedule 3 whilst awaiting a deportation order.

32. The total period of detention is relevant, it is submitted, as part of the overall circumstances of the case, namely a period of some 21-22 months, or if it is right to deduct the period in custody served, then the appropriate period of detention is one of some 17 months. The claimant submits that the overall period of detention is not excused by a lack of co-operation. The claimant accepts that he has presented as a Ghanaian previously, but he has given an explanation for so doing.

33. As to absconding, it is submitted that whilst the claimant's record is not perfect, his record is not the worst. It is not combined with likely criminality on the part of the claimant. As to the second question to be posed in circumstances which affect the claimant, namely whether there is a reasonable prospect of the claimant being removed within a reasonable future period of time, the claimant submits that there is no reasonable prospect, that there have been repeated attempts to obtain travel documents which have failed, and that there is no indication of when removal is likely to be capable of being effected. To all intents and purposes, the submission is that an impasse has been reached in the claimant's case after months in detention and despite the claimant having co-operated with the authorities.

The defendant's submissions

34. The defendant submits that the appropriate time for detention which falls to be considered here is from 1 December 2007 -- in other words, a period of ten months. Prior to that, the claimant was not detained pending his removal under a deportation order. The defendant submits that, in looking at all the circumstances, the period of detention is not unreasonable. The defendant did accept that the period of detention from 31 December 2006 was relevant to all of the circumstances of the case. In particular, the defendant submits, firstly, the claimant has been inconsistent in his account over the years as to where he came from and in respect of his background. In the period from 1998 until 2004 the claimant swore that he came from Ghana and then changed his story. Thereafter, the defendant accepts that he has been consistent, but submits that it is right to take into account the earlier period. As a result, the submission made by the defendant is that it is right to take into account the history of

non-co-operation and inconsistency as set out in the document produced by the defendant's counsel to the hearing and, as a result, the defendant believes that the claimant has more to reveal to the defendant.

35. Secondly, the submission was made that the defendant has been proactive in its efforts as set out in the witness statement of Holly Teasdale. The results of the recent enquiries were expected, I was told in response to a question that I raised, within a period of eight to ten weeks from the making of the request. What understandably was not known was what the results of those enquiries were likely to be, and therefore the ultimate position on the part of the defendant.

36. Thirdly, it was submitted that because of the factual complexity of the case, the defendant was entitled to take longer in its enquiries here than in a more straightforward case.

37. Fourthly, dealing with the prospect of absconding, the defendant submits that the prospect of absconding here was highly relevant as the claimant had entered on a false passport. It was accepted that absconding was not a trump card.

38. On the second issue, the only reason for the defendant not being able to remove the claimant was the lack of emergency travel documents. Within a few months it was submitted that the defendant expects to be able to deport the claimant, and that that is a reasonable expectation based upon the enquiries that are ongoing. The defendant accepted the wording of the quality assurance report dated 30 September 2008, which I have set out above, and in particular, in relation to that part of it where it says:

> "Despite this, we are no nearer to removing the subject and, although we are still pursuing avenues, we cannot gauge the timescales or prospects of success."

That was capable of referring to the overall position on detention, although the defendant submitted that, in fact, that was dealing with the position looking forward and that the defendant had in fact taken all reasonable steps.

The decision

39. In my judgment, the period of detention to be taken into account in assessing the duration of the period of time within which the claimant has been in detention runs from 31 December 2006. Whilst the initial period of detention was under Schedule 2, and it was therefore not a period when the claimant was detained awaiting deportation, it was clearly part, and is clearly part, of the overall circumstances of the case as the defendant accepts. It is right, however, to discount from that overall period the length of four months' imprisonment, when the claimant was serving his prison sentence for the criminal offence to which he pleaded guilty. It follows the overall period for detention for consideration here is a period of 18 months.

40. It is right, as the defendant submits, that the claimant has been inconsistent with his account over the years, including during the appeal process in 2004 and 2006. In my judgment, it is right to take that behaviour into account. Again, that is part of the

overall circumstances of the case and it does raise questions about the credibility on the part of the claimant. So, too, it is relevant to take into account the fact that the claimant entered the country on a fraudulently obtained passport and took no steps to regularise the situation until he was discovered in 2004. In my judgment, that conduct also does raise a question about the prospect of absconding on the part of the claimant.

41. As set out in the factual part of this judgment, this case is factually unusual and complex. That is clearly something which, in my judgment, operates in the Secretary of State's favour as allowing a longer period of time within which to make enquiries. Taking those factors together, with those referred to by Dyson LJ in the case of I v the Secretary of State for the Home Department, the defendant is entitled to have a longer period of time to make enquiries.

42. All cases looking at the issue of whether there has been a reasonable period of detention are fact sensitive to their individual circumstances. In itself a period of 18 months' detention may not be unreasonable, but the question is whether it is so in the circumstances of this particular case.

43. Having considered the individual circumstances here, in my judgment there are two compelling factors that assist the judicial decision-making process with which I am engaged. The first is the contents of Miss Teasdale's witness statement, and in particular paragraph 60 which I have set out above. That was entirely silent as to the time period within which the defendant expected to be able to deport the claimant. She said:

> "We are satisfied that he can be deported within a reasonable period of time."

44. It was only upon questioning of the defendant's counsel that an attempt was made to define a reasonable period of time, but then it was not possible to do so with clarity because of the understandable uncertainty as to the nature of replies that may be received.

45. Secondly, a quality assurance assessment of the detention review dated 25 September 2008 where the quality assurance officer says candidly:

> "We are no nearer to removing the subject and, although we are pursuing avenues, we cannot gauge the timescales or prospects of success."

46. In my judgment, it appears that the defendant has indeed reached something of an impasse in dealing with the claimant's circumstances. Although further enquiries are in hand, their outcome is uncertain. The period of detention could therefore drift for an uncertain period of further time. I find that the carrying out of the current enquiries does not assist the defendant in establishing a reasonable period of detention here so that, in all the circumstances of this particular case, in my judgment the period of time for which the claimant has been detained is unreasonable.

Issue 2

47. Is there a reasonable prospect of the claimant being released and, if so, what is that prospect reasonably based upon? As set out, until I raised the question, no timeframe was set out in the Secretary of State's evidence. Within a few months the defendant argues that she will expect to be able to deport the claimant. The problem with that submission, in my judgment, is that it does not lie easily (or at all) with the assessment by the Higher Executive Officer in the quality assurance section of the monthly detention report. The view which I have set out was a clear and candid assessment of the current position as at 30 September.

48. In my judgment, therefore, the defendant has an uncertain expectation as opposed to a reasonable expectation of being able to deport the claimant in the current circumstances as a result of the present enquiries that are being undertaken. In my judgment, that fails to meet the test set out by Mitting J in the case of A, which I have set out above.

49. It follows that the claim for judicial review succeeds on ground 2 also.

50. During the hearing there was some discussion about the conditions that would be appropriate should it be the case that the release of the claimant was ordered. It was clear and accepted that those conditions had to be strict, but in relation to the precise nature of those conditions, it may well be appropriate to hear further submissions on that issue now, together with the form of orders that are requested given the nature of the judgment that I have given.

51. Mr Scannell, is there anything further you wish to say?

52. MR SCANNELL: My Lady, I am grateful. Before I deal with the matters that flow, could I just mention two points of factual detail?

53. THE DEPUTY JUDGE: Yes, certainly.

54. MR SCANNELL: My Lady, the first relates to the time when you were reciting the facts and you mentioned a date. 6 November 2007, I believe the date should have been, and you corrected yourself and said the date should 2006. In fact, the date that you were looking at had to do with, as I recall, the service of notice of intention to deport and matters that followed thereafter, and it should be 2007 as you first said.

55. THE DEPUTY JUDGE: Yes, thank you.

56. MR SCANNELL: The only other date, my Lady, that I draw to your attention is in the context of the decision at the end of your judgment agreeing with the submission that I made that the whole period is relevant. The date you gave was 1 December 2006. In fact, it is the period from 31 December 2006.

57. THE DEPUTY JUDGE: Thank you very much, Mr Scannell. I am most grateful for that.

58. MR SCANNELL: My Lady, so far as the orders that flow are concerned, I would seek, in the terms in which the orders of remedies were set out in the claim form, first of all a declaration that the defendant's decision to maintain detention is unlawful. There is a

claim for damages and I do make that claim, but suggest that those be determined in due course.

59. THE DEPUTY JUDGE: Certainly. I am not in a position to deal with that.

60. MR SCANNELL: Of course, my Lady. I would seek an order that the claimant be released, and I am more than content with the terms that were under discussion that flowed from the judgment, I think, of Mitting J in Bashir originally. I think he set those out.

61. THE DEPUTY JUDGE: Yes, they are summarised in the case of A and others at paragraph 39, which was the paragraph that we discussed at the hearing.

62. MR SCANNELL: That is right and I am content with that. My learned friend seemed to have an issue with curfew.

63. THE DEPUTY JUDGE: I will come back to that.

64. MR SCANNELL: But I am content with those details. My Lady, the only other matter is costs, and you will have seen that the claim form seeks costs on an indemnity basis.

65. THE DEPUTY JUDGE: Yes, I did see that.

66. MR SCANNELL: Can I say the reason we put the claim for costs on an indemnity basis is the background to the case and the conduct of the defendant in having persistently declined to answer the questions raised by the claimant's solicitors from July 2007 -- there was 9 July 2007, 1 August, 2007 and then 31 March 2008, and indeed on at least those four occasions, what was sought to be raised was an indication from the Secretary of State as to what the precise position was, and it was consistent with the approach that my Lady has finally taken and resolved in the claimant's favour -- of course, against the backdrop of the two pieces of evidence referred to by my Lady in her judgment. We are looking at a later period. But the fact of the matter is that those instructing me, the claimant's solicitor, have pushed, quite rightly, for effectively a timetable to be given by the Secretary of State and the Secretary of State has failed at any time to answer the question being raised, and indeed on my Lady's findings, failed even to answer the question appropriately at the hearing itself. That is the context in which, and the reasons for which, we seek costs on an indemnity basis, based on that conduct that I have identified. My Lady, that is all I say about costs on an indemnity basis, otherwise we of course apply for our costs. Unless there is anything further I should deal with --

67. THE DEPUTY JUDGE: No, I do not think so.

68. MR SCANNELL: I am sorry, my instructing solicitor reminds me that addresses for the claimant's release have been agreed, and I do have them.

69. THE DEPUTY JUDGE: Right, good. That presumably is in the period since we were last at court.

70. MR SCANNELL: Yes. Thank you, my Lady.

71. THE DEPUTY JUDGE: Yes, Miss Patry-Hoskins?

72. MS PATRY-HOSKINS: My Lady, just going through the relief sought by my learned friend -- first of all, a declaration. The Secretary of State has no problem with the declaration itself. That follows on from your Ladyship's judgment. Damages, of course that is not a matter for you at this stage, however there is going have to be some -- well, before damages can be assessed, there has to be some assessment of the period for which detention was unlawful because of course you cannot assess damages unless you take a view as to which period. Obviously detention was initially lawful. This is not a case where you have said that the entire period was unlawful, and we do not have a time marking for when the period did become unlawful. So that might be something which we might need to discuss between us.

73. THE DEPUTY JUDGE: I will come back to Mr Scannell on that.

74. MS PATRY-HOSKINS: It may be we need to come back to that in a moment. Obviously paragraphs 3 and 4 are not relevant. Now, the issue of costs, of course I do not resist the principle of costs on the ordinary basis, I cannot. However, I am slightly confused as to the basis on which indemnity costs are claimed. I think it is being said that essentially because the Secretary of State failed to answer some letters in which a timeframe was requested, she should be required to pay costs on an indemnity basis. I cannot see reference -- well, certainly no reference was made to the Civil Procedure Rules in the submissions of my learned friend. At the moment, not having had any warning of the basis for this application, I cannot see how the rules would apply. The bottom line is that, as I understand it, indemnity costs are appropriate when the Secretary of State has behaved or any party has behaved unreasonably in the course of a hearing, but in the limited time I had available to me I was just looking up the rules.

75. THE DEPUTY JUDGE: Do you want to refer me to where you are looking exactly?

76. MS PATRY-HOSKINS: If you give me one moment I will make sure I am looking at the right section before I take you there. It is in Part 47, and as I understand it the rule is 47.14 and the commentary on the indemnity principle is at 47.14.4. I am in the 2008 White Book.

77. THE DEPUTY JUDGE: Sorry, it is in the commentary?

78. MS PATRY-HOSKINS: Yes, the most helpful parts are in the commentary. If you have a 2008 White Book, it is 1242, but that all relates to detailed assessment of costs. My Lady, I think the bottom line here is that the Secretary of State accepts, of course, that some letters were not responded to. However, the bottom line is this: it is clear from the Secretary of State's position, both at the time and at the hearing of this claim, that the Secretary of State would have maintained detention on the basis that she was carrying out the steps which were set out in some detail in Miss Teasdale's witness statement. Now, this is not a case where the Secretary of State has been criticised for failing to carry out proactive steps in any way. Yes, there may have been a failure to

respond to some correspondence, I accept that, but that is not, in my submission, a basis for awarding costs on the indemnity basis. Had the Secretary of State failed to respond to this claim or had somehow behaved unreasonably in the course of litigation, then that might be different, but in this case the Secretary of State has at every stage throughout the detention attempted to take steps to remove or deport the claimant, has attempted to ensure that he is informed of why, by carrying out detention reviews on a regular basis, and the failure to respond to a few letters, in my submission, is not a proper basis for awarding indemnity costs. If you are minded to make such an order, then I would be grateful for a moment to have a look at the rules and make sure I have said everything that there is to say.

79. THE DEPUTY JUDGE: Certainly. What about the conditions point?

80. MS PATRY-HOSKINS: The conditions, yes.

81. THE DEPUTY JUDGE: You remember there was some confusion last time about the curfew.

82. MS PATRY-HOSKINS: I specifically asked the question as to why curfew was on the basis that we had requested. Essentially, the curfew was requested at a specific time in the morning and at a specific time in the evening, you will remember that, between 6 and 8 in the morning and 8 and 10 in the evening. Essentially, the response that has come back is that those hours are imposed -- the curfew is imposed in order to make sure that the claimant is at the address given between those times so that the tagging equipment can confirm that he has not absconded, and the reason why the times are split between morning and evening is to ensure that the Secretary of State is aware of an absconder at the earliest possible opportunity. In theory you would be aware of someone having absconding within ten hours of the breach. If you had it only once, in the morning, say, someone could abscond immediately after the curfew had ended and then no one would be able to tell that he had absconded until the following morning, but by having a period in the morning and a period in the evening, that ensures that an absconder can be identified at the earliest possible time. There is no magic in the actual times.

83. THE DEPUTY JUDGE: Right, so just in terms of the curfew, I had been minded to impose a more general order: in other words, a 12-hour curfew. How do you want that part of the conditions to be phrased? Do you want to think about that, maybe take instructions on that?

84. MS PATRY-HOSKINS: I will take instructions just to make sure I get that absolutely right.

85. THE DEPUTY JUDGE: Certainly. (Pause)

86. MS PATRY-HOSKINS: My Lady, I am being told that the easiest way of dealing with this is for your Ladyship to impose the 12-hour curfew as set out in A. That is obviously a matter for you.

87. THE DEPUTY JUDGE: Yes, it is common ground, and Mr Scannell is not arguing against this, that the claimant should be released with anything other than strict conditions. If you tell me that the particular hours that you are seeking are appropriately strict and that is the optimum position so far as the defendant is concerned, I do not have any difficulty imposing that as a condition, but I would like to know how you want it phrased. That is what we were struggling with on the last occasion. I do not think we have achieved any greater clarity this morning. If you could agree with your clients what the appropriate wording is, then I am happy to consider that as one of the conditions.

88. MS PATRY-HOSKINS: Okay. My Lady, I will need a few moments.

89. THE DEPUTY JUDGE: Yes, I understand that.

90. MS PATRY-HOSKINS: I do not think there is anything else I need to address you on. Perhaps you would like to hear from Mr Scannell while I get instructions.

91. THE DEPUTY JUDGE: All right, you do that.

92. MR SCANNELL: My Lady, so far as curfew times are concerned, you will hear no objection from me.

93. THE DEPUTY JUDGE: I gathered that last time. Obviously it is sensible to word the appropriate condition in the way that the Secretary of State for the Home Department would prefer, but I just need to know what the wording is.

94. MR SCANNELL: Of course, my Lady. So far as the observations on indemnity costs are concerned, my Lady, you have heard what I say. I did not think there would be any surprise that that would be sought because it was in the claim form.

95. THE DEPUTY JUDGE: It is.

96. MR SCANNELL: My Lady's discretion on costs is wide. It is contained in rule 44, and it is a matter for you whether you regard the conduct as being sufficient to warrant what I have asked for. I do not say any more about that.

97. So far as damages are concerned, my learned friend is right, it does not flow from your judgment inexorably as to precisely when the period was reached. I answered the question you asked of me, I believe last week, by referring to March, April of this year as being the period from which detention had become unreasonable. I did that because, looking just back very briefly at the chronology, on 31 March 2008 the claimant's solicitor had written again raising the questions about the continued lawfulness of detention and the absence of any reasonable prospects of removal. I think my submission was that, in effect, from that date the time was up and we have certainly had impasse since then. Beyond that, my Lady, I do not think I can say more.

98. THE DEPUTY JUDGE: Thank you very much, Mr Scannell.

99. MS PATRY-HOSKINS: With the greatest of respect, if anything can be gleaned from your Ladyship's judgment on this it is that, as of the date of the detention review in which it was said for the first time we are no nearer -- I cannot remember the exact wording --

100. THE DEPUTY JUDGE: It is the quality assurance report of 30 September of this year.

101. MS PATRY-HOSKINS: If anything can be gleaned, it is from that date that it has become unreasonable to detain the claimant. But you can see the difficulty that there is in assessing damages if we do not have a timeline.

102. THE DEPUTY JUDGE: I can. I will happily deal with that in the next part dealing with the orders. Now, what about the wording of this condition?

103. MS PATRY-HOSKINS: My Lady, I have not brought a copy of A with me and it might be helpful if I can borrow a copy of A.

104. THE DEPUTY JUDGE: I have the bundle of authorities here.

105. MS PATRY-HOSKINS: I am just trying to remember the wording in A that was used in respect of the curfew.

106. THE DEPUTY JUDGE: Right, what Mitting J said is as follows. I will read the relevant part out:

> "The order which I propose to make, subject to counsel, is that which I made in Bashir v Secretary of State [2007] EWHC Admin 3017, namely that each of the three claimants I have identified should be admitted to bail on conditions which include a 12-hour curfew, tagging, daily reporting to an immigration office or at a police station and residence at an address to be identified or agreed by the Secretary of State."

107. That is the relevant part of that paragraph.

108. MS PATRY-HOSKINS: In that case, the order would be that the claimant be released from detention as of today -- given that the addresses have now been agreed -- as of today's date, subject to conditions that, and then (1) curfew be dealt with first; that the claimant -- it seems strange to deal with residing last because residing is the most important thing and all the other orders follow from that. So that he reside at an address agreed with the Secretary of State. I am grateful for any suggestions from Mr Scannell.

109. MR SCANNELL: The address would be 141 Fieldfare Road, London SE28 8HP, and as I have indicated, my Lady, that is an address that is suitable. That is an agreed address.

110. MS PATRY-HOSKINS: So condition (1) would be that he reside at 141 Fieldfare Road, London SE28 8HP.

111. THE DEPUTY JUDGE: Yes.

112. MS PATRY-HOSKINS: And then it must follow that curfew must follow from that, so that the second condition is that the claimant -- I have never had to draft one of these before so I am thinking on my feet -- that the claimant remain at the agreed address between the hours of 6 to 8am and 6 to 10pm.

113. MR SCANNELL: I am content with those times -- 6 to 8am and 6 to 10pm.

114. MS PATRY-HOSKINS: We are not asking for the 12-hour curfew --

115. THE DEPUTY JUDGE: So that deals with the time period then.

116. MS PATRY-HOSKINS: -- that the claimant agree to be subject to tagging.

117. THE DEPUTY JUDGE: And then daily reporting.

118. MS PATRY-HOSKINS: Our view is that the curfew and the tagging are sufficiently strict to allow weekly reporting as opposed to daily reporting.

119. MR SCANNELL: We are grateful for that, my Lady.

120. MS PATRY-HOSKINS: So we say condition (4) be that the claimant report weekly -- I am hearing some whispers --

121. MR SCANNELL: We were going to ask if we could report to the local police station, just because it would be easier to get to.

122. MS PATRY-HOSKINS: My instructions are to ask that he report to the local enforcement office weekly.

123. MR SCANNELL: I just think that he is going to have no money and travelling is going to be more difficult.

124. THE DEPUTY JUDGE: Well, I will put that it can be to either.

125. MS PATRY-HOSKINS: I think I am going to have to take formal instructions on that just in case there is anything --

126. THE DEPUTY JUDGE: All right. I do not want to be ambiguous.

127. MS PATRY-HOSKINS: I would not want to commit to that without taking formal instructions.

128. MR SCANNELL: My Lady, the only other additional order I would seek is that I suggest that the order should reflect that he be released forthwith.

129. MS PATRY-HOSKINS: My Lady, of course, we will do it as soon as reasonably possible, but there will be formalities to be gone through. A phone call will have to be made and arrangements will have to be put in place as well, but it is going to be today.

130. THE DEPUTY JUDGE: Yes.

131. MR SCANNELL: My Lady, by not later than 4pm today?

132. MS PATRY-HOSKINS: I would not be willing to accept that.

133. THE DEPUTY JUDGE: I do not think I need to hear from anybody any further in relation to that. Thank you very much.

134. Right, I will just deal with the consequential orders now and the issue of costs and I will wait to hear from you, Miss Patry-Hoskins, in relation to the location of reporting.

135. It follows from my judgment that there are consequential orders to be made: the first is that there is a declaration that the defendant has acted unlawfully in failing to release the claimant; second, that there is an order that the claimant be released. So far as damages are concerned, I will come back to that in just one moment. So far as the issue of costs are concerned, a claim is made for costs to be paid on an indemnity basis, which is objected to on behalf of the Secretary of State. It seems to me, in the exercise of my discretion, that this is not a case for costs to be awarded on an indemnity basis. Whilst it is the case that there have been occasions when correspondence has been directed to the Secretary of State which the defendant has not responded to, the defendant overall has responded to enquiries made of her and indeed has conducted this litigation in a reasonable way.

136. I deal with the issue of damages now. It is clear from my judgment that the issue of damages cannot be dealt with today and would have to be put off to another occasion. I had hoped that from my judgment it was clear that the two highly material considerations which influenced my judgment as to the duration of detention being unreasonable, and whether there was any reasonable prospect of the claimant being released, were the two relatively recent pieces of evidence, namely the quality assurance report of 30 September of this year and also the witness statement from Miss Teasdale dated 1 October of this year. It follows from setting out, as I have done, that those are the two highly material considerations which I have taken into account that, in my judgment, the period of detention became unreasonable at the end of September of this year. The assessment of damages, if it is thought appropriate to pursue, as I say will be dealt with on another occasion.

137. It is clear that, so far as the claimant is concerned, any release has to be subject to stringent conditions. So far as those conditions are concerned, they are, firstly, that the claimant is to reside at the address which is agreed between the claimant and the defendant as being 141 Fieldfare Road, London SE28 8HP. Secondly, the claimant is to remain at the agreed address between the hours of 6 to 8 in the morning and 6 to 10 in the evening. Thirdly, the claimant is to be subject to tagging. Fourthly, the claimant is to be subject to a weekly reporting restriction. I await further information as to where it is said that the weekly reporting should take place. I think, subject to that, that deals with everything, does it not?

138. MR SCANNELL: My Lady, it does. I am most grateful.

139. MS PATRY-HOSKINS: Sorry, a phone call is being made outside.

140. THE DEPUTY JUDGE: I appreciate that.

141. MR SCANNELL: My Lady, I am told by my instructing solicitor that I will need a detailed assessment of the costs in any event.

142. THE DEPUTY JUDGE: I will order that there is a detailed assessment of your costs, Mr Scannell.

143. MS PATRY-HOSKINS: My instructions are that the Secretary of State would require reporting to be at a local enforcement centre. The fact that the Secretary of State has agreed to weekly reporting restriction as opposed to daily ones means that it would be less onerous on the claimant to have to report to a local enforcement office. Essentially the Secretary of State is trying to move reporting away from police stations and to local enforcement centres and that is why we cannot agree.

144. MR SCANNELL: I am not going to say anything more about that.

145. THE DEPUTY JUDGE: I did not think you would. Is the local enforcement centre sufficiently precise? Is everybody happy with where the local enforcement centre is?

146. MS PATRY-HOSKINS: There are two in London only, so on that basis, yes. We will identify which one and we will of course let the claimant know.

147. THE DEPUTY JUDGE: My order in terms of that is that the claimant is to be subject to weekly reporting at the local enforcement centre, the precise address of which can be agreed between the parties. Thank you both very much.