Neutral Citation Number: [2009] EWHC 2506 (Admin)

Case No: CO/2936/2007

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

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 14/10/2009

Before :

THE HONOURABLE MR JUSTICE SALES

- -

Between :

The Queen on the Application of Mowleed Mohammed Hussein	**Claimant**
- and -	
The Secretary of State for the Home Department	**Defendant**

- -
- -

Ms Laura Dubinsky (instructed by **Refugee and Migrant Justice**) for the **Claimant**
Mr Alan Payne (instructed by **Treasury Solicitor**) for the **Defendant**

Hearing dates: 15/6/09 – 19/6/09

- -

Judgment

Mr Justice Sales:

1. The main subject of this claim as it currently stands is a claim for damages for false imprisonment of the Claimant by virtue of the exercise of powers of detention by the Defendant ("the Secretary of State") under paragraph 2(3) of Schedule 3 to the Immigration Act 1971.

2. The claim was commenced on 11 April 2007 at a time when the Claimant was still held in detention. On 21 August 2007 the Claimant was released from detention upon an application for bail made to an Immigration Judge, after several previous such applications had been dismissed.

3. Originally, the claim was brought by way of the judicial review procedure under CPR Part 54 for a mandatory order requiring the Secretary of State to direct the release of the Claimant, together with declaratory relief and damages for the tort of false imprisonment. Since the claim included a claim for a mandatory order, it was obligatory for the Claimant to use the Part 54 procedure: CPR Part 54.2. The declarations sought were a declaration that the Claimant has been unlawfully detained and a declaration that the Secretary of State "has failed to establish and/or implement a system to prevent immigration detainees from being held in prisons contrary to his own policy and/or to prevent immigration detainees from being held with convicted prisoners contrary to the Prison Rules 1999". There was also a claim for just satisfaction under the Human Rights Act 1998 in relation to what was claimed to be a breach of Article 5(1) of the European Convention on Human Rights (right to liberty and security of the person); however, Miss Dubinsky for the Claimant told me that it is parasitic upon, and adds nothing to, the claim for false imprisonment: there was therefore no argument about Article 5 and the case before me proceeded simply as a claim for false imprisonment.

4. A claim for damages in tort may be included in judicial review proceedings under Part 54: see CPR Part 54.3(2), which cross-refers to s. 31(4) of the Supreme Court Act 1981. Section 31(4) provides:

> "(4) On an application for judicial review the High Court may award damages to the applicant if—
>
> (a) he has joined with his application a claim for damages arising from any matter to which the application relates; and
>
> (b) the court is satisfied that, if the claim had been made in an action begun by the applicant at the time of making his application, he would have been awarded damages."

5. Since the Claimant has now been released, he does not pursue the claim for a mandatory order. An amended claim form was issued in January 2009. He does maintain his claims for damages for false imprisonment and for declaratory relief. There is no doubt that it was open to the Claimant to include his claim for damages for false imprisonment in these judicial review proceedings, in accordance with CPR Part 54.3(2) and s. 31(4) of the 1981 Act. As it transpires, however, there are certain

disputes of fact which are potentially of relevance to the determination of the claim. Both parties assumed that the claim in respect of false imprisonment should be determined in accordance with the usual procedure in judicial review proceedings, without hearing oral evidence from witnesses and without cross-examination. This left the court in an awkward position as to the proper approach it should adopt in resolving relevant disputes of fact. It also prompts the following comments on the procedure which should be followed in this sort of case.

6. Usually, a claim for judicial review involving application of rules of public law will be capable of being resolved on the basis of written witness statements and the documents exhibited to them. The facts in such cases are not substantially in dispute. For this reason, CPR Part 8 as modified by CPR Part 54 applies to such claims. CPR Part 8 provides for a somewhat simplified procedure where the court is required to decide on a question "which is unlikely to involve a substantial dispute of fact": CPR Part 8.1(2). Very often, the factual position so far as concerns liability in relation to a claim in tort for damages which is included in a claim in judicial review will be capable of being established by reference to the same materials, where the facts are not substantially in dispute (if liability is established, a factual inquiry into the damage suffered can be directed).

7. Sometimes, however, a substantial dispute of fact may arise in such cases. Where this occurs, either party may apply to the court for an order under CPR Part 8.1(3) for the claim to continue as if the claimant had not used the Part 8 procedure (i.e. for it to be treated instead as a Part 7 claim), and for directions. Alternatively, either party may apply to the court within the Part 8/Part 54 procedure for directions requiring or permitting the giving of oral evidence or requiring the attendance for cross-examination of a witness who has given written evidence: CPR Part 8.6(2) and (3). In practice, in such a situation, once it becomes clear that a substantial dispute of fact needs to be considered in order for the claim to be determined, the parties should co-operate to seek appropriate directions from the court as to how that dispute of fact may be resolved (see also *R (Al-Sweady) v Secretary of State for Defence* [2009] EWHC 2387 (Admin) at [15]-[29], to which Mr Payne properly drew my attention shortly before the handing down of this judgment). The fact that a claim (such as a claim in tort) happens to be brought using the procedure in Part 54 does not mean that ordinary procedures employed by the courts for resolving substantial disputes of fact (including cross-examination) are not to be applied. It is difficult to see why the procedure for resolving a substantial dispute of fact should be any different from that which would be applied if such a claim was brought (as it could have been) using the Part 7 procedure, which is usually the appropriate procedure to be employed where there is or may be a substantial dispute of fact. The reason provision is made in the rules for a claim such as a claim in tort to be included in a Part 54 claim is for convenience and to promote consistency of outcome, by ensuring that all relevant claims (in both public law and private law) arising out of a particular set of facts can be heard and determined in the same proceedings; it is not to provide a passport to avoid the usual procedures which the courts employ to resolve substantial disputes of fact. (There may sometimes be good reason to proceed on the basis of written evidence alone, for instance if a person is currently detained and a speedy decision about the lawfulness of his detention is required; then the court may simply have to do the best it can on written material – but that is not this case, as it came before me, and even in such a case it would still be desirable for the parties to seek to agree and to

inform the court in advance that such a departure from the usual methods of resolving disputes of fact is proposed by them).

8. In the present case, it emerged from the evidence served by each side that there was a substantial dispute of fact as to whether the Claimant failed to co-operate with immigration officials who were seeking information from him in order to give effect to the order for his deportation. As appears below, that was an issue which potentially affected the lawfulness of the Claimant's detention, and hence affected his claim for declaratory relief, for damages for false imprisonment and (while he was still detained) for a mandatory order for his release. But when it emerged that there was a factual issue between the parties on this point neither the Claimant nor the Secretary of State made any application to court for oral evidence to be heard or for cross-examination of witnesses. Instead, at the hearing both Mr Payne, for the Secretary of State, and Miss Dubinsky, for the Claimant, made extensive reference to the contemporaneous documentation in the form of reports of meetings between officials and the Claimant. Miss Dubinsky also relied on witness statements of the Claimant, dealing in general terms with what had happened at those meetings. The Secretary of State did not put in witness statements from the officials who attended the meetings, although the contemporaneous documents recorded their views of what had happened. (At the end of the trial Mr Payne did make an application that the Claimant should be called to give oral evidence; the application was made without prior notice to the Claimant, who by that stage was not in attendance at court; in my view, it was an application made far too late in the day and it fell to be rejected for reasons I gave at the time).

9. Mr Payne submitted that the hearing before me did not constitute a trial. I cannot accept this. The hearing before me clearly was a trial of the Claimant's claims in tort. The usual rules of evidence apply. Changing tack, Mr Payne also submitted, by reference to CPR 32.5, that the onus lay on the Claimant to give evidence orally unless the court ordered otherwise, if he wished to rely on the witness statements served on his side. I do not think that is right either. In proceedings under Part 8 and Part 54 the default position is that written evidence may be relied on if served in accordance with the rules or with the permission of the court, as was the case with all the written evidence in these proceedings (see CPR 8.6 and 54.16). Special directions are required if oral evidence is to be given.

10. In view of the way in which both sides approached the evidence, where no witness was called to give live evidence and be cross-examined, I consider that the proper approach to assessment of the evidence in relation to the question whether the Claimant co-operated or not with immigration officials in relation to the removal process is to treat the evidence in his witness statements with a measure of generosity, since he was not challenged on it by way of cross-examination. However, I think Mr Payne was entitled to make reference to contemporaneous records by immigration officials (as, indeed, Miss Dubinsky also did) as evidence to be taken into account when considering what happened at the Claimant's meetings with them. He was also entitled to invite me to evaluate the Claimant's evidence in his witness statements critically by reference to other contemporaneous records, other statements made by the Claimant and inherent probabilities.

The Secretary of State's policy

11. Throughout the period of the detention of the Claimant, the Secretary of State had in place a published policy regarding the detention of persons subject to immigration control pending their possible removal, set out in a document known as the Operational Enforcement Manual ("the OEM"). The relevant passages in the OEM were as follows:

> "*Chapter 38 – Detention and Temporary Release*
>
> *3.1 Policy*
>
> *General*
>
> In the 1998 White Paper "Fairer, Faster and Firmer – A Modern Approach to Immigration and Asylum" the Government made it clear the power to detain must be retained in the interests of maintaining effective immigration control. However, the White Paper confirmed that there was a presumption in favour of temporary admission or release and that, wherever possible, we would use alternatives to detention (see 38.20 and chapter 39). The White Paper went on to say that detention would most usually be appropriate:
>
> - to effect removal;
>
> - initially to establish a person's identity or basis of claim; or
>
> - where there is reason to believe that the person will fail to comply with any conditions attached to the grant of temporary admission or release. …
>
> *Use of detention*
>
> In all cases detention must be used sparingly, and for the shortest period necessary. It is not an effective use of detention space to detain people for lengthy periods if it would be practical to effect detention later in the process once any rights of appeal have been exhausted. A person who has an appeal pending or representations outstanding might have more incentive to comply with any restrictions imposed, if released, than one who is removable.
>
> The routine use of prison accommodation to hold detainees ended in January 2002 in line with the Government's strategy of detaining in dedicated removal centres. Nevertheless, the Government also made clear that it will always be necessary to hold small numbers of individual detainees in prison for reasons of security and control. …
>
> *38.1.1. Implied Limitations on the Statutory Powers to Detain*
>
> In order to be lawful, immigration detention must be for one of the statutory purposes for which the power is given and must

accord with the limitations implied by domestic and ECHR case law. Detention must also be in accordance with the Government's stated policy on the use of detention.

38.3 Factors influencing a decision to detain (excluding pre-decision fast track cases)

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

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

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

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

5. Each case must be considered on its individual merits. …

38.10.1 Criteria for detention in prison

Immigration detainees should only be held in prison establishments when they present specific risk factors that indicate they are unsuitable for immigration removal centres, for reasons of security or control. Immigration detainees will only normally be held in prison accommodation in the following circumstances:

- national security – where there is specific (verified) information that a person is a member of a terrorist group or has been engaged in terrorist activities

- criminality – those detainees who have completed prison sentences of four years or more, have been involved in the importation of Class A drugs, committed serious offences involving violence, or committed a serious sexual offence requiring registration on the sex offenders' register

- security – where the detainee has escaped or attempted to escape from police, prison or immigration custody, or planned or assisted others to do so

- control – engagement in serious disorder, arson, violence or damage, or planning or assisting others to so engage."

12. One aspect of the Claimant's case is that he claims that he was detained in breach of certain aspects of the policy set out in the OEM, and that the effect of that was to render his detention unlawful.

The Prison Rules 1999

13. Rule 7 of the Prison Rules 1999 (headed classification of prisoners) provides at sub-rule (2)(b):

> "Unconvicted prisoners … shall under no circumstances be required to share a cell with a convicted prisoner."

14. The Claimant claims that for the first part of the time he was detained under powers in the 1971 Act, until 18 October 2004 (when he was transferred to Colnbrook Immigration Removal Center – "IRC"), he was located at HMP Wandsworth, subject to a basic prison regime and required to share a cell with convicted prisoners, in breach of this rule.

The Facts

15. The Claimant is a national of Somalia. He was born on 15 June 1979. His family lived in Hargeisa in an area of Somalia now known as Somaliland. Civil war broke out in Somalia in 1990 when the Claimant was 11. Somaliland sought to break away from the rest of Somalia, and has now achieved a form of autonomous existence. It has its own government, although it is not recognised as an independent state by the international community. With the civil war, the Claimant fled with his family. He and his brother were separated from the others, who came to the UK. Eventually, after a period in a refugee camp in Ethiopia, the Claimant and his brother arrived in the United Kingdom on 24 November 1994, when the Claimant was aged 15. He was granted limited leave to remain here with his mother, who had exceptional leave to remain. On about 27 March 1996, the Claimant was granted further leave to remain as a dependant of his mother until 16 June 1997.

16. On 4 April 1996 the Claimant received his first criminal conviction, a caution for shoplifting. On 17 October 1996 he was sentenced to 30 months detention for robbery. He developed an alcohol abuse problem.

17. On 16 May 1997 the Claimant's mother made an application for an extension of her and her family's leave to remain in the UK. On this occasion, however, the Claimant was not included in the application. The application was granted, but since it did not include the Claimant it meant that after the expiry on 16 June 1997 of his existing leave to remain the Claimant had no proper basis for remaining in the UK. The Claimant was not aware that the application made by his mother had been limited in this way.

18. Upon his release from custody, the Claimant found himself in difficult circumstances. The absence of authorisation for him to remain in the UK meant that he did not have access to social assistance and benefits. This seems to have increased the risk of the Claimant re-offending.

19. The Claimant received further custodial sentences. On 13 March 1998 he was sentenced to three months detention for possession of a bladed article in a public place and shoplifting. On 30 September 1998 he was sentenced to six weeks detention for taking a vehicle without consent and driving dangerously. On 18 December 1998 he was sentenced to eight months detention for burglary and theft. On 7 April 1999 he was sentenced to 21 days custody for threatening behaviour, failure to surrender to bail, shoplifting and threatening to damage property. On 18 June 1999 he was sentenced to three years detention for robbery. On 24 January 2001 he was sentenced to six months detention for burglary and theft of about £5 from a café, together with 503 days for breach of the licence conditions under which he had been released from his last offence.

20. By Home Office letter dated 20 November 2001 the Claimant was informed that the Secretary of State was, in light of his offending, considering his deportation to Somalia and inviting representations from him on that issue. The solicitors then representing the Claimant (Stanley & Co) responded by letter dated 18 December 2001, in which they made representations against his deportation. They asserted that the Claimant expressed "deep remorse for his involvement in criminal activities", which he attributed to the fact that he had been thrown out of his mother's house and had turned to drink. They stated that the Claimant had reached a period of stability in his life, since he was now in receipt of welfare benefits and had been provided with accommodation in a hostel. They also maintained that the Claimant's removal to Somalia would be in breach of the European Convention on Human Rights, since there would be a real possibility that his life would be in danger or he would be at risk of torture or inhumane treatment.

21. It appears that no decision was taken to deport the Claimant at this stage. By letter of 21 May 2002 to the Home Office, Stanley & Co pressed for the Claimant's application for asylum to be considered as soon as possible, and pointed out that he was having to sleep rough as his welfare benefits had been suspended due to his inability to provide his social security office with proof of his immigration status. They asked for the Claimant to be granted indefinite leave to remain in the UK. By letters dated 30 May 2002, 4 November 2002 and 28 January 2003 Stanley & Co continued to press for a decision to be made on his application. The material before the court did not contain any reply to these letters. Consideration was given within the Home Office to a proposal that the Claimant be granted leave to remain in the UK for a further three years, but it was not approved.

22. Instead, shortly after the Claimant's release from custody in respect of his latest offence, he committed an offence of theft by stealing a watch from a jacket on 17 August 2003 (for which he was arrested and released on bail) and an offence of burglary on 29 August 2003, while on bail, involving entry to a hotel room and theft of a camera and suitcase. He pleaded guilty to these offences and was sentenced in the Crown Court on 14 January 2004 to a total of 15 months imprisonment.

23. Miss Dubinsky submitted that the circumstances of the Claimant's offending involved relatively minor offences committed because the Claimant had not been provided with social support. She pointed to a series of comments by the Claimant's probation officer in late 2000 that the Claimant had been released on licence and was homeless and unable to claim benefits until he obtained immigration papers, which put him at a serious risk of re-offending; and a further letter from the officer in January 2001 to

Paul Boateng MP to inform him that, unable to claim benefits because of the absence of immigration papers, the Claimant had indeed re-offended by committing the burglary of a café and taking about £5 in change, for which he had been sentenced to six months in prison and a further 503 days of custody for breach of his licence conditions. She also referred to the letters from Stanley & Co to the Home Office in 2002 and 2003 in support of the Claimant's belated application for further leave to remain in the UK, in which they called attention to the Claimant's difficult circumstances in the absence of a decision granting him immigration status and to the risk of his re-offending in order to provide for himself while living on the streets (it seems that although the Claimant had been in receipt of benefits at one stage, this had not continued). Miss Dubinsky also pointed to the fact that since the Claimant was released from immigration custody on 21 August 2007 and provided with social support, he has not gone back to offending. In relation to this, Miss Dubinsky submitted that it is a factor to be taken into account when assessing the lawfulness of the Claimant's detention up to 21 August 2007. I will consider that aspect of the case further below.

24. As regards the submission that the Claimant's criminal offending was comparatively minor and excusable, I do not accept it. It is true that some of the Claimant's offending might be explained by his difficult circumstances of not having access to social support for a period of time, but not all of it can be explained in that way. In particular, his most serious offending went well beyond anything which could be excused on this basis. He was also persistent in his offending, accumulating a large number of convictions from an early age. The length of the custodial sentences imposed on the Claimant reflects the gravity of his offending.

25. The Claimant's criminal record was reviewed in a determination dated 25 February 2005 by an Immigration Judge, in which the Claimant's claim to be given leave to remain in the UK under the Immigration Rules and on Convention rights grounds was rejected. The Claimant gave evidence before the Immigration Judge and was asked about the circumstances of his offending. The Immigration Judge's finding was that there was a pattern of offending which was unlikely to desist and that the rift with his family and the difficulty he had in obtaining funding for everyday living did not excuse a continual course of criminality including offences relating to violence. The Immigration Judge reviewed these matters in detail and had the advantage of seeing the Claimant give evidence about them. I see no reason to doubt his assessment of their gravity. The Immigration Judge supported his assessment with these comments at [55]:

> "As to one offence of robbery, the appellant on his own admission admits that it involved the use of an imitation firearm. Whether or not it was a cigarette lighter and could not actually be fired is only a limited mitigating factor. Such attacks are frightening for the victim and is in my view quite rightly considered a serious offence. As to his second offence of robbery I cannot accept his explanation that all it involved was being part of a fight on a train. The matter was tried before a judge and jury and he was found guilty. I accept that it took place on a train. It was therefore a robbery on a train or possibly an attempted robbery, it matters not which. As such it

> again is a serious matter. Furthermore his explanation [of the offence of possessing a blade in a public place] that his blade was simply a kitchen knife is not in my view a persuasive mitigation. He himself admitted it was kept in his sock. It demonstrates to me an ability to seek to explain away matters which are in fact serious with superficially innocuous explanations. The fact that his most recent offences were for a burglary and a theft indicates the continuing approach to crime and one I consider significant."

26. Under the sentence imposed in January 2004, the Claimant was due to be released on 16 April 2004. The question therefore arose whether the Claimant should then be deported. On 9 April 2004 the Claimant was served with notice that the Secretary of State had decided that it was conducive to the public good to make a deportation order against him, that he proposed to give directions for the Claimant's removal to Somalia and informing him of his right of appeal against the decision.

27. On 15 April 2004, pursuant to paragraph 2(2) of Schedule 3 to the Immigration Act 1971, the Secretary of State issued an Authority for Detention of the Claimant once he was released from prison to cause him to be detained until the deportation order was made or an appeal against it was determined in the Claimant's favour. The Authority for Detention was accompanied by a letter of the same date to the Claimant giving reasons for his continued detention (which I will call "immigration detention"). This letter included the following:

> "…detention is only used where there is no reasonable alternative available and there is reason to believe that you would not comply with any restrictions attached to your release. …
>
> It has been decided that you should remain in detention because:
>
> You are likely to abscond if given temporary admission or release.
>
> There is insufficient reliable information to decide whether to grant you temporary admission or release.
>
> The decision to detain you has been reached on the basis of the following factors:
>
> You do not have enough close ties (e.g. family or friends) to make it likely that you will stay in one place.
>
> You were of no fixed abode on your arrival in prison.
>
> You have little incentive to remain in touch.
>
> Your conduct.

Removal could be within a reasonable timescale should you not decide to appeal.

In reaching this decision Articles 5 and 8 of the European Convention on Human Rights have been taken into account. Article 5 states that a person may be arrested or detained to prevent them effecting an unauthorised entry into the country or where action is being taken against them with a view to deportation or extradition. You are the subject of deportation action. It is therefore considered that there is a legitimate aim in maintaining your detention. It is also considered when taking into account all the known facts of your case that detention is proportionate to a social need being fulfilled and that it is necessary for the prevention of disorder and crime and is in the wider interest of the maintenance of an effective immigration policy.

It has also been considered whether your right to respect for private and family life will be breached if you remain in detention.

You have not submitted evidence of any relationships in the United Kingdom considered to be of sufficient proximity to give rise to private/family life for the purposes of Article 8(2).

In considering whether private life exists you have not submitted any evidence of your private life here. It is not known if you own property here. You have had no known employment. Whilst it is accepted that during your time in the United Kingdom you may have established a private life it is the view that interference can be justified in the circumstances of this case. …

In reaching this decision your rights have been balanced against the wider rights and freedom of others and the general public interest. The extent of your possible private/family life has been weighed against your criminal convictions. It is considered that our actions are proportional to a social need being fulfilled and it is not accepted that the decision to maintain your detention would breach Article 8.

Your detention will be reviewed on a regular basis."

28. At the hearing before me, the main focus has been on the Secretary of State's claim that there were good grounds to consider that the Claimant's removal could be effected within a reasonable timescale. Miss Dubinsky submitted that at the outset of the immigration detention of the Claimant, or alternatively at some later date, there was no reasonable prospect of the Claimant being deported to Somalia (in particular, Somaliland), so that his detention pursuant to the Secretary of State's powers under

the 1971 Act became unlawful. It is relevant to consider the developing position in relation to removals to Somaliland at this stage, before returning to the details of the Claimant's case.

The feasibility of returns to Somaliland

29. The Claimant originates from Hargeisa in Somaliland.

30. It is necessary to distinguish between enforced returns and voluntary returns to Somaliland. An enforced return is a return effected without the Claimant's co-operation. A voluntary return is a return effected with the Claimant's co-operation in relation to the means used to implement his removal and transportation to Somaliland. In both cases, the consent of the local authorities in Somaliland is required. The availability of these two types of return has varied over time.

31. On 4 July 2003 a Memorandum of Understanding was signed by the UK Government and the Somaliland authorities dealing with removals from the UK to Somaliland ("the 2003 MOU"). In order to secure their agreement to the return of an individual to Somaliland, the Somaliland authorities required as much information about the individual as possible, including regarding the clan history of the individual (cumulatively referred to as "bio-data" in the papers), in order to allow them to be satisfied that the individual had the requisite degree of connection with Somaliland to warrant return there. Their usual position is that to be accepted for return to Somaliland an individual needs to come from a clan with a sizeable representation there, and/or to have been born there (or have parents who were born there) and/or to have family currently residing there. The first stage of the information gathering process under the 2003 MOU involved the completion of a bio-data form. Such a form would be forwarded to the Somaliland authorities, who would have a period of time under the MOU in which to confirm whether or not an individual was acceptable for return there. The evidence is that the scrutiny applied by the Somaliland authorities is stringent, and that the necessary bio-data is difficult to obtain without the co-operation of the individual concerned.

32. The position adopted by the Secretary of State, as set out in the witness statement of Hannah Honeyman of 4 May 2007, prepared in response to an application for interim relief by the Claimant, was that the 2003 MOU provided a real prospect of removal of the Claimant to Somaliland, which had been thwarted by the failure of the Claimant to co-operate in the provision of sufficient bio-data to be put to the Somaliland authorities to persuade them to accept his return to Somaliland. The Secretary of State's position in May 2007 was that the 2003 MOU meant that there was "a real prospect of the Claimant being removed to Somaliland within a reasonable timescale", so that the Claimant remained properly detained at that time pursuant to paragraph 2(3) of Schedule 3 to the 1971 Act. I will examine below the question of whether the Claimant failed to co-operate in the provision of bio-data and, if so, what the legal consequences of that might be.

33. In another case (decided in December 2006) concerning possible removal to Somaliland – but where possible removal to Somalia was also under consideration (*R (A) v Secretary of State for the Home Department* [2006] EWHC 3331 (Admin)) – Calvert-Smith J considered on the evidence before him regarding the operation of the 2003 MOU that the MOU "was almost completely ineffective because of the

difficulties in gathering the bio-data required by the authorities in Somaliland to satisfy them that the person concerned was entitled to reside in Somaliland" ([44]). The learned judge also concluded that during the period between 20 August 2004 and 20 July 2006 the 2003 MOU "was effectively a dead letter in respect of Somaliland" ([47]), since it appeared that there had in fact been no, or perhaps only one, removal effected under it (cf [45]). The learned judge also addressed the question of practical difficulties concerning removals to Somaliland and Somalia. He concluded that in December 2006 there was a realistic prospect of immediate return to Somalia, which meant that the claimant's current detention was not unlawful; but also granted a declaration that in the period from 3 December 2004 to 20 July 2006 the claimant had been unlawfully detained, by reason of the absence in that period of any imminent prospect of removal.

34. The Secretary of State's evidence before this court included two witness statements of Richard Pickering, the Deputy Director of the International Delivery Directorate within the Immigration & Nationality Directorate of the Home Office, dated 8 November 2006 and 4 December 2006, prepared for the purposes of another case concerning proposed removal to Somaliland in which judgment was handed down by Davis J in December 2008: *R (Abdi) v Secretary of State for the Home Department* [2008] EWHC 3166 (Admin) ("*Abdi No. 1"*). According to Mr Pickering's evidence, in 2004 seven individuals were referred to the Somaliland authorities under the 2003 MOU and all were rejected; the next referral was in February 2006, and was also rejected; however, in his second witness statement, he said that in early 2004 a family of five or six had been referred to the Somaliland authorities under the 2003 MOU, were accepted for return and were successfully returned. On 28 June 2006 a team from the Home Office and Foreign & Commonwealth Office visited the authorities in Somaliland to investigate whether the process for return of individuals to Somaliland might be made easier. The Somaliland authorities affirmed that the 2003 MOU remained operational, indicated a willingness to assist with returns to Somaliland and agreed to second an official to the UK on a trial basis to assist with the identification of those who would be acceptable for return to Somaliland. That official commenced work in the UK in October 2006, attending interviews with potential returnees and (if of the view that they were from Somaliland) taking steps to secure approval from the Somaliland authorities for their return. In late 2006 an individual was identified by this process whom the Somaliland authorities were prepared to accept for return to Somaliland. (In addition, there was an internal memorandum in the papers before me recording that on about 25 October 2006 an official from Somaliland attended Colnbrook IRC to meet detainees who were or might be from Somaliland - this indicates a degree of seriousness on the part of the Somaliland authorities in seeking to honour the terms of the 2003 MOU).

35. Mr Pickering also gave evidence that commercial air services (provided by Daallo Airlines and African Express) from Dubai in the United Arab Emirates to Somaliland were established from at least about November 2003, and that in January and February 2004 arrangements were put in place with Emirates Airline (which operated a route from the UK to Dubai) and the authorities in the United Arab Emirates which meant that enforced returns to Somalia and Somaliland became possible. There were a number of enforced returns effected in 2004 via such a route to Mogadishu in Somalia, which indicated its viability. However, in June 2004 and on 20 August 2004 Daallo Airlines and African Express respectively indicated that they were no longer

willing to carry enforced returns, because of the risk of threats to the airlines and their staff if they were involved in such returns. They remained willing to carry individuals who signed disclaimers to confirm that they were returning voluntarily (and in fact several voluntary returns to Somalia using African Express were effected in 2004-2006). That remained the position until May 2006, when discussions with African Express indicated that it might be prepared once again to carry enforced returns. Those discussions resulted in an agreement with African Express in late July 2006 allowing for enforced removals to both Somalia and Somaliland. The individual referred to in para. [34] above was the subject of an enforced removal to Somaliland via Dubai in late 2006. Accordingly, Mr Pickering indicated in his evidence that if Mr Abdi were co-operative in providing his bio-data, and it was acceptable to the Somaliland authorities, he could be removed to Somaliland.

36. The Secretary of State's evidence before this court also included a number of other witness statements. In her second witness statement, dated 13 June 2007, Hannah Honeyman said that another individual (Mr I, referred to in para. [37] below) was accepted by the Somaliland authorities for return under the 2003 MOU on 4 May 2007 and that he made a voluntary return there later that month. The 2003 MOU was renewed on similar terms in a new Memorandum of Understanding with the Somaliland authorities signed on 3 June 2007 ("the 2007 MOU").

37. Clive Wools, an inspector in the Returns Liaison Unit for the Home Office, made a witness statement in *Abdi No. 1* dated 20 November 2008, which was also in evidence before me, regarding the negotiations leading to the 2007 MOU. The Somaliland authorities indicated that they wished to co-operate fully with the British authorities in respect of returns of those with a right to return to Somaliland and no right to remain in the UK. Pending agreement on the new MOU, the Somaliland Foreign Minister agreed personally to review the case of a Mr I (an individual from Somaliland, in immigration detention in the UK, who wished to return to Somaliland) which was then before the English courts. The result was that on 4 May 2007 the Somaliland authorities accepted Mr I for return to Somaliland.

38. Mike Carlos, the executive officer in the Criminal Casework Directorate of the United Kingdom Border Agency responsible for dealing with the present judicial review proceedings, made three witness statements, dated 17 November 2008, 3 December 2008 and 18 June 2009. He explained that the Claimant's case was not referred to the Somaliland authorities. This was because the bio-data information provided by the Claimant was not sufficient to allow the UK authorities to put him forward for acceptance by the Somaliland authorities with any prospect of success. Mr Carlos also gave evidence that certain comments noted in detention reviews of the Claimant, to the effect that the Somaliland authorities would require documentary proof regarding his bio-data details, were incorrect. Having specifically checked the position with those familiar with dealing with the Somaliland authorities, his evidence, which I accept, was that the Somaliland authorities do not require documentary proof of identity or in support of the bio-data set out on the bio-data form to be provided.

39. Summarising the position as it emerges from the evidence before this court so far as concerns returns to Somaliland between 16 April 2004 and 21 August 2007 (the period of the immigration detention of the Claimant): (i) there were reasonable grounds for the Secretary of State to think that the Somaliland authorities were in principle willing to accept individuals for return to Somaliland if adequate bio-data

showing a sufficient connection with Somaliland were provided in respect of them (see further paras. [79] – [83] below); (ii) the Somaliland authorities applied stringent standards in assessing whether sufficient bio-data were provided, and in practice a substantial degree of co-operation in provision of such bio-data was required from the individual concerned, but on this evidence it would be going too far to say that either the 2003 MOU or the 2007 MOU was a dead letter and of no practical effect (accordingly, on the evidence before me, I do not share the assessment of the 2003 MOU by Calvert-Smith J in *R (A) v Secretary of State for the Home Department* referred to above; I am fortified in that conclusion by the view of Davis J in *R (Abdi) v Secretary of State for the Home Department* [2009] EWHC 1324 (Admin) – *Abdi No. 2* - at [59] that at no stage on the material before him was there a complete impasse on returns to Somalia, including Somaliland); (iii) voluntary removals to Somaliland were possible throughout the period; (iv) enforced removals to Somaliland were possible only up to 20 August 2004 and were only again in contemplation from May 2006 and actually possible from late July 2006 onwards.

The immigration detention of the Claimant

40. On 16 April 2004 the Claimant finished his criminal custodial term and passed into immigration detention pursuant to the Authority to Detain. He initially remained detained at HMP Wandsworth on the basic prison regime. According to his evidence, he shared a cell with convicted prisoners. The Claimant was eventually moved to Colnbrook IRC on 18 October 2004.

41. In the early phase of his immigration detention, the Claimant maintained that he was from Mogadishu in Somalia, rather than from Somaliland. This was the claim he made in his witness statement dated 16 August 2004 in support of his claim for asylum. It was not correct. It strains credulity that the Claimant did not at all material times appreciate that he was from Hargeisa in Somaliland rather than Mogadishu, even though he had left at an early age, and it is difficult to reconcile his original claim that he was from Mogadishu with his evidence in statements before this court, which do not suggest that he was ever under that misapprehension. It is very unlikely that his family members would have left him with the impression that he came from Mogadishu rather than Hargeisa (indeed, in his witness statement of 10 August 2007, the Claimant says "My parents have told me that I was born in the city of Hargeisa …"). Moreover, there is an internal immigration service document from about 2001 which states that "[the Claimant] comes from Hargeysa", which appears to be based on information which the Claimant provided at that time. A possible inference to be drawn is that when in his witness statement of 16 August 2004 the Claimant claimed to be from Mogadishu in Somalia, rather than from Hargeisa in Somaliland, that was because of the perceived benefits to him of claiming to be from Mogadishu (which at the time was regarded as more unstable than Somaliland), rather than from any genuine belief in the claim. However, bearing in mind the approach to evidence identified at para. [10] above and in the absence of hearing the Claimant cross-examined on this point, and also bearing in mind that in that witness statement he also offered to supply contact details for his family, I do not think it would be right for me to reach the conclusion that the Claimant deliberately suppressed the truth about his origins.

42. Nonetheless, this failure by the Claimant at the beginning of his immigration detention to identify his true place of origin as Somaliland obviously prevented the Secretary of State from seeking to explore his removal there from the outset.

43. On 25 February 2005 the Claimant's appeal to an Immigration Judge against the decision to deport him was dismissed. At a first hearing on 31 August 2004 the Claimant said that he had only just been shown his mother's form applying for leave to remain which showed that he did not come from Mogadishu in Somalia but from Hargeisa in Somaliland (up till then the Claimant had been maintaining that he was from Mogadishu: see [16] of the Immigration Judge's decision). He also wished to consider the list of antecedents which had been provided by the Home Office. The hearing was adjourned and resumed again on 9 November 2004. Now that the Claimant said he was from Hargeisa, the Secretary of State undertook to return him to Somaliland rather than anywhere else in Somalia ([32], [52]). The Immigration Judge found that Somaliland was one of the more stable areas in Somalia and that there would be no insurmountable obstacles to the Claimant's return there. He recorded that the Claimant was not aware of his clan, but went on to observe that "the indications are that he comes from a majority clan [and his] mother has been a member of the Ruling Party in Somaliland" ([52], cf [27]). He reviewed the Claimant's history of offending (see para. [25] above) and rejected the Claimant's submission that to return him to Somaliland would involve a breach of his Convention rights under the Human Rights Act 1998.

44. The Immigration Judge's findings about the connection of the Claimant with Somaliland, his clan background on his mother's side (at least) of belonging to a majority clan in Somaliland and his mother's previous membership of the ruling party in Somaliland are relevant as providing an objective foundation for the Secretary of State to think that there was a real prospect of obtaining information to show that the Claimant had a sufficiently strong connection with Somaliland as might be adequate to satisfy the Somaliland authorities to accept him for return there under the 2003 MOU or 2007 MOU. Officials interviewed the Claimant in February 2005 and on a number of occasions subsequently, but he was uncooperative (see para. [48] below).

45. An application by the Claimant for reconsideration of the Immigration Judge's decision under s. 103A of the Nationality, Immigration and Asylum Act 2002 was dismissed by a Senior Immigration Judge on 8 April 2005. His appeal rights became exhausted on 26 April 2005. A further application submitted by the Claimant on 29 December 2005 for review by the High Court was refused on 31 January 2006. Whilst the Claimant was challenging his deportation at this stage, it was reasonable that the Secretary of State did not seek to interview him to seek further information which might provide the basis for an approach to the Somaliland authorities, since it was unlikely that he would co-operate in his removal at a time when he still hoped to overturn the deportation order against him. Further, there is nothing to indicate that the Claimant would have been more willing to co-operate in the provision of information at that time than he had been previously or proved to be later on: see para. [48] below. Once the position was finally resolved, officials again sought to interview him to obtain more information.

46. The Claimant was interviewed on a number of occasions by officials seeking to obtain bio-data on the basis of which an application for his return to Somaliland could be made to the Somaliland authorities under the 2003 MOU and then the 2007 MOU.

The Secretary of State maintains that he was uncooperative in providing such information. The Claimant, on the other hand, as set out, for example, in the first witness statement of his solicitor, Roopa Tanna, dated 10 April 2007, disputes this. Ms Tanna said that there were limits to the information he could provide because he had left Somaliland as a child and could not be expected to recall matters about which he was asked. In a further witness statement of Ms Tanna, dated 3 May 2007, made after receipt of letters on behalf of the Secretary of State referring to the Claimant's conduct at interviews, however, it was accepted that at one interview with an immigration official he refused to answer the questions about his background which were put to him: the explanation given for this was that he had been asked the same questions a few weeks before by another immigration official, and he felt frustrated. In that witness statement, the Claimant also accepted that at an interview on 13 July 2006, despite having provided some biographical information for inclusion in the bio-data form, he refused to sign the form (i.e. to acknowledge that he accepted what was set out in it was accurate): the explanation given was that he had made an application to the European Court of Human Rights and had been advised by his representative and that due to this pending application he said he was not prepared to sign the form. A further witness statement of the Claimant, dated 8 June 2009, was also admitted in evidence. The Claimant again denied that he had been uncooperative, but again accepted that he had shown his frustration with the process; he did not retract the previous accounts given about his behaviour.

47. It is thus clear, even on the Claimant's own evidence, that there was a degree of uncooperativeness on his part at least at certain points in the course of his immigration detention in relation to provision of bio-data required for transmission to the Somaliland authorities. I do not consider that either of the explanations offered by the Claimant for his lack of co-operation in relation to the two specific incidents referred to in Ms Tanna's second witness statement is a good one. As to the first, even if he felt that he had provided information previously, it was clear that the immigration official was seeking information in good faith to complete the bio-data form, and a sense of frustration because of what had happened a few weeks before does not in my view excuse his refusal to co-operate in the provision of information to that official. As to the second, the fact that the Claimant had made an application to the European Court of Human Rights was no excuse at all for his refusal to sign the bio-data form presented to him.

48. In fact, these instances of lack of co-operation by the Claimant do not stand alone. There is a substantial body of contemporaneous evidence that the Claimant was deliberately withholding his co-operation from the deportation process:

(1) On 7 February 2005 he was interviewed, but gave minimal details in response to questions. In particular he did not give his mother's full names, though it appears from the previous witness statement of his dated 16 August 2004 in his immigration appeal that he was aware of them (the name given there is Maryam Adi Amin, although that should be compared with a witness statement she made dated 31 August 2008 giving her name as Hali Abdi Amin); there was also a discrepancy between the name he gave for his father on the form and in his witness statement (respectively, Mohammed Hussein Said and Mohammed Hussein Sicid). The Claimant also refused to sign the form;

(2) On 18 May 2005 there was a further attempt to interview to the Claimant, but he did not co-operate. He refused to sign a disclaimer form (i.e. to indicate he was prepared to co-operate in his voluntary return to Somaliland and to assist in obtaining an EU travel document which would facilitate his removal);

(3) The Claimant's refusal to sign such a disclaimer form was a continuing impediment to effecting the removal of the Claimant, as he knew. He was given a note dated 24 September 2005 informing him that his deportation appeal had been dismissed, and that the Secretary of State was continuing to seek to make arrangements to remove him, which stated "However this is taking longer than we would like because you have not informed us of whether you intend to sign a disclaimer". A similar note was given to him dated 30 March 2006. The Claimant did not offer to sign a disclaimer in response to these or any other notes sent to him;

(4) On 15 February 2006 the Claimant was interviewed and provided some information which was set out in the bio-data form, which on this occasion he signed. But this time he did not supply his mother's full name nor that of his father (as compared with what he had said in his witness statement of 14 August 2004); nor did he identify his father's place of birth as Hargeisa (even though that had been set out in the previous bio-data form drawn up from information supplied by him);

(5) On 31 March 2006 the Claimant was interviewed by Gemma Sturgeon, an immigration official. He told her that he would not co-operate because he had already completed a bio-data form (i.e. on 15 February 2006); according to her note of the meeting and a later signed statement from her, when Ms Sturgeon told him that that form did not contain sufficient information he "got up and walked out of the room". As a result the Claimant was served with an IS 35 notice warning that he could be prosecuted for non-compliance in answering questions (i.e. under s. 35 of the Asylum and Immigration Act 2004);

(6) On about 20 April 2006 the Claimant was interviewed by another immigration official, Bob Phee. The Claimant refused to sign the disclaimer form and stated that he did not wish to return to Somaliland. According to the note of the interview made by Mr Phee shortly afterwards, when the Claimant complained about his detention Mr Phee explained that the reason for it was his non-co-operation in relation to the required travel document, at which the Claimant "started to rant that he would not co-operate with the immigration service anymore"; Mr Phee told him that he had answered all of the questions he had put in his application for review of his detention, and "He then stormed out of the room." As a result, Mr Phee recommended that the Claimant should be prosecuted for non-compliance (in the event, this suggestion was not pursued). This interview resulted in another note to the Claimant, dated 2 May 2006, which stated: "We are continuing to make arrangements to obtain a travel document for your removal from the United Kingdom. On 20 April 2006 you refused to co-operate with documentation. By not co-operating it is viewed as a deliberate attempt to thwart the removal process. To avoid prolonged detention, you are advised to sign the attached disclaimer." The Claimant did not do so; nor did he reply to this or any other note to dispute the claim that he had been uncooperative;

(7) A note to the Claimant in similar terms was sent on 1 July 2006. This note added that his continued refusal to co-operate was viewed as a deliberate attempt to thwart

the removal process, and stated that continued failure to co-operate could lead to his being prosecuted under s. 35 of the Asylum and Immigration Act 2004. A contemporaneous internal note made the fair comment, "He is determined that he will not be removed to Somalia and has no wish to sign a disclaimer for voluntary removal to Somalia. Various interviews with the subject have resulted in either him walking out or being aggressive and abusive";

(8) On 13 July 2006 the Claimant was interviewed by Bernadette Downey, an administrative officer at Dover IRC. According to a statement that Ms Downey prepared later, the Claimant asked her why he was regarded as not complying, and she replied that he had walked out of the interview at Colnbrook IRC on 5 April 2006 (this was probably a reference to his interview with Mr Phee). The Claimant responded that that was Colnbrook, but he was now at Dover, and indicated that he was now willing to sign the disclaimer. But when she met him later in the day to present the disclaimer to him for signature, he refused to sign, saying that he had spoken to his legal representatives who were making an application to the European Court of Human Rights on his behalf (see paras. [46] and [47] above);

(9) On 31 July 2006 another note was sent to him in terms similar to that of 1 July 2006. It failed to produce any co-operation from the Claimant;

(10) When the official from Somaliland attended Colnbrook IRC on about 25 October 2006 (see para. [34] above), no effective interview could be arranged with the Claimant, because of the dearth of information he had provided;

(11) In a monthly progress report dated 18 January 2007 sent to the Claimant it was stated "The current barrier to your removal is your non-compliance with the Immigration Service". The Claimant did not respond to offer his co-operation;

(12) A further monthly progress report dated 3 May 2007 repeated the point, stating that the current barrier to the Claimant's removal was that he had "consistently refused to co-operate with the documentation process"; it went on, "We are continuing to make arrangements to obtain a travel document for your removal from the United Kingdom. However, this is taking longer than we would like because you have refused to be interviewed by the Immigration Service authorities. If you wish to assist us in progressing your case, and potentially reducing the time you spend in detention prior to removal, please speak to one of the Immigration Officers at the Removal Centre". This seems to have produced some result, in that the Claimant was interviewed again on 6 May 2007, at which time he was assessed as being annoyed but compliant; he said would complete the bio-data form again. This time he stated that his last address in Hargeisa was in a town called Lanta; this was information which he had not proffered previously, and hence supports the impression that he had failed previously to co-operate as fully as he could;

(13) On 8 May 2007 the Claimant's claim in these judicial review proceedings for an interim order directing his release came before Collins J in the Administrative Court. The Secretary of State, through Mr Payne, conceded permission. Collins J declined to make the interim order sought. Mr Payne indicated that the Secretary of State proposed to write to the Claimant setting out the information he sought, including from the Claimant's family, and Collins J indicated that that would be a good idea. There was no express acceptance in court by Counsel for the Claimant

that he would co-operate in that process, but with the support of the learned judge behind the proposal the Secretary of State could reasonably think that it might be an approach which would bear fruit. A letter setting out the information sought was sent on 14 May 2007, and Ms Tanna for the Claimant went to some lengths to seek to obtain answers both from the Claimant and from family members, which she set out in a witness statement dated 25 May 2007 (see paras. [56]ff below). She was able to add some information to what had been supplied before, in particular identifying his clan as the Gadabursy clan. The Claimant also agreed to be interviewed again, which took place on about 29 May 2007. He filled out another bio-data form and signed it. There were still discrepancies between the names he gave for his mother and father ("Male Abdi Amin", "Mohammed Hussein") and those given on previous forms and in his witness statement of 14 August 2004, and now the Claimant put his place of birth "Not known" (rather than Hargeisa, as he had stated before) – so it was difficult to conclude, even now, that the Claimant was being fully co-operative. On this occasion he also identified his clan as the Gadabursy clan, claiming that his brother told him what clan he belonged to. This information must have been easy for him to obtain at all times: see paras. [56]-[58] below. Its provision at this point supports the view that previously he had not been co-operating as fully as he could have done, but suggests that he was making some effort to be more candid at this stage.

49. It is clear from detention reviews carried out for the Secretary of State and other contemporaneous documents from the period of his immigration detention that the assessment was that the Claimant represented a high risk of absconding and was likely to re-offend if he were released. They also support the evidence for the Secretary of State that it was thought that he could be removed if he co-operated with the removal process.

50. In April 2006 there were exchanges between officials in which the possibility of the Claimant's release was mooted. In a memo of 10 April 2006, Mr Hearn wrote to Mr Lambert: "We have reached something of an impasse on this case. The [Emergency Travel Document] is not the only barrier to removal given that we do not return to Somalia against the individual's will. We need to make a decision on this case soon if it becomes clear that Mr Hussein will not co-operate with the documentation process and that therefore removal cannot be effected, we will need to consider release on tagging. Before we do so could you please check with Colnbrook as to whether Mr Hussein is likely to co-operate with the disclaimer". By a memo 19 April, Mr Lambert asked Mr Atkinson to check on the position, and asking him, if the Claimant was not co-operating, to prepare for his release subject to electronic tagging. Mr Atkinson reported back that the Claimant was not co-operating, but nonetheless proposed that detention should be maintained. That view prevailed.

51. In an internal note of 2 August 2006 Mr Hearn recorded: "Given [the Claimant's] propensity to re-offend and his overall record of non-compliance, Mr Hussein is unlikely to co-operate with any conditions of temporary release. The removal issue is difficult but here Mr Hussein comes from Somaliland and there has been significant progress in routing [i.e. arranging carriers] which means that removal will be a realistic prospect within the next few months", and recommended that his detention be continued. Accordingly, it is clear that consideration was given to the possibility of release subject to electronic tagging, but it was not thought to be satisfactory.

52. During his immigration detention, the Claimant made a number of unsuccessful applications for bail to Immigration Judges. In written submissions prepared by the Claimant's legal representatives for a bail hearing on 13 December 2006, the Immigration Judge was "urged to consider electronic tagging as an alternative to continued detention", and reference was made to section 36 of the Asylum and Immigration Act 2004 (which introduced powers for electronic monitoring). The document went on to make the submission that "the applicant has already passed into the phase of languishing in indefinite immigration detention. The Asylum and Immigration Tribunal should make such a finding and recognise the seriousness of the situation that the Home Office has allowed to pass". The Immigration Judge rejected the application for bail. The significance of this is that an independent judge at this stage did not consider electronic tagging to be a viable alternative to detention in the Claimant's case (i.e. he endorsed the view of immigration officials on this point); the Judge also noted the lengthy delay, but indicated that if it was to be said that this rendered the Claimant's detention unlawful it would be a matter for another court – the Judge did not consider that the Claimant's detention had been so extended as to make it obvious that he should be released.

53. A decision letter dated 15 January 2007 was sent to the Claimant to explain that continued detention was considered appropriate because it was assessed that he was likely to abscond if given temporary admission or release. A renewed Authority for Detention was issued on the same date.

54. A further application for bail was dismissed by an Immigration Judge on 25 January 2007, although the Judge indicated that he would look favourably on any future application if no further progress were made by the Home Office. By letter dated 14 March 2007 from the Claimant's solicitors, he requested access under section 7 of the Data Protection Act 1998 to all personal data about himself held by the Home Office. A request for additional information about removals to Somaliland was made under the Freedom of Information Act 2000 by letter dated 22 March 2007 from the Claimant's solicitors. After a lengthy delay, these requests appear to have led to the disclosure of much of the material to which reference has been made above.

55. On 14 April 2007 the Claimant issued his claim form in these proceedings seeking judicial review of his continued detention and other relief. On 8 May 2007 the hearing before Collins J took place (see para. [48(13)] above).

56. By letter dated 14 May 2007 from the Home Office, the Secretary of State made a further effort to obtain bio-data from the Claimant by setting out a list of questions regarding his clan, full last known address in Somaliland, details of any schools, mosques, hospitals or doctors attended in Somaliland and details of his parents and siblings, including their dates and places of birth. The Claimant gave his solicitor permission to contact his brother and his mother in relation to this. His own responses, provided in a telephone conversation on 16 May 2007, were set out in the third witness statement of Ms Tanna, dated 25 May 2007. He told Ms Tanna that he found it difficult to recall specific details of his childhood in Somaliland, and that there was no system of addresses there as in Europe. He did not provide precise details of the places of birth of his parents and siblings, and no dates of birth. According to Ms Tanna's witness statement, in respect of his clan he told her "that he had spoken to his brother Amin Mohammed Hussein previously who had told him that they were from the Gadabursy clan".

57. This is of some significance, because it is clear from the decision of the Immigration Judge of 25 February 2005 that the Claimant had spoken to his brother to obtain information in the course of the hearing of his appeal against deportation: see [28]-[29]. At that hearing there was debate about the Claimant's clan, and he denied knowledge of his father's clan. But there is at least a possibility (to put it no higher) that his brother would have been able to inform him, and would have informed him then, that they were from the Gadabursy clan. But that was not disclosed either to the Immigration Judge nor in the Claimant's interviews with immigration officials before 29 May 2007. At the hearing before me, in an attempt to de-fuse this point, Miss Dubinsky, on instructions from Ms Tanna, sought to suggest that in fact the Claimant had not spoken to his brother before 16 May 2007, but did so only in response to the letter of 14 May 2007 sent on behalf of the Secretary of State. I find this very difficult to accept. Ms Tanna's third witness statement was precise and clear on this point; it was written less than ten days after the conversation; it does not seem likely that Ms Tanna would have mis-remembered what she had been told by the Claimant at that point; it does not seem likely that she would have a better recollection of the conversation now, more than two years after it took place. No application was made to put in any witness statement from Ms Tanna to retract the evidence given by her in her third witness statement and to explain the basis on which the retraction was to be made. Accordingly, I think it is appropriate to take this part of her evidence in her third witness statement at its face value.

58. This is an area in which it would have been valuable to have observed the Claimant's reaction to questions in cross-examination. Did he know and deliberately suppress information about his father's clan? He certainly would have known that this was important information about himself, since at paragraph 20 of his witness statement of 8 June 2009 he informed the court that "Clans in Somalia go down through the father". However, since the Claimant was not cross-examined, and having regard to the approach to the evidence set out in para. [10] above, I think that it would not be right to conclude that he had actual knowledge of his clan before late May 2007 and deliberately withheld the information from the Immigration Judge and the Secretary of State. Nonetheless, it is clear that the Claimant's brother knew this, the Claimant had ready access to him, and the fair inference is that the Claimant could easily have checked on this information and supplied it to the immigration officials who sought to interview him, had he been seeking to co-operate in providing them with information.

59. In the course of her inquiries in response to the letter of 14 May 2007 Ms Tanna managed to speak to the Claimant's brother, Amin Mohammed Hussein. He provided little additional information, other than to confirm that the family came from an area called Eftean in Hargeisa in Somaliland and to give his own date of birth. He explained that his mother was unwilling to provide information because she was angry with the Claimant for the problems he had caused for the family. Ms Tanna attempted to speak to her, but without success.

60. The Claimant made a first witness statement dated 10 August 2007 in support of an application to the Asylum and Immigration Tribunal for bail on 14 August 2007. In that, the Claimant sought to downplay the significance of the offences of which he had been convicted – "To the best of my recollection, I have never been convicted of any offence involving violence" (cf. para. [25] above). He said he had overcome his problem of alcohol addiction, and had not drunk since 2003. He also said that his

solicitors had arranged for him to have support from NASS under hard cases support, so that if released he would not be destitute. He reiterated the previous denial given by his solicitor on his behalf that he had been deliberately uncooperative. He strongly denied this, and claimed that he had "usually answered [immigration officials'] questions to the best of [his] ability". He said he did not know the answers to many of the questions he had been asked. He admitted that at times he had lost his patience and refused to continue the interview.

61. The Claimant also addressed the circumstances in which he had been removed into ordinary prison at HMP Brixton because of a disturbance at Colnbrook IRC on 14 May 2007 in which he was involved. He said that he had acted in opposition to a new rule regulating and somewhat restricting the system of association and access to the mosque which had previously been in place. The new rule introduced staggered times by wings for association and access to the mosque, whereas before everyone from all the wings had associated together. He said that it was a peaceful protest, involving the refusal by persons detained at the IRC to return to their rooms when required to do so that evening.

62. The Secretary of State's case on this was set out in a letter dated 8 June 2007 to the Claimant's then solicitors, which stated that the Claimant "did not comply with staff requests to lock up for a roll count and incited other detainees to do the same." The Claimant has not denied this account; indeed, his own witness statement tends to support it.

63. Internal security and proper order are important matters at an IRC. In the interest of everyone there, in-mates are subject to basic discipline and an obligation to comply with rules introduced to ensure good order. There is very little information available to me relating to what happened in this incident – it was treated by both parties as rather a peripheral issue. On the material available to me, I cannot say that the Claimant's transfer to HMP Brixton was improper or unjustified.

64. The Claimant's solicitor wrote on 12 June 2007 requesting that the Claimant be moved back to an IRC. The response, dated 22 June 2007, stated that the Claimant had been referred to Colnbrook IRC, which refused to accept him, because of his previous misconduct; Colnbrook IRC was privately run, and the Secretary of State had no power to compel it to accept the Claimant; and as a result of the Claimant's criminal record no other detention centre was suitable, so he would have to remain in prison. I had very little information about this decision, which was treated as peripheral and was not directly under challenge. I am not in a position to say that it was improper or unjustified.

65. A Home Office internal note of 5 June 2007, reviewing the position after the further interview with the Claimant on 29 May 2007 and the signing of the 2007 MOU on 3 June 2007, stated that the Claimant's case would be put forward under that MOU as a priority removal, and on that basis recommended maintaining his detention. Since the Claimant had now provided information about his clan, which might potentially be persuasive for the Somaliland authorities, and since the signing of the 2007 MOU indicated that there was a renewed willingness by the Somaliland authorities to consider removals there, this was in my view a reasonable position for the Secretary of State to adopt. The reference to the priority to be given to the Claimant's case indicates an awareness that matters should now be brought speedily to a head. The

indication from the Immigration Judge on the bail application on 25 January 2007 (para. [54] above) served to underline the point. In my view, by this stage matters should have been brought to a head very speedily.

66. A further internal note of 9 July 2007 noted that the position on removals to Somaliland had been checked, and it had been confirmed that enforced removal there was possible to Berbera in Somaliland (although removal to Hargeisa itself was looking unlikely). It was decided that the Claimant's detention should be maintained, with efforts to be made to expedite his removal. This note concentrated on the viability of removal routes to Somaliland; it did not address what steps had been made to approach the Somaliland authorities to see if the information available about the Claimant would satisfy them that he could be returned to Somaliland. In fact, it seems that by this stage an assessment had been made that the information provided thus far was still inadequate to be passed to the Somaliland authorities.

67. On 31 July 2007 the Claimant made a further application for bail to an Immigration Judge. It was dismissed.

68. In the monthly progress report dated 3 August 2007 sent to the Claimant, his previous lack of co-operation was referred to and he was again encouraged to co-operate further. The inference to be drawn is that by this time officials had established that they did not have sufficient material with which to approach the Somaliland authorities.

69. The Claimant made a further witness statement dated 10 Aug 2007 in support of a further bail application. He asked to be released from detention to continue his life in the UK.

70. The bail hearing took place on 21 August 2007. The Immigration Judge granted him bail. It seems a reasonable inference that his release on bail was ordered at that stage because of the very long period during which he had been detained without being removed and the absence of any immediate prospect that he would be removed to Somaliland.

71. In about early 2009 those acting for the Claimant gained access to the evidence and documents disclosed by the Secretary of State in the *Abdi* litigation. These materials included some internal Home Office memos which suggested that the 2003 MOU was regarded as ineffective, and that the Somaliland authorities required documentary proof to accompany any bio-data form submitted to them (the Claimant was, of course, unable to supply any documentary proof of any statements which might be contained in his bio-data form). However, the Secretary of State filed evidence in the *Abdi* proceedings to the effect that these memos were incorrect as statements of the true position, which evidence was accepted by Davis J in those proceedings: see *Abdi No. 1* at [158]-[159]. That evidence was also available before me, and I also accept it. As set out above, there was also a witness statement of Mr Carlos before me to the effect that the Somaliland authorities did not at any time insist upon being provided with documentary proof of statements in a bio-data form as a precondition for accepting a person for removal to Somaliland, which I also accept.

The Statutory Framework

72. Section 3(5)(a) of the 1971 Act provides that a person who is not a British citizen is liable to deportation from the UK if "the Secretary of State deems his deportation to be conducive to the public good …".

73. Paragraph 2(2) and (3) of Schedule 3 to the 1971 Act provides:

> "(2) Where notice has been given to a person in accordance with regulations under [section 105 of the Nationality, Immigration and Asylum Act 2002 (notice of decision)] of a decision to make a deportation order against him and he is not detained in pursuance of the sentence or order of a court, he may be detained under the authority of the Secretary of State pending the making of the deportation order.
>
> (3) 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)."

The basis of the Claimant's claim for damages for false imprisonment and declaratory relief

74. Miss Dubinsky puts the claim forward on three grounds;

(1) She relies upon the principles articulated by Woolf J in *R v Governor of Durham Prison, ex p. Hardial Singh* [1984] 1 WLR 704 to submit that throughout the Claimant's immigration detention there was no reasonable prospect of his removal to Somaliland, so that his detention under the power contained in Schedule 3 to the 1971 Act was unlawful throughout;

(2) In the alternative, again relying on the principles in *Hardial Singh*, she says that at some point the immigration detention of the Claimant became unreasonably long and hence unlawful;

(3) Finally, she submits that the Claimant's detention was unlawful because the Secretary of State failed to comply with his policy as set out in the OEM: (i) the Claimant was not detained for the shortest period of time which was necessary in his case; and (ii) reasonable alternatives to detention were not explored and pursued, namely release with hard cases support for the Claimant in the community from NASS and/or electronic tagging, so as to reduce the risk of the Claimant re-offending or absconding.

75. It is common ground that the principles set out in *Hardial Singh* apply. Mr Payne submits that the Claimant's immigration detention was lawful at all times. He submits that there were objective grounds for assessing that there was a reasonable prospect of removal of the Claimant; that the Claimant's detention was not unreasonably long, in particular because of the Claimant's lack of cooperation with the removal process, for

which he must bear responsibility; and that there was no failure to comply with the OEM.

76. I turn to consider Miss Dubinsky's submissions in turn. It is convenient to address grounds (1) and (2) together.

Ground (1): there was never any realistic prospect of removal of the Claimant

Ground (2): the detention of the Claimant was unreasonably long

77. *Hardial Singh* concerned the immigration detention of a claimant in respect of whom the Secretary of State had made a deportation order. The relevant principles which fell to be applied were set out by Woolf J at [1984] 1 WLR 704, 706B-F as follows:

> "Under Schedule 3 to the Immigration Act 1971 the Secretary of State has the power to detain an individual who is the subject of a decision to make a deportation order, under paragraph 2(2) of the Schedule, pending the making of the deportation order. That power requires the person to be detained under paragraph 2(3) after the making of a deportation order and pending the removal of the person from the United Kingdom. Since 20 July 1983, the applicant has been detained under the power contained in paragraph 2(3) of Schedule 3 to the Immigration Action 1971. Although the power which is given to the Secretary of State in paragraph 2 to detain individuals is not subject to any express limitation of time, I am quite satisfied that it is subject to limitations. First of all, it can only authorise detention if the individual is being detained in one case pending the making of a deportation order and, in the other case, pending his removal. It cannot be used for any other purpose. Secondly, as the power is given in order to enable the machinery of deportation to be carried out, I regard the power of detention as being impliedly limited to a period which is reasonably necessary for that purpose. The period which is reasonable will depend upon the circumstances of the particular case. What is more, if there is a situation where it is apparent to the Secretary of State that he is not going to be able to operate the machinery provided in the Act for removing persons who are intended to be deported within a reasonable period, it seems to me that it would be wrong for the Secretary of State to seek to exercise his power of detention.
>
> In addition, I would regard it as implicit that the Secretary of State should exercise all reasonable expedition to ensure that the steps are taken which will be necessary to ensure the removal of the individual within a reasonable time. In this connection I have been referred to two authorities which give some assistance …"

78. For the purposes of the submission on ground (1), it is the third of the limitations referred to by Woolf J which is directly relevant. But although it is conceptually distinct from the first and second limitations (see *R (I) v Secretary of State for the Home Department* [2002] EWCA Civ 888 – "*I*" - at [46]-[47] per Dyson LJ) it is clearly linked to them (see *R (A) v Secretary of State for the Home Department* [2007] EWCA Civ 804 - *"A (Somalia)"* – at [45] per Toulson LJ). The second limitation is the basis for Miss Dubinsky's submissions on ground (2). In the circumstances of this case it is appropriate to consider grounds (1) and (2) together. The question on ground (1) is whether it was apparent to the Secretary of State at any stage that he was not going to be able to operate the machinery provided in the 1971 Act to remove the Claimant within a reasonable period; the question on ground (2) is whether the Claimant was detained for longer than a reasonable period.

79. In addressing the question on ground (1), the court has to ask whether there was "some prospect" of the Claimant being removed within a reasonable period: see *R (Khadir) v Secretary of State for the Home Department* [2006] 1 AC 207, [32]-[33] per Lord Brown of Eaton-under-Heywood, referring to the similar power of detention in paragraph 16 of Schedule 2 to the 1971 Act. It is for the court to assess whether the period in contemplation was a reasonable one in all the circumstances. The court is not confined to applying *Wednesbury* principles to assess whether the Secretary of State himself rationally held the view that the period in contemplation was reasonable. But at the same time, in a case such as this, where a judgment about the availability of removal depended in a significant way upon an assessment of how a foreign government would react, the court will be slow to second-guess the assessment in that regard which is made by the executive. This reflects the fact that the executive is much better placed than the court to assess the likely reactions of foreign governments, both because its representatives are directly involved in the relevant negotiations with those governments and because they are themselves, or have access to assessments by, skilled diplomats and officials with knowledge and experience of foreign affairs.

80. An analogous issue arose in *Youssef v The Home Office* [2004] EWHC 1884 (QB), which concerned the question whether the claimant could safely be deported to Egypt, without risk of his being ill-treated there. The claimant was detained while the UK government sought assurances as to his treatment from the Egyptian government. The lawfulness of his detention, on *Hardial Singh* principles, depended on whether there was a reasonable prospect of securing agreement from the Egyptian government to give sufficiently extensive and effective assurances. The proper approach was set out by Field J at [62]-[63] as follows:

> "62. Whilst it is a necessary condition to the lawfulness for Mr. Youssef's detention that the Home Secretary should have been reasonably of the view that there was a real prospect of being able to remove him to Egypt in compliance with Article 3 ECHR, I do not agree that the standard by which the reasonableness of that view is to [be] judged is the *Wednesday* standard. I say this both because I can find nothing in the judgement of Woolf J. in *Hardial Singh* that points to this being the standard and because where the liberty of the subject is concerned the court ought to be the primary decision-maker as

> to the reasonableness of the executive's actions, unless there are compelling reasons to the contrary, which I do not think there are. Accordingly, I hold that the reasonableness of the Home Secretary's view that there was a real prospect of being able to remove Mr. Youssef to Egypt in compliance with Article 3 ECHR is to be judged by the court as the primary decision-maker, just as it will be the court as primary decision-maker that will judge the reasonableness of the length of the detention bearing in mind the obligation to exercise all reasonable expedition to ensure that the steps necessary to effect a lawful return are taken in a reasonable time.
>
> 63. It follows that I respectfully disagree with the approach taken by Sullivan J. and apparently also by Andrew Collins J; and I do so in the realisation that if the challenge is not to the lawfulness of detention but to the decision to remove or deport, it will be by judicial review and the reasonableness of the Home Secretary's view will indeed be assessed on *Wednesday* principles. In most false imprisonment and habeas corpus proceedings the difference between the two approaches is likely to be more apparent than real because when applying the approach I hold to be the correct one, the court ought in my opinion to have regard to all the circumstances and in doing so should make allowance for the way that government functions and be slow to second-guess the Executive's assessment of diplomatic negotiations. However, there may be cases, albeit few in number, where the liberty of the subject will depend on which approach is applied."

(See also *A (Somalia)* at [62] per Toulson LJ, with whose judgment Longmore LJ agreed).

81. In the present case, the evidence about the conduct of negotiations with the Somaliland authorities is not detailed (presumably because of the difficulties of presenting such evidence in open court, which would be in breach of the usual diplomatic convention that private exchanges between governments are to be treated as confidential, and which might therefore undermine this country's relations with Somaliland). I also do not have detailed information about the type and quantity of bio-data which the Somaliland authorities have in fact accepted as sufficient in relation to other cases where returns there have been made. Such returns had been very few, so it may well be that no clear pattern had emerged of what the Somaliland authorities would or would not accept by way of bio-data. This makes it difficult for the court, and must also have made it difficult for the Secretary of State, to form any clear, final view about whether the Claimant might – if he had co-operated fully with the attempts to obtain bio-data about him – have been able to provide sufficient bio-data to satisfy the Somaliland authorities that he should be accepted for removal to Somaliland.

82. In my view, however, it is clear on the evidence that the relevant officials acting for the Secretary of State believed that removal of the Claimant to Somaliland, if he

cooperated with the removal process, was a real possibility. The fact that the Somaliland government entered into the 2003 MOU could not simply be dismissed as an empty gesture. The fact that the Somaliland authorities remained willing to engage with the UK government to negotiate the 2007 MOU and continued to accept throughout the principle that persons with a sufficient link with Somaliland could be removed there gave objective grounds to support the assessment of the executive that, in an appropriate case, the Somaliland authorities would accept removals there.

83. Taking these points together with the proper legal approach on an issue relating to the assessment of the likely behaviour of a foreign government set out by Field J in *Youssef* at [63]-[64], I conclude that the Secretary of State had reasonable grounds throughout the period of the Claimant's immigration detention to believe that one of the conditions which had to be satisfied before the Claimant could be removed to Somaliland (namely, the willingness of the Somaliland authorities to accept removals in appropriate cases) would be fulfilled.

84. Two other conditions also required to be fulfilled before the Claimant could be removed to Somaliland: (i) there would have to be a route in place via which his removal there could be effected and (ii) there would have to be sufficient bio-data available about the Claimant to satisfy the Somaliland authorities that he did indeed have sufficient links with Somaliland. The possibility of these two conditions being fulfilled was linked with the question of the co-operation of the Claimant in the removal process. For the period until late July 2006, the Secretary of State could not remove an individual to Somaliland unless he signed a form indicating his consent, which the Claimant declined to do. The Claimant was also unforthcoming about details of his background in Somaliland.

85. The judgment of the Court of Appeal in *A (Somalia)*, on appeal from Calvert-Smith J's judgment referred to in para. [33] above, bears on the proper approach to these issues. *A (Somalia)* concerned the immigration detention of the claimant for an extended period pending his deportation to Somalia. The claimant had committed very serious sexual offences and had made it clear that he was determined not to be returned to Somalia. Calvert-Smith J held that the claimant had been unlawfully detained from 4 December 2004 to 20 July 2006, but lawfully detained from 21 July 2006 to the date of his judgment (7 December 2006). According to Calvert-Smith J's judgment, the difference in the lawfulness of the claimant's detention depended principally upon the fact that in the first period only voluntary removals to Somalia were possible on the available carriers, and there was no way to effect enforced removals (and hence, since the claimant refused to cooperate in his removal, it was not possible to remove him), whereas in the latter period carriers were prepared to effect enforced removals to Somalia, so that it became possible to remove the claimant there: see the summary of the position by Toulson LJ in the Court of Appeal at [17] and his analysis of Calvert-Smith J's judgment at [30]-[33]. The difficulties regarding removal to Somalia in that case were essentially the same as the difficulties regarding removal to Somaliland in the present case (see paras. [29] – [39] above).

86. In the Court of Appeal there was debate about the significance of the fact that the claimant could have been removed to Somalia throughout the period of his immigration detention, if he had agreed to that course being taken. Toulson LJ set out the core principles derived from *Hardial Singh* and pointed out that the powers of detention under paragraph 2(2) and 2(3) of Schedule 3 to the 1971 Act may be

exercised only during such period as is reasonably necessary for the purpose of removing the person detained, and that the period which is reasonable will depend on all the circumstances of the case ([43]). He expressed the principle in this way at [45]:

> "… there must be a sufficient prospect of the Home Secretary being able to achieve that purpose to warrant the detention or the continued detention of the individual, having regard to all the circumstances including the risk of absconding and the risk of danger to the public if he were at liberty. Counsel for both parties agreed with that approach as a matter of principle."

87. Toulson LJ considered the significance to be attached to the claimant's refusal to accept voluntary repatriation at [54]-[55]:

> "54. 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.
>
> 55. A risk of offending if the person is not detained is an additional relevant factor, the strength of which would depend on the magnitude of the risk, by which I include both the likelihood of it occurring and the potential gravity of the consequences. Mr Drabble submitted that the purpose of the power of detention was not for the protection of public safety. In my view that is over-simplistic. The purpose of the power of deportation is to remove a person who is not entitled to be in the United Kingdom and whose continued presence would not be conducive to the public good. If the reason why his presence would not be conducive to the public good is because of a propensity to commit serious offences, protection of the public from that risk is the purpose of the deportation order and must be a relevant consideration when determining the reasonableness of detaining him pending his removal or departure."

88. He reached this conclusion, and overruled the decision of Calvert-Smith J that the claimant's detention had been unlawful for part of the period in question, at [58]-[59]:

> "58. The period of A's detention after he would otherwise have been entitled to release at the end of his custodial sentence was lengthy. However, throughout that period it would have been possible for him to be transported to Somalia, if he had not refused to go, and there was moreover some prospect of the Home Secretary being able to carry out his enforced removal, although there was no way of predicting with confidence when this might be. In the meantime, on the judge's findings, the risk of A absconding if he were at liberty was as high as it could be. There was also a high risk of him re-offending, and, given the nature of his previous offending, this would have been a very worrying prospect. For the reasons already given, it was in my view wrong in principle to offset against those factors A's reasons for not wishing to return to Somalia. These were irrelevant to the lawfulness of his detention in circumstances where his return would not have involved a breach of the Refugee Convention or the European Convention. I accept also the argument on behalf of the Home Secretary that the misleading statement made by Home Office officials, to which I have referred, cannot be said to have made A's detention unlawful.
>
> 59. I would hold that the period of A's detention, despite its length, was in the circumstances reasonably necessary for the purposes of the deportation order and so lawful. I would therefore allow the Home Secretary's appeal. …"

89. Longmore LJ agreed with the judgment of Toulson LJ. Keene LJ agreed that the claimant's refusal to accept voluntary repatriation was a factor relevant to rendering his detention lawful throughout the whole period in question, albeit he did not regard it as of fundamental importance: [79]. At [82] he said this:

> "The combination of these two factors, namely a very high risk of absconding if released and a high risk of sexual re-offending, must be seen as justifying allowing the Secretary of State, in the words of Simon Brown LJ in *R (I)*, "a substantially longer period of time within which to arrange the detainee's removal abroad" (paragraph 29). Whether the length of detention up to and including the "middle period" was nonetheless so long as to be unreasonable and thus unlawful is far from easy to determine. I recognize that it must be exceptional to regard lengthy administrative detention as lawful when there is some prospect of removal but no clearly predicted date for it. However, when one adds to the assessment the fact that this detainee could have returned voluntarily to Somalia but had refused to do so, it seems to me that the answer has to be that

> his continued detention was still reasonable. He had it in his own hands to secure his release from detention by choosing to return voluntarily."

90. In *I*, to which Keene LJ referred, Simon Brown LJ (as he then was) also accepted the relevance of a claimant's refusal to accept voluntary repatriation as one factor bearing on the question of the reasonableness of a period of immigration detention: [30]-[31]. On the facts of that case, the possibility of voluntary return (in that case, to Afghanistan) had arisen only right at the end of the period and was discounted by Simon Brown LJ as a factor of any weight for that reason ([32], [37]; cf [41] per Mummery LJ and [50]-[52] per Dyson LJ).

91. In the light of these authorities, I conclude that the refusal of the Claimant to agree to sign a disclaimer indicating his willingness to return voluntarily to Somaliland so as to allow the Secretary of State to remove him there in the period when only voluntary returns were possible was a factor of considerable weight tending (alongside other factors, reviewed below) to justify the detention of the Claimant. The present case is similar in that regard to *A (Somalia)*.

92. That leaves the third condition for a potentially successful removal, namely that the Somaliland authorities would accept the Claimant as a person having a sufficient connection with Somaliland as to persuade them to agree to his return there. In this regard, the failure of the Claimant to co-operate with the Secretary of State's attempts to gather information about his links with Somaliland is significant in three ways.

93. First, the failure of the Claimant to co-operate and his obstructiveness mean that he bears a considerable degree of responsibility for the situation in which the Secretary of State found himself over a substantial period. This is a factor of considerable weight in support of the legality of his detention over a long period of time, by analogy with *A (Somalia)*. As with the significance to be attributed to a refusal to agree to voluntary return in that case, the weight to be attached to this factor seems to me to be natural, in light of the basic considerations that there is a strong public interest in maintaining fair and effective immigration controls; the 1971 Act specifically provides for the Secretary of State to seek to remove persons on the ground that it is conducive to the public good under s. 3(5); and the Act confers powers upon him under paragraph 2 of Schedule 3 to detain persons precisely to ensure the effective implementation of such controls and decisions to remove persons on such grounds. It would undermine fair and effective immigration control and the proper implementation of the Secretary of State's powers to act in the public interest if a person who is for good reason to be removed could, by withdrawing co-operation when it is required for some aspect of the removal process, defeat that process and procure his release from immigration detention. This is not to say that detention can be maintained indefinitely on the basis that an individual will not co-operate with the removal process in some necessary way (compare *R (Bashir) v Secretary of State for the Home Department* [2007] EWHC 3017 (Admin)): the relative weight to be given to other factors, and in particular the individual's interest in being at liberty, will increase over time and eventually outweigh this factor. But if there is a wilful failure on the part of an individual who is to be removed to co-operate in some necessary

aspect of the removal process, that will usually be an important consideration to be taken into account when assessing the continued legality or otherwise of his detention.

94. On the particular facts of this case, in the early stages of his immigration detention the Claimant misrepresented that he was from Mogadishu, not Somaliland. This created doubt about his origins at the outset, and diverted the Secretary of State away from considering removal to Somaliland. After the Claimant accepted that he was from Somaliland, he was evasive in providing full details about his parents and failed to co-operate by providing important details about his clan (which he had ready means of finding out, throughout his detention) until late May 2007.

95. Secondly, once the Claimant acknowledged that he was in fact from Somaliland, the Secretary of State had reasonable grounds for thinking that it might be possible to obtain further information from him about his connections with Somaliland. At that stage, the lack of co-operation on the part of the Claimant fostered the impression that he might well have significant information which he could provide, but which he was deliberately withholding (his was not a case of a person being fully candid with the Secretary of State, who could then be confident that there genuinely was no more useful information likely to be extracted). In those circumstances, the Secretary of State was entitled to continue to press the Claimant for information to try to get to the bottom of what he could or could not provide.

96. The impression that the Claimant might well be able and willing to assist the Secretary of State, if he wanted to, was supported by occasions on which he appeared to soften his stance and to indicate that he would co-operate, only to retreat into obstruction again (see para. [48(8)] and [48(12)] above). It was also supported in May 2007 by his willingness to instruct his solicitor to seek to obtain information from his family and himself in an effort to answer the Secretary of State's questions in the letter of 14 May 2007. In the light of these gestures, the Secretary of State had reasonable grounds to believe that pressing the Claimant for more information might be productive.

97. Thirdly, the lack of co-operation and obstructiveness displayed by the Claimant constituted objective grounds supporting the Secretary of State's assessment that there was a serious risk that he would abscond in order to defeat the removal process if he were released: compare *I* and *A (Somalia)*.

98. The main thrust of Simon Brown LJ's judgment in *I* was to emphasise that the reasonableness of a period of detention pending removal will depend on the circumstances of the particular case (see [29], echoing Woolf J in *Hardial Singh*), and that a range of circumstances might be relevant to be taken into account in reaching a conclusion. The degree of risk of absconding and the degree of risk of re-offending, as well as the seriousness of the re-offending in prospect, all have a bearing on the question. The higher those risks and the more serious the possible offending which is in contemplation, the longer will be the period of detention allowed under Schedule 3 to the 1971 Act to enable the Secretary of State to seek to arrange the detainee's removal abroad: [29]. The likelihood or otherwise that removal will in fact prove to be possible is also relevant, as is the period of time during which the claimant has already been subject to immigration detention: [37]. The refusal of the claimant to cooperate with the process for his removal is also a relevant factor to be added to the

list. The burden is on the Secretary of State to satisfy the court on the balance of probabilities that the claimant is being properly detained "pending removal": [37].

99. On the particular facts of that case, Simon Brown LJ considered that the claimant's detention had become unlawful after some 16 months in custody. The claimant had been convicted on two counts of indecent assault and sentenced to three years imprisonment. Simon Brown LJ made reference to the fact that, while in immigration detention, the claimant had been subject to the same prison regime as a convicted prisoner ([18]), but did not explicitly identify that as a relevant factor in the assessment. In my view, however, it is a factor which is capable of having some weight in the overall assessment, depending on the particular circumstances of the case (for example, it may tend to reduce the significance of this factor when the individual's own conduct caused him to be allocated to an ordinary prison and thus made subject to an ordinary prison regime, as occurred in the present case from 14 May 2007).

100. The judgment of Dyson LJ confirms that the conditions in which a person is detained may be a relevant factor: see [48] and [56]. At [48] he said:

> "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."

101. Dyson LJ reached the same conclusion as Simon Brown LJ (i.e. that the detention in *I* had become unlawful) in circumstances where he considered that there was no evidence that the claimant was liable to re-offend, and only a risk (but no probability) that he would abscond: [56]. Mummery LJ dissented, on the grounds that he considered that there was a probability that the claimant would abscond ([43]), and that in the sensitive negotiations with countries neighbouring Afghanistan to allow for returns to Afghanistan it could not be said that those negotiations would probably fall through and that there was no real prospect or possibility of the Secretary of State being able to operate the machinery for removing the claimant within a reasonable period ([44]).

102. It is clear from these judgments that the lawfulness of an individual's detention for the purposes of removal depends upon an overall assessment from time to time of a range of factors. As is emphasised in all the authorities, each case depends upon its own particular facts.

103. My evaluation of the legality of the Claimant's detention in the present case is as follows. He had been convicted of serious (albeit not very serious) offences. He had given every sign of being a repeat offender. On the evidence available throughout his detention, the Secretary of State was entitled to regard the risk of his re-offending in potentially serious ways as high.

104. Miss Dubinsky submitted that I should have regard to the later conduct of the Claimant, after his release on 21 August 2007, and the fact that he had not re-offended since then. She said that since the court is the judge of whether the Secretary of State in fact had reasonable grounds to detain (as explained in *Youssef* and *A (Somalia)*), the court is not bound to confine its assessment to the picture which presented itself to the Secretary of State, but can look at the matter more widely, including by looking at things which happened after the period of detention.

105. I do not accept this. In my view, although the court is the judge of whether reasonable grounds for detention existed at any particular point in time, it makes that assessment by reference to the circumstances as they presented themselves to the Secretary of State. The Secretary of State needs to have means of assessing the legality of his actions at that time, in order to know what his legal duty is. Rule of law values indicate that the Secretary of State should be entitled to take advice and act in light of the circumstances known to him, without fear of being caught out by later circumstances of which he could have no knowledge.

106. Further, the legality of detention may in principle be tested in court at any time while it continues, (when the court invited to assess it will of necessity have regard to the circumstances as they present themselves at that time) as well as after it has come to an end. But Miss Dubinsky's proposed approach would mean that the answer about the legality of detention at a given point in time could vary, depending on when the individual went to court. In my view, this would be profoundly wrong as a matter of principle. The individual's detention must either be lawful or not at that given point in time; it cannot be (apparently) lawful when tested then but at the same time be inchoately or potentially unlawful, depending on events occurring perhaps months or years later. Indeed, on the logic of Miss Dubinsky's argument, it would also be relevant if later still the individual did in fact engage in further criminal behaviour (as is now alleged against the Claimant, in respect of incidents in 2009) – then the lawfulness of the individual's detention on date *x* could change depending on whether a court looked at the position on date *x* itself (when the court would necessarily have to look at the circumstances as they appeared at that time and might, say, have found the detention to be lawful), or at a later date (when, perhaps, the individual had been released and had not re-offended, so that – according to the argument – the detention on date *x* might be found in fact to have been unlawful), or at a later date still (when, perhaps, having abstained from offending for a period, the individual had gone back to crime, so that – on the logic of the argument – the detention on date *x* might be found in fact to have been lawful again). That cannot be correct. The law creates rights which are stable, rather than rights which are subject to radical uncertainty of this kind.

107. The Claimant was also assessed throughout to represent a high risk of absconding if released from detention. That assessment was reasonable and was supported by objective grounds. The Claimant had breached bail and violated licence conditions in the past. He was a repeat offender with scant respect for the law. He had made it clear

that he did not wish to be removed to Somaliland and was uncooperative and obstructive in relation to the removal process.

108. The Secretary of State's assessment that the Claimant would be likely to re-offend and to abscond if released was reviewed and endorsed periodically by Immigration Judges, who are independent of the executive, in dismissing the Claimant's applications for bail. I do not think their rulings can be faulted. The decisions of independent judges reviewing the position at the time with the benefit of submissions on both sides carry considerable weight in supporting the assessment of the Secretary of State.

109. Miss Dubinsky submitted that the Claimant could safely have been released, since electronic tagging could have been available to prevent his absconding. I do not accept this. Electronic tagging was considered, but had clearly been rejected as a solution. Electronic tagging may not always be effective to discourage absconding. Particularly in light of the high risk of absconding that the Claimant presented, I think the Secretary of State and the Immigration Judges were entitled to think that release of the Claimant subject to electronic tagging was not a suitable and effective way of meeting the risk that he would go to ground, and that detention was required.

110. The Secretary of State made repeated attempts to obtain information from the Claimant which could have enabled his removal to Somaliland under the agreements in place with the Somaliland authorities. After the Claimant dropped his case that he was from Mogadishu, it was clear that he accepted that he was indeed from Somaliland. The Secretary of State was therefore pressing the Claimant for information to support and establish something which the Claimant agreed was true. Although he had left Somaliland as a child, he had been reunited with his family in the UK. It is not credible to suppose that he knew nothing whatever about his origins in Somaliland, and in particular that he was not aware of, or could not readily find out about, his clan background (which is an important aspect of society in Somaliland). His obstructiveness when immigration officials sought to interview him supported the sense that he might be withholding relevant information, and it was reasonable for the Secretary of State to assess that if pressed further he might well provide information which could be put to the Somaliland authorities with some reasonable prospect of it being accepted by them. That impression was supported by the fact that at times the Claimant appeared to indicate that he was on the point of being cooperative, but then reverted to being unhelpful. It was also supported by the Claimant's reaction to the hearing before Collins J on 8 May 2007 and to the letter of 14 May 2007, in which the Secretary of State set out his questions, which the Claimant then took steps to answer, including by reference to his family as necessary. In my view, the Secretary of State was entitled at that stage to pursue these avenues of inquiry, which it seemed might well lead to the provision of better information which could be put to the Somaliland authorities.

111. The Secretary of State was entitled to hold the view that the 2003 MOU and 2007 MOU were not a dead letter, but provided a realistic and viable possibility that removals could be effected to Somaliland in appropriate cases (see paras. [29] – [39] and [79] – [83] above). There was also a viable route for the Claimant's removal to Somaliland throughout the period, either on the basis of voluntary return or, later on, also on the basis of enforced return.

112. These all seem to me to be powerful factors in favour of justifying the detention of the Claimant and supporting its legality. Against them, however, must be weighed the very long period of time during which the Claimant was subjected to immigration detention and the ordinary prison conditions in which he was being held from mid-May 2007. I consider that this latter factor is of comparatively lesser weight, because the Claimant had brought about his own transfer from Colnbrook IRC to secure prison conditions by his refusal to accept the rules and controls in place at the centre (see paras. [61] – [64] above).

113. The long period of time over which the Claimant was detained is a factor of considerable and increasing importance as the situation dragged on. In my view, especially in the latter stages (from late 2006) the Secretary of State should have been giving particularly anxious consideration to the question whether it remained viable to suppose that there was a realistic possibility of removal to Somaliland, such as to justify the detention of the Claimant. Apart from the inherent unattractiveness of continuing to detain the Claimant at that stage after such a long period of detention, an Immigration Judge had given warning at the bail hearing on 25 January 2007 (para. [54] above) that the situation should be resolved soon.

114. In my judgment, the sending of the letter of 14 May 2007 (with the support of Collins J at the hearing on 8 May 2007) represented a crystallised final opportunity to seek to obtain additional helpful bio-data from the Claimant. He had already been in detention for a very long time by then, but by responding positively to the letter appeared to indicate a new-found willingness to co-operate. The witness statement of Ms Tanna of 25 May 2007 made it clear that she had taken further inquiries of his family as far as could reasonably be expected. For the first time, the appearance was given that the Claimant was seeking to be candid and helpful, and that serious steps to assist the Secretary of State had been taken.

115. Particularly after the long time in which the Claimant had been in detention at that stage, I consider that this final provision of information by Ms Tanna and then by the Claimant at interview on about 29 May 2007 should have brought matters to a head. The Secretary of State then had as much information as it was ever likely he could obtain, and he had the benefit of the new impetus in relations with the Somaliland authorities created by the signing of the 2007 MOU. The internal assessment on 5 June 2007 was that the Claimant's case should be treated as a priority. The Secretary of State was entitled to a short period after this to give the new situation careful consideration, to consider whether any further avenues of inquiry might be possible and whether any viable approach to the Somaliland authorities might be made on the basis of the information which was available. In my view, that period should not have exceeded 14 days.

116. There is no evidence to suggest that at that stage there was any realistic way forward which might have allowed the Claimant's removal to Somaliland. The information available was assessed to be insufficient. At that point, there was no serious prospect of supplementing it. Rather, the case seems simply to have been allowed to drift towards the increasingly likely grant of bail which eventually occurred. In my judgment, therefore, the Claimant's detention became unlawful from 20 June 2007. He is therefore entitled to damages for false imprisonment for the period from 20 June 2007 to his release on 21 August 2007, to be assessed. I should indicate that there is nothing I have seen on the evidence before me which would warrant an award of

exemplary damages. The Claimant is also entitled to a declaration that his detention between 20 June 2007 and 21 August 2007 was unlawful.

Ground (3): detention in breach of the Secretary of State's policy in the OEM

117. I do not think that there is any substance in this alternative ground of challenge to the lawfulness of the Claimant's detention. It adds nothing to the Claimant's main case under grounds (1) and (2). The OEM stated that detention should be used sparingly and for the shortest period necessary. In my view, in the circumstances of this case, this does no more than state in somewhat different terms the position under the general law. The Claimant could only lawfully be detained under paragraph 2(3) of Schedule 3 to the 1971 Act if there were objective grounds for thinking that it was necessary to do so to ensure that the Secretary of State's powers of removal could effectively be implemented. I have found that there were such objective grounds up to 19 June 2007, but not beyond. Alternatives to detention such as release with electronic tagging were considered and were rejected, on good grounds. There were strong reasons in the Claimant's case to assess that he posed a high risk of absconding and a high risk of re-offending, and in such circumstances detention was clearly the most appropriate solution to ensure effectiveness of the removal process.

118. Miss Dubinsky submits that there is no evidence in the early stages of the Claimant's detention, before April 2006, of any consideration being given to electronic tagging. She says that this gives rise to a distinct argument, that the Claimant's detention was unlawful in that early period because the Secretary of State failed to consider a relevant consideration, identified as such in the OEM (the availability of tagging, in combination with the availability of hard cases support for the Claimant from NASS if he were released), when deciding to maintain his detention. (On the information available to me, electronic tagging was only a practical option from about July 2005, so Miss Dubinsky's argument is applicable from then until about April 2006).

119. In my view there are two answers to this submission. First, I do not draw the inference that no consideration was given to electronic tagging before April 2006 simply because there was no explicit reference to it as a possibility in the papers. The range of options available for dealing with persons facing deportation are limited and will be well known to the immigration officials and Immigration Judges dealing with such cases. The probability is that they do in fact have in mind the range of options when deciding what to do in any given case – they are not obliged to set them out each time by rote, especially if the circumstances are such as to point clearly to one particular conclusion, that detention is required (as in this case).

120. Secondly, even if I were wrong about that, it would not follow that the Claimant's detention was unlawful or that this point could support a claim in false imprisonment during the relevant period. A question would arise whether the error by decision-makers in failing to have regard to that consideration was causative of the detention of the Claimant. If he would have been detained for good reasons even if the error had not occurred, his detention would be lawful: see *Abdi No. 1* at [129]ff, where Davis J reviews the relevant authorities. In this case, it is clear that the decision throughout the relevant period would have been to detain the Claimant; that is what happened in April 2006 and thereafter when electronic tagging was expressly considered both by immigration officials and an Immigration Judge.

121. Next, I refer to section 38.10.1 of the OEM ("Criteria for detention in prison"). This was not at the forefront of the Claimant's case and there was little debate about it. The Claimant was detained in ordinary prison at the start of his immigration detention and at the end of it. The policy is expressed to apply "normally" (and see the introduction under the heading "General" in section 38.1, stating that alternatives to detention would be used "wherever possible"). The policy contains no absolute assurance that immigration detention will only ever take place in immigration removal centres (rather than prison) other than in the circumstances referred to in section 38.10.1. If the Secretary of State is for some reason confronted with a situation in which a person subject to immigration control is properly to be detained under the powers in Schedule 3 to the 1971 Act to ensure his effective removal, and the only available place to detain him is prison, the terms of the OEM do not prevent the Secretary of State from lawfully ordering his detention in prison. This is what appears to have been the position in the first phase of the Claimant's immigration detention.

122. The reason for his detention in prison from 15 May 2007 until his release was his violation of the rules at Colnbrook IRC and incitement of others to do the same. In my view, this was a matter which in fact fell within the terms of section 38.10.01, since his actions were intended to cause the authorities in the IRC to lose control in it, and produced that result for a significant period of time. That was an incident of serious disorder, which undermined proper control in the IRC in a fundamental way. That was clearly the view of the management of the IRC. In any event, the IRC (which is privately run) refused to hold the Claimant any longer, so the position would again appear to have been the same as for the initial phase of his immigration detention.

Alleged breach of the Prison Rules

123. The Claimant says that in the initial phase of his immigration detention in 2004 he remained in prison, and whilst there was detained in a cell with convicted prisoners in breach of the applicable Prison Rules. Mr Payne submits that this complaint ought properly to be directed against the prison governor rather than the Secretary of State. I agree. The Claimant is not entitled to relief against the Secretary of State in relation to this complaint.

Conclusion

124. I find that the Claimant is entitled to damages for false imprisonment from 20 June 2007 until his release on 21 August 2007 and to a declaration that he was falsely imprisoned over that time. I dismiss his claims for more extensive relief.